M. B. Sherrin
Attorney At Law
Concord, N. C.

THE LAWYERS REPORTS ANNOTATED

BOOK XXXII.

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY P. FARNHAM, ASSISTANT

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LAWYERS' REPORTS,

ANNOTATED.

OKLAHOMA SUPREME COURT.

KANSAS MOLINE PLOW COMPANY,
Plff. in Err.,
v.
G. W. SHERMAN, Interpleader, etc.

(3 Okla. 204.)

***Where a transfer of property is made for the purpose,** or with the intent on the part of the person making such transfer, to hinder and delay creditors, it is fraudulent and void; and the conveyance is fraudulent and void, also, as to the transferee, if at the time or before the making of the transfer the transferee had notice of such facts and circumstances as would arouse the suspicion of an ordinarily prudent man, and cause him to make inquiry as to the purpose for which such transfer is being made, which would disclose the fraudulent intent of the maker; and it is not necessary, in order to defeat such a

*Headnote by BIERER, J.

NOTE.—*Participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against the vendor's creditors.*

I. *Necessity of participation; general doctrine.*
II. *What constitutes participation.*
III. *Effect of payment of full consideration.*
IV. *The intent necessary to constitute fraud.*
V. *To what conveyances the rule applies.*
a. *Generally.*
b. *Marriage settlements.*
c. *Assignment for creditors.*
VI. *Necessity of injury to creditors.*
VII. *Knowledge or notice sufficient to put purchaser upon inquiry.*
a. *Generally.*
b. *Notice or knowledge of indebtedness or insolvency.*
c. *Knowledge of intended preference.*
d. *Inadequacy of price.*
e. *Retention of possession.*
f. *Reservations and secret trusts.*
g. *Transfers out of the ordinary course of business.*
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k. *Conveyance fraudulent on its face.*
l. *Knowledge of or notice to agent.*
m. *Other circumstances and conditions.*
VIII. *Payment after notice.*
IX. *Application of purchase price to debts.*
X. *Effect of assumption of vendor's debts.*
XI. *Effect of relationship or intimacy of parties.*
XII. *Effect of fraud in other transactions.*
XIII. *Registration and failure to record.*
XIV. *Purchases from fraudulent grantees.*
XV. *Presumptions and burden of proof.*
XVI. *Effect of participation.*

I. *Necessity of participation; general doctrine.*

The questions in this note, like those in the note to Rice v. Wood, 31 L. R. A. 609, are founded upon the provisions of the act of 13 Eliz. chap. 5, and the statutes of the different states modeled after it. This act declares all conveyances or other disposition of property, real or personal, made with the intention of defrauding creditors, to be null and void as against them, with the proviso that nothing therein contained shall extend to defeat any estate or interest made on good consideration and bona fide to any person having at the time no notice of such fraud. This statute is still in force in England, and has been re-enacted in Ireland, and has been adopted by a number of the American states, including Maine, New Hampshire, Massachusetts, Delaware, Pennsylvania, Maryland, and Iowa, and the statutes of the other states are modeled after it and are in the main simply a re-enactment of it.

Under these statutes the rule is practically universal that in order to render a sale void as to creditors it is not only necessary that the vendor should have entertained a fraudulent design, but it is also necessary that the vendee should have participated in it. Schroeder v. Walsh, 120 Ill. 403 (1887); Ewing v. Runkle, 20 Ill. 448 (1858); Anderson v. Warner, 5 Ill. App. 416 (1879); Frakes v. Brown, 2 Blackf. 295 (1830); Drummond v. Couse, 39 Iowa, 442 (1874); Preston v. Turner, 36 Iowa, 671 (1873); Fifield v. Gaston, 12 Iowa, 218 (1861); Myers v. Tyson (Kan.) 43 Pac. 91 (1896); Baudin v. Rohlff, 1 Mart. N. S. 165, 14 Am. Dec. 181 (1823); Marden v. Babcock, 2 Met. 99 (1840); Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400 (1831); Fraser v. Passage, 63 Mich. 551 (1886); Durfee v. Paritt, 14 Minn. 424 (1869); Ryan v. Young, 79 Mo. 30 (1883); Ames v. Gilmore, 59 Mo. 537 (1875); Henderson v. Henderson, 55 Mo. 534 (1874); Curtis v. Vuliton, 3 Mont. 153 (1878); Jaeger v. Kelley, 52 N. Y. 274 (1873); Newman v. Cordell, 43 Barb. 448 (1864); Peck v. Carmichael, 9 Yerg. 327 (1836); Woody v. Dean, 24 S. C. 499 (1885); Sterling v. Ripley, 3 Pinney, 155 (1851); Magniac v. Thompson, 1 Baldw. C. C. 344 (1831); Leach v. Francis, 41 Vt. 670 (1869).

The vendee must have been either an active or passive participant in the fraud. New York F. Ins. Co. v. Tooker, 35 N. J. Eq. 408 (1882).

The validity of a transfer is not affected by the fraudulent intent of the vendor in making it, where the consideration was adequate, unless the purchaser participated in the intent. Pickett v. Pipkin, 64 Ala. 520 (1879); Bradley v. Ragsdale, Id. 559 (1879); Stover v. Herrington, 7 Ala. 142, 41 Am. Dec. 86 (1844); Borland v. Mayo, 8 Ala. 104; Erd v. Cole, 31 Ark. 554 (1876); Grunsky v. Parlin (Cal.) 42 Pac. 575 (1895); Partelo v. Harris, 26 Conn. 480 (1857); Hatch v. Jordon, 74 Ill. 414 (1874); Myers v. Kinzie, 26 Ill. 36 (1861); Steele v. Ward, 25 Iowa, 535 (1868);

transfer, to show that the transferee had actual notice of, or was a participant in, the fraud of the maker of the transfer. The former holding of this court on this question in the case of *Chandler* v. *Colcord*, 1 Okla. 260, is overruled.

(September 7, 1895.)

ERROR to the District Court for Oklahoma County to review a judgment in favor of the interpleader in an action by plaintiff against J. R. Sherman to recover the purchase price of goods sold and delivered him in aid of which an attachment was issued and levied on property claimed by the interpleader. *Reversed.*

The facts are stated in the opinion.

Mr. **Selwyn Douglas** for plaintiff in error:

The jury should have been informed that the fact that G. W. Sherman knew before he

---

Ratcliff v. Trimble, 12 B. Mon. 32 (1851); Violett v. Violett, 2 Dana, 323 (1834); Jaeger v. Kelley, 52 N. Y. 274 (1873); Savage v. Knight, 92 N. C. 493, 53 Am. Rep. 423 (1885); Reiger v. Davis, 67 N. C. 185 (1872); Lassiter v. Davis, 64 N. C. 498 (1870); State, Patrick, v. Keeler, 49 Mo. 548 (1872); Collins v. Cook, 40 Tex. 238 (1874); Connell v. Miller, 1 Kerr, N. B. 302; Gridley v. Bingham, 51 Ill. 153 (1869).

And unless such participation is made to appear. Shealy v. Edwards, 75 Ala. 411 (1883); Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221 (1877); Old Nat. Bank v. Findley, 131 Ind. 225 (1892); Stewart v. English, 6 Ind. 176 (1855); Bastian v. Christesen, 34 La. Ann. 883 (1882); Edwards v. Reid, 39 Neb. 645 (1894); New York F. Ins. Co. v. Tooker, 35 N. J. Eq. 408 (1882); Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58 (1871).

And deeds will not be set aside as fraudulent and made with intent to defraud creditors where it appears that they were taken by the respective grantees in good faith and upon a good, lawful, and sufficient consideration. Sumner v. Skinner, 80 Hun, 201 (1894).

So, an intent of a vendor to defraud creditors will not invalidate the conveyance unless the vendee participated in it. Tompkins v. Nichols, 53 Ala. 197 (1875); Mathews v. Reinhardt, 149 Ill. 635 (1894); Miller v. Kirby, 74 Ill. 242 (1874); Hessing v. McCloskey, 37 Ill. 341 (1865); Adams v. Foley, 4 Iowa, 44 (1856); Cooke v. Cooke, 43 Md. 522 (1875); Spring Lake Iron Co. v. Waters, 50 Mich. 13 (1883); Sibly v. Hood, 3 Mo. 290 (1834); Pierson v. Tom, 1 Tex. 577 (1848); Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1847); Goshorn v. Snodgrass, 17 W. Va. 717 (1881).

And the right of persons becoming interested in the property of a debtor through a conveyance made with intent to defraud creditors without participating in the fraudulent design of the debtor are not affected thereby. Shealy v. Edwards, 78 Ala. 176 (1884); Blodgett v. Chaplin, 48 Me. 322 (1861); Gentry v. Robinson, 55 Mo. 260 (1874); Hall v. Arnold, 15 Barb. 599 (1853); Cannon v. Young, 89 N. C. 264 (1883); Tuteur v. Chase, 66 Miss. 476, 4 L. R. A. 832 (1889).

And the sale must have been the means of carrying the intent into effect. Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1847).

To render a transfer of property void as against creditors for fraud, the fraud must affect the contract, and the contract is not the purpose of one but the agreement of two minds. Rose v. Coble, Phill. L. 517 (1868).

The statute as to fraudulent conveyances contemplates two parties to the collusion and fraud, the grantor and the grantee. Anderson v. Roberts, 18 Johns. 515, 9 Am. Dec. 235 (1820); Goshorn v. Snodgrass, 17 W. Va. 717 (1881).

The fraud which will vitiate a sale must be mutual,—that is, it must be intended by both parties thereto, or else by one and acquiesced and furthered by the other with knowledge of the former's fraudulent purpose. Horbach v. Hill, 112 U. S. 144, 28 L. ed. 670 (1884).

It is the intent that makes a conveyance of property fraudulent as to creditors, and such intent must have been participated in by the grantee as well as the grantor. Splawn v. Martin, 17 Ark. 146 (1856).

And the true question with reference to a conveyance alleged to be fraudulent is, Did the vendee make the sale with intent to defraud the creditors of the vendor, and as a means of aiding in the accomplishment of his purpose? Brown v. Foree, *supra*.

Thus, proof of a fraudulent intent on the part of a grantee is essential to a recovery in an action to set aside a conveyance as in fraud of creditors where the conveyance was not voluntary. Baldwin v. Short, 125 N. Y. 553 (1891).

And a conveyance is not avoided by the mere fact that it may have the effect of hindering or delaying creditors of the grantor; it must also have been made with a design to hinder or delay such creditors which must be effectuated by making the conveyance, and the intent must have been participated in by the purchaser. Hardwick v. Cox, 50 Mo. App. 509 (1892).

Nor can a creditor of a vendor maintain an action to restrain a sale upon the ground that it was in fraud of the vendor's creditors unless he shows that the vendee was a party to the fraud. Montgomery v. Wilson, 31 La. Ann. 196 (1879).

And a conveyance of property received from a fraudulent grantor without guilty knowledge or actual fraud and upon such terms as did not divert it from the payment of his debts or inflict substantial injury upon creditors, will not be set aside, even as constructively fraudulent. Smith v. Selz, 114 Ind. 229 (1887).

And an assignment of mortgages with intent to delay and defeat the collection of a particular debt will not be set aside as to the creditor to whom that debt is due unless the assignee participated in such fraudulent intent or had notice of facts and circumstances from which the fraudulent intent of the assignor was a natural and legal inference. Tantum v. Green, 21 N. J. Eq. 364 (1869).

And a statement by one of two partners that he intended to pay such debts as he could, and to "break full handed," does not show fraud in a subsequent transfer of the firm, in the absence of proof of participation by the purchaser,—especially where he refused to have anything to do with the matter unless the sale was bona fide. Waterman v. Donalson, 43 Ill. 29 (1867).

Nor can real estate purchased by a grantee in good faith before the issue of an attachment be taken thereunder upon the ground that the conveyance was made by the grantor with intent to defraud creditors. Johnston v. Field, 62 Ind. 377 (1878).

So, a sale of a chattel by a sheriff conveys good title to the purchaser, unless there was fraud in which he participated, although the property was not present at the time of the sale. Kean v. Newell, 1 Mo. 754, 14 Am. Dec. 321 (1827).

And a sale by judgment debtors, with the consent of their judgment creditors, of property which had been levied upon under execution issued on judgments confessed by such debtors, will not be declared fraudulent and void as to other creditors in the absence of anything to impeach the judgments or the good faith of the purchaser who took the property. McEvony v. McCann, 31 Neb. 597 (1891).

purchased the property that his brother was owing very large sums to various creditors for the goods was sufficient to put him upon his inquiry, and that G. W. Sherman's knowledge of such indebtedness was sufficient to charge him with knowledge of everything done or intended to be done by his brother, and therefore charged him with knowledge of the probable results of his brother's conduct, as affecting his creditors.

Work v. *Coverdale*, 47 Kan. 307; *Dows* v. *Kidder*, 84 N. Y. 121.

G. W. Sherman did have such knowledge; and it charged him with knowledge of the fraudulent intent of J. R. Sherman.

Stearns v. *Gage*, 79 N. Y. 102; *Hough* v. *Dickinson*, 58 Mich. 89; *Lyons* v. *Hamilton*, 72 Iowa, 759; *Dorrington* v. *Minnick*, 15 Neb. 397; *Bollman* v. *Lucas*, 22 Neb. 796; *Gollober* v. *Martin*, 33 Kan. 352.

So, a wife to whom a deed is made by a third person by the permission of her husband, who participated with the grantor in the fraudulent intent to defraud other creditors, is not chargeable with complicity in her husband's intent, where she purchased without any participation in or actual knowledge thereof, and the evidence does not show that he was her agent. Bruen v. Dunn, 87 Iowa, 483 (1893).

And a conveyance by a husband to his wife, made for the purpose of placing the property conveyed beyond the reach of his creditors, is valid and effectual as against such creditors when made upon consideration of his receipt of her separate property through the course of many years and its appropriation to his own use, where she had no knowledge of and did not participate in his fraudulent purpose. Brookville Nat. Bank v. Kimble, 76 Ind. 195 (1881).

An instruction that if a sale was made to defraud creditors of the vendor it would be void will be taken as including the vendee with the vendor as entertaining such intent, and therefore as not erroneous, though it would have been better to have added that the knowledge of the participation of the vendee was also necessary. Miller v. Bryan, 3 Iowa, 58 (1856).

A conveyance made for the purpose of defrauding creditors, in which purpose both vendor and purchaser participated, however, is void as against such creditors, within the statute of frauds. Chapel v. Clapp, 29 Iowa, 191 (1870); Stone v. Spencer, 77 Mo. 356 (1883); Union Nat. Bank v. Warner, 12 Hun, 306 (1877); Eigenbrun v. Smith, 98 N. C. 207 (1887); Brown v. Webb, 20 Ohio, 389 (1881); Merchants' Bank v. Clarke, 18 Grant, Ch. (N. C.) 594 (1871); Wood v. Irwin, 6 Grant, Ch. (N. C.) 398 (1869); Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348 (1811); Beidler v. Crane, 135 Ill. 92 (1890); Millington v. Hill, 47 Ark. 301 (1886).

Although it was made with the bona fide intent to pass the property. Merchants' Bank v. Clarke, *supra*.

And whether the sale was or was not intended to take effect as between the parties to it. Wood v. Irwin, *supra*.

And without reference to the time of delivery of possession. Stone v. Spencer, *supra*.

And though a full and sufficient consideration is paid. See *infra*, III., *Effect of payment of full consideration*.

Thus, a conveyance accepted by a grantee with a like fraudulent intent with his grantors, and with full knowledge of which they conspired to deprive a creditor of his just claim, is fraudulent and void as against such creditors whether it was with or without consideration. Slagle v. Hoover, 137 Ind. 314 (1894).

And a sale made with the intention of preventing creditors from collecting their demands, or to avoid the recovery of judgments against the vendor, is voidable as to creditors, where the vendee participated in the fraudulent intent or had notice of it, though he paid an adequate consideration. Wright v. Brandis, 1 Ind. 336 (1849).

And a deed made with intent upon the part of the grantor to defraud his creditors, which was known to and participated in by the grantee, is void, though the grantor reserved sufficient property to pay all his debts existing at the time of the execution of the deed, and though the purchase money was duly paid by the grantee. Hudson v. Jordan, 108 N. C. 10 (1891).

So, one who purchases a stock of goods from one member of a firm to aid him in defrauding the other members and the creditors of the firm acquires no title to the goods, and a subsequent sale made by the other partners in behalf of the firm passes good title to the purchaser whether he had notice of the former sale or not. Gradle v. Kern, 109 Ill. 557 (1884).

Nor can a purchaser who obtains a stock of goods of a debtor who is making the sale with intent to delay and defraud his creditors, and is a party to the fraud or has knowledge of facts which would excite the suspicion of a prudent man and put him upon inquiry, be said to act in good faith. Martin v. Marshall, 54 Kan. 147 (1894).

And a transfer the object of which was to conceal the goods transferred from attachment, of which the transferee was fully aware having participated in it and himself suggested the arrangement, is invalid as against creditors. Hawes v. Mooney, 39 Conn. 37 (1872).

And a deed executed by a son to his father in anticipation of the son's approaching marriage, for the purpose of defeating the wife's right of dower, which is concealed from the intended wife with the collusion of the father, is void as in fraud of the marital rights of the wife, based upon the valuable consideration of marriage. Brooks v. McMeekin, 37 S. C. 285 (1892).

So, where a purchaser at a sheriff's sale, by fraudulent combination with the judgment debtor and others, is enabled to purchase the property of the judgment debtor, the whole sale is fraudulent and void as to creditors of the judgment debtor, even though the purchaser had paid his own money at the sale, and he has no right to retain the property purchased as a security for the money he has paid. Stovall v. Farmers' & M. Bank, 8 Smedes & M. 305, 47 Am. Dec. 85 (1847).

And a sale by a mortgagee of chattels worth much more than the mortgage debt, fraudulently made to a purchaser who participated in the fraud, to defeat the mortgagor's creditors and deprive them of any benefit from the surplus, conveys no title as against an attaching creditor of the mortgagor. Collingsworth v. Bell (Kan.) 43 Pac. 252 (1896).

And a sale of lands under a mortgage to the state to secure a loan from the sinking fund, and an agreement between the mortgagor and the purchaser for the purpose of delaying the mortgagor's creditors, which purpose was known to the purchaser, that he should not reinstate the mortgage but should hold the land in trust for the mortgagor and permit him to redeem it whenever his relations with his creditors would allow him to do so with safety, and that the mortgagor should pay the purchaser whatever amount the latter might pay the state for interest, which he did for a time, when the purchaser paid the amount due the state and re-

Direct proof of a combination in a conveyance to defraud creditors cannot in general be expected, but from all the circumstances attending the transaction the court may infer the conveyance to be fraudulent, and the conveyance of all the vendor's property, especially when secretly made, will be held fraudulent as to creditors.

Bradley v. *Buford*, Sneed (Ky.) 12, 2 Am. Dec. 703; *Gollober* v. *Martin*, *supra*.

Messrs. **Amos Green & Son** for defendant in error.

Bierer, J., delivered the opinion of the court:

The Kansas Moline Plow Company brought suit in the district court of Oklahoma county on the 11th day of September, 1893, against J. R. Sherman, to recover the sum of $1,821.76, in which amount the plaintiff claimed

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ceived a deed,—is fraudulent and void as to the mortgagor's creditors, who are entitled to have the property applied to the payment of other debts without refunding the amount paid by the purchaser. Musselman v. Kent, 33 Ind. 452 (1870).

Any disposition of property for a present consideration which was liable for a debt then existing, made to hinder, delay, or defraud a creditor, all of the parties to the transaction having knowledge of and participating in the fraudulent purpose, is fraudulent and void as to such creditor, whether between individuals or a partnership and a third party, or between the partners themselves; and the exemption laws furnish no protection to the grantee under such circumstances. Aiken v. Steiner, 98 Ala. 355 (1892).

So, an assignee of a judgment against one who conveys away his lands, rendered subsequent to the transfer but based upon a claim which arose antecedent thereto, may pursue any property for the payment thereof belonging to the grantor and liable thereto, unless transferred to a bona fide purchaser for a valuable consideration. Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708 (1868).

And it is sufficient for a creditor assailing a transfer to show that the purchaser was aiding and assisting the vendor in perpetrating a fraud, or that in making the purchase he himself entertained the same fraudulent intent. Starin v. Kelly, 88 N. Y. 418 (1882).

Where the evidence is conflicting as to the participation by the vendee in the fraud of his vendor, the determination of the question is for the jury. Anderson v. Warner, 5 Ill. App. 416 (1879); State, Parrick, v. Keeler, 49 Mo. 548 (1872).

And the court cannot tell the jury, in an action to set aside a conveyance as fraudulent as against creditors, what facts are sufficient to justify them in inferring fraud under a statute making the question of fraudulent intent a question of fact. Leasure v. Coburn, 57 Ind. 274 (1877).

II. *What constitutes participation.*

Some of the cases have acted upon the rule that in order to render a sale of property fraudulent as to the creditors of the vendor, it must appear, not only that the purchaser knew the vendor was designing to defraud his creditors, but also that he participated in the fraud by entering into the common design entertained on his part to defraud his creditors.

This was expressly held in Anderson v. Warner, 5 Ill. App. 416 (1879), and Chandler v. Colcord, 1 Okla. 260 (1893).

And in Erb v. Cole, 31 Ark. 554 (1876) it was held that a sale made by one who was indebted at the time and did not intend to apply the money received to the payment of his debts, is not invalid as to creditors, where the purchaser did not participate in his fraudulent intent by purchasing with a view to aid and abet it.

And in Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1846), it was held that the vendee's knowledge of the vendor's fraudulent intent is not conclusive evidence of a similar intent upon his part, and the question as to the concurrence in such intent is one of fact for the jury and is the main fact in the issue.

And the same rule was laid down in Brown v. Smith, 7 B. Mon. 361 (1847).

So, quite a number of cases have seemed to require the concurrence of participation with knowledge or notice of the fraudulent intent of a vendor to justify the setting aside of a transfer as against creditors.

Thus, to render a conveyance void for fraud upon creditors, it is necessary that the grantee should have had knowledge of and in some way participated in the fraud. Fraser v. Passage, 63 Mich. 551 (1886).

And a fraudulent purpose on the part of a vendor will not affect the vendee unless he had knowledge of and participated in it. Cooke v. Cooke, 43 Md. 522 (1875); Shealy v. Edwards, 78 Ala. 176 (1884); Grunsky v. Parlin (Cal.) 42 Pac. 575 (1895); Pierson v. Tom, 1 Tex. 577 (1847); Mathews v. Reinhardt, 149 Ill. 635 (1893); Violett v. Violett, 2 Dana, 323 (1834).

So, a sale for an adequate price will not be annulled as in fraud of creditors, unless it appears that the purchaser knew of the insolvency of the vendor and bought with the intent to assist him in defrauding his creditors. Bastian v. Christesen, 34 La. Ann. 883 (1882).

And a vendee of a stock of goods, to whom they were conveyed with the intent upon the part of the vendor to defraud his creditors, cannot be held chargeable as trustee unless he had knowledge of the design of the vendor and aided in carrying it into execution. Blodgett v. Chaplin, 48 Me. 322 (1861).

And a conveyance founded upon a valuable consideration will not be set aside on behalf of creditors because of fraud of the grantor in which the grantee did not participate and of which he had no knowledge. Pickett v. Pipkin, 64 Ala. 520 (1879); Bradley v. Ragsdale, 64 Ala. 559 (1879); Partelo v. Harris, 26 Conn. 480 (1857); Reiger v. Davis, 67 N. C. 185 (1872).

But the prevailing rule would seem to be that adopted by the principal case overruling Chandler v. Colcord, 1 Okla. 260 (1893), that in case of sales made to one not a creditor, taking the transfer with knowledge or notice of the vendor's fraudulent intent, constitutes in itself a participation in such fraudulent intent which will invalidate the transfer.

Thus, fraud may be imputed to parties to a purchase, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design upon such notice into operation. Maguiac v. Thompson, 32 U. S. 7 Pet. 348, 8 L. ed. 709 (1833).

And a purchase by one who knows that the vendor by the sale intends to defraud his creditors makes the vendee a participant in such fraudulent intent and invalidates the sale. Walcott v. Brander, 10 Tex. 419 (1853); Smith v. Collins, 94 Ala. 394 (1891); Ziegler v. Carter Bros. 94 Ala. 291 (1891); Reeves v. Skipper, 94 Ala. 407 (1891); Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104 (1861).

Though he takes immediate and open possession. Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233 (1859).

And a purchaser to whose notice an unlawful purpose on the part of the vendor is brought, and who assents to the conveyance made in pursuance

J. R. Sherman was indebted to it upon certain promissory notes and an open account for goods, wares, and merchandise sold and delivered to J. R. Sherman. The next day an order of attachment was issued in the case, and the property in controversy levied upon. G. W. Sherman, by leave of court, interpleaded in the cause, claiming that he was the owner of the goods attached, by virtue of a purchase made from J. R. Sherman on the 6th day of September, 1893. Upon issues being formed upon this interplea, a trial was had before the court and a jury, and a verdict and judgment given and rendered for the interpleader, G. W. Sherman, for the value of the property and damages, from which the plaintiff appeals.

The evidence given upon the trial of the case is quite voluminous, and it is unnecessary to give it in detail. It is sufficient to

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thereof, is a participator in the fraudulent purpose and derives no title under it to the prejudice of other creditors. Rencher v. Wynne, 86 N. C. 269 (1882).

To establish a fraudulent transfer, knowledge or notice by the grantee of a fraudulent intent upon the part of the grantor must be shown, which will be sufficient to charge him with participation in it. Hoyt & Bros. Mfg. Co. v. Turner, 84 Ala. 523 (1887).

And a purchaser will be held to be a participator in the seller's fraud if he had notice of it and still dealt with him, thereby affording him means to make his fraudulent efforts against his creditors successful. Christian v. Greenwood, *supra*.

And a debtor, although possessed of ample means to satisfy all demands against him, may be guilty of a fraudulent intent in selling his property, as by converting it into money for the express purpose of putting it beyond the reach of his creditors, and the vendee purchasing with knowledge of such intent or notice of facts calculated to put a reasonable man on inquiry, even though for a cash consideration, is a participator in the fraud. Smith v. Collins, 94 Ala. 394 (1891).

And a fraudulent intent on the part of a seller not participated in by the purchaser will avoid a sale as to creditors, under How. (Mich.) Stat. § 6190, making a sale of personal property fraudulent as to creditors where possession is retained in the vendor unless shown to have been made in good faith. Such participation is only necessary where a sale followed by an actual change of possession is attacked. Kipp v. Lamoreaux, 81 Mich. 299 (1890).

So, it is sufficient to invalidate a sale made with intent to defraud creditors that the purchaser knew of such intent. It is not necessary that he should have also been privy to the vendor's fraud. Dougherty v. Cooper, 77 Mo. 528 (1883).

Or that he should have purchased with the intention of aiding the vendor in a fraudulent design as against creditors in order to render the conveyance fraudulent. It is sufficient if he had notice of the fraudulent intent on the part of the grantor. Cowling v. Estes, 15 Ill. App. 255 (1884).

Or that he had knowledge of such facts as should charge him with notice of such intent. Lyons v. Hamilton, 69 Iowa, 47 (1886); Jones v. Hetherington, 45 Iowa, 681 (1877); Kellogg v. Aherin, 48 Iowa, 299 (1877); Williamson v. Wachenheim, 58 Iowa, 277 (1882); Bedford v. Penny, 58 Mich. 424 (1885); Hough v. Dickinson, Id. 89 (1885).

And it is not necessary to show an actual agreement between a vendor and purchaser that the latter would aid the former to defraud his creditors. Brittain v. Crowther, 54 Fed. Rep. 295, 12 U. S. App. 148 (1893).

Or an actual participation in the fraud of a vendor on the part of a vendee; if he knew of such fraudulent intent or had knowledge of facts sufficient to excite the suspicion of a prudent man and to put him upon inquiry, it is sufficient to invalidate the conveyance though the transfer was for a valuable consideration. Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331 (1851).

A combination or confederacy between a vendor and purchaser to hinder or delay creditors is not necessary to invalidate the sale. It is sufficient if an intent such as the statute prohibits prompted the parties in making the transfer, in which case it is immaterial whether a valuable consideration had been paid or not. Burgert v. Borchert, 59 Mo. 80 (1875).

The intent to defraud creditors will be presumed where the parties knew that such would be the effect of the conveyance. Nichols v. Nichols, 61 Vt. 426 (1889).

So, the fraudulent intent of a grantor is distinct and separate from such an intent on the part of the grantee, and may be proved by declarations and admissions of the grantor though unknown to the grantee, but the conveyance will not be set aside as fraudulent without proof of knowledge on the part of the grantee from which an intent on his part may be inferred. Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400 (1831).

And where an attaching creditor seeks to set aside a sale by his debtor of the attached goods, on the ground of fraud, it is not necessary to establish a fraudulent intent on the part of the purchaser; but it must be shown that the debtor had such intent and that the purchaser had notice thereof or of such facts as should have put him upon inquiry which would have led to such knowledge. Spaulding v. Adams, 63 Iowa, 436 (1884).

So, a sale made with intent to defraud creditors is invalid, where the purchaser knew of such intent at the time of the purchase. Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704 (1876); Carter Bros. v. Coleman, 82 Ala. 177 (1886); Carter v. O'Bryan (Ala.) 16 So. 894 (1895); Watts v. Kilburn, 7 Ga. 356 (1849); Fishel v. Lockard, 52 Ga. 632 (1874); Ruffing v. Tilton, 12 Ind. 260 (1859); Phillips v. Reitz, 16 Kan. 396 (1876); Hathaway v. Brown, 18 Minn. 414 (1872); Frederick v. Allgaier, 88 Mo. 598 (1886); Greenwell v. Nash, 13 Nev. 287 (1878); Allison v. Hagan, 12 Nev. 38 (1877); Sabin v. Columbia River Lumber & F. Co. 25 Or. 15 (1893); Coolidge v. Heneky, 11 Or. 327 (1883); Ashmead v. Hean, 13 Pa. 584 (1850); Garahy v. Bayley, 25 Tex. Supp. 294 (1860); Dodd v. Gaines, 82 Tex. 429 (1891); Oppenheimer v. Halff, 68 Tex. 409 (1887); Hadock Bros. v. Hill, 75 Tex. 193 (1889); Barties v. Gibson, 17 Fed. Rep. 293 (1883).

And is sufficient to avoid a sale without any proof whatever of an actual fraudulent intent upon the part of the vendee. Hough v. Dickinson, 58 Mich. 89 (1885).

And though the latter had no desire or purpose whatever to defraud them. Jordan v. Collins (Ala.) 18 So. 137 (1895); Edgell v. Lowell, 4 Vt. 405 (1832).

And it is sufficient to invalidate the sale, to show that the purchaser had notice of the vendor's intent to defraud his creditors. DeWalt v. Doran, 21 D. C. 163 (1892); Bush v. Collins, 35 Kan. 535 (1886); Chaffe v. Gill, 43 La. Ann. 1054 (1891); Hathaway v. Brown, 18 Minn. 414 (1872); Burley v. Marsh, 11 Neb. 291 (1881); Roberts v. Anderson, 3 Johns. Ch. 371 (1818); McKinnon v. Reliance Lumber Co. 63 Tex. 30 (1885); Blum v. Simpson, 71 Tex. 628 (1888); Barker v. Phillips, 11 Rob. (La.) 190 (1845).

Notice to a purchaser of property from a debtor, who sells with intent to hinder, delay, or defraud his creditors, of his fraudulent intent, is *per se* evidence of *mala fides* and renders the sale invalid. Hanchett v. Goetz, 25 Ill. App. 445 (1887).

And a sale made for the fraudulent purpose of

state, briefly, that there is evidence tending to show that J. R. Sherman engaged in the hardware and implement business in Oklahoma City in July, 1892, having purchased a stock of a former merchant; that on the 6th day of September, 1893, he was largely indebted to various creditors, a part of which indebtedness was falling due and was unpaid. G. W. Sherman, a brother of J. R. Sherman, who had been residing in Northern Ohio, after some correspondence with J. R. Sherman, came to Oklahoma City, during the latter part of August, 1893, and went into his brother's store, where he clerked for a couple of weeks before September 6, 1893. He brought with him from Ohio some $600 or $700, and with little, if any, other visible means, knowing that his brother was in-

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defeating the vendor's creditors is invalid as against such creditors, though made for an adequate and full consideration, where the grantee knowingly assists in effectuating such fraudulent intent or even has notice thereof. Beidler v. Crane, 135 Ill. 92 (1890); Millington v. Hill, 47 Ark. 301 (1886).

Thus, one who purchases from a debtor who converts his property into money because it is more easily secreted, intending to put it out of the reach of his creditors, with knowledge of such object on the part of the seller, obtains no title as against creditors. Sabin v. Columbia River Lumber & F. Co. 25 Or. 15 (1893); Deering v. Collins, 38 Mo. App. 23 (1889).

And a sale by an insolvent debtor pending suit, of personal property which he has removed to another state for the purpose of defeating a creditor, to one who has full knowledge of the fraudulent purpose for which it is removed, is void as against creditors. Watts v. Kilburn, 7 Ga. 356 (1849); Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104 (1861).

And the sale by a debtor of his goods with the purpose to defraud his creditors, made with the knowledge of the vendee, taking the vendee's note for a balance remaining unpaid, payable at a future day, may be treated by a creditor as void; and he may subject the goods sold to the payment of his claim or compel the fraudulent vendee to account for the purchase price, but he cannot have both remedies. Bradford v. Beyer, 17 Ohio St. 388 (1867).

So, where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife with knowledge of his purpose accepts the benefit of the act and claims under it, the conveyance is invalidated as against creditors, though she pays a fair consideration. Peeler v. Peeler, 109 N. C. 628 (1891).

And a transfer of property made for the purpose of defeating an allowance made against the vendor of counsel's fees in an action for a divorce pending against him is invalid as against the person entitled thereto, where the purchaser knew of such intent at the time of his purchase though he paid a full consideration therefor. Garesche v. MacDonald, 103 Mo. 1 (1890).

So, one who purchases certain real estate from his brother, who is in embarrassed circumstances, giving his notes therefor, with knowledge that the object of the grantor was to delay and defraud his creditors, and afterwards, and during the pendency of an action by a creditor who had attached the land as that of the grantor, conveys the same to his wife, taking her notes, is not a bona fide purchaser who will be protected against creditors, and the subsequent sale to the wife is not a bona fide sale. Savage v. Hazard, 11 Neb. 323 (1881).

And the purchase of lands from a defaulting treasurer by his brother living in the same county and having an office in the same courthouse, and knowing that the land was purchased with the county's money and held in secret trust, is invalid as against creditors of such defaulter, and especially so as against sureties who had been compelled to make good the very money that was paid for such land. Fulkerson v. Sappington, 104 Mo. 472 (1891).

And a bill in equity will lie under the Pennsylvania act providing that all the debts of a decedent shall be a lien upon his real estate for a period of five years after his death, on the part of creditors against a purchaser from a decedent in his lifetime whose purchase was not bona fide but made with knowledge of the fraudulent intent of his grantor, though such creditors had not reduced their claims to judgments; and the court will decree the conveyance void and that the lands conveyed shall be subject to their debts. Fowler's Appeal, 87 Pa. 449 (1878).

And a distribution by a debtor in a weak state of mind of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary assignment, and partly by pecuniary gifts, is void as against creditors, under the statute of 13 Eliz. chap. 5, where the children were aware at the time that creditors' claims would be defeated, though it did not appear that the debtor had any such intention. Cornish v. Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. N. S. 494, 20 Week. Rep. 897 (1872).

So, a complaint to set aside a fraudulent conveyance made for a valuable consideration which does not aver a fraudulent intent on the part of the grantor, and that the grantee had notice thereof, is demurrable. Willis v. Thompson, 93 Ind. 62 (1883).

The absence of such knowledge or notice, however, is almost, if not quite, universally recognized as a complete protection to the purchaser.

Thus, in order to set aside a transfer made for a valuable consideration as fraudulent as against creditors the grantor must not only have entertained an intent to defraud them but the purchaser must have had knowledge or notice thereof. Grimes v. Hill, 15 Colo. 359 (1890); Kenney v. Dow, 10 Mart. (La.) 577, 13 Am. Dec. 342 (1822); Seixas v. Citizens' Bank, 38 La. Ann. 424 (1886); Gamble v. Harris, 5 Del. Ch. 512 (1884); Groff v. Cooper, 6 Houst. (Del.) 36 (1880); Kyger v. The F. Hull Skirt Co. 34 Ind. 249 (1870); First Nat. Bank v. Carter, 89 Ind. 317 (1883); McCormick v. Hyatt, 33 Ind. 546 (1870); Willis v. Thompson, 93 Ind. 62 (1883); Hutchinson v. Watkins, 17 Iowa, 475 (1864); French v. Reel, 70 Iowa, 122 (1886); Temple v. Smith, 13 Neb. 513 (1882); Miller v. Lacey, 7 Houst. (Del.) 8 (1884); Weis Bros. v. Dittman, 4 Tex. Civ. App. 35 (1893); Hickman v. Trout, 83 Va. 478 (1887); Garland v. Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756 (1826); Goshorn v. Snodgrass, 17 W. Va. 717 (1881); Hopkins v. Langton, 30 Wis. 379 (1872); Hooser v. Hunt, 65 Wis. 71 (1886); Bollman v. Lucas, 22 Neb. 797 (1888).

But a purchase from a vendor who acted with intent to defraud his creditors must, to be protected, have been, not only without knowledge of such fraudulent intent, but also without notice or grounds for reasonable suspicion of such intent. Nicol v. Crittenden, 55 Ga. 497 (1875).

A grantee in a fraudulent deed is not affected by the fraud unless it be shown that he co-operated in the making thereof or took with notice of the intended fraud. Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221 (1877); Edwards v. Reid, 39 Neb. 645 (1894); Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58 (1871); Savage v. Knight, 92 N. C. 493, 53 Am. Rep. 423 (1885); Cannon v. Young, 89 N. C. 264 (1883); Durfee v. Pavitt, 14 Minn. 424 (1869).

In order to defeat the deed of a purchaser from one who conveys lands with a fraudulent intent as against creditors, the vendee must have had notice

debted to various creditors in amounts which he states he believed to be about $2,500, he purchased the entire stock of goods of his brother, which was all the visible assets his brother had, and all the property subject to execution, although J. R. Sherman states that he had notes in the bank, uncollected, and some in his own possession, amounting to several thousand dollars. An invoice hurriedly made, and without attracting the attention of the clerks in the store, up to the very date of the alleged transfer of the stock of goods, amounted to about $4,000, and the stock and about $600 worth of notes were transferred by contract and bill of sale to G. W. Sherman, in consideration of the payment of $600 in cash and of eight notes (though J. R. Sherman says he does not know whether

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of the intent, or have participated in the fraud. Henderson v. Henderson, 55 Mo. 534 (1874); Preston v. Turner, 36 Iowa, 671 (1873).

A conveyance cannot be disturbed as against the grantee unless he participated in the fraud of the grantor so far at least as to have knowledge of the fraudulent intent. Steele v. Ward, 25 Iowa, 535 (1868); Leach v. Francis, 41 Vt. 670 (1869); Myers v. Tyson (Kan.) 43 Pac. 91 (1896).

So, a purchaser for a good consideration without notice of fraud will be protected against his vendor's creditors although the conveyance was made with intent on his part to defraud them. Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704 (1876); Lehman v. Kelly, 68 Ala. 192 (1880); Galbreath v. Cook, 30 Ark. 417 (1875); Massie v. Enyart, 32 Ark. 257 (1877); Lee v. Abbe, 2 Root, 359, 1 Am. Dec. 78 (1796); Colbert v. Sutton, 5 Del. Ch. 294 (1880); DeWalt v. Doran, 21 D. C. 163 (1892); Fishel v. Lockard, 52 Ga. 632 (1874); Spicer v. Robinson, 73 Ill. 519 (1874); Palmer v. Henderson, 20 Ind. 297 (1863); Bunnell v. Witherow, 29 Ind. 123 (1867); Hutchinson v. Horn, 1 Ind. 363, 50 Am. Dec. 470 (1849); Studabaker v. Langard, 79 Ind. 320 (1881); Wilson v. Fuller, 9 Kan. 176 (1872); Leen Kee v. Smith Bros. 35 La. Ann. 518 (1883); Hollister v. Loud, 2 Mich. 309 (1852); Eureka Iron & S. Works v. Bresnahan, 66 Mich. 489 (1887); Durkee v. Chambers, 57 Mo. 575 (1874); Dougherty v. Cooper, 77 Mo. 528 (1883); State v. Mason, 112 Mo. 378 (1892); Hill v. Taylor, 125 Mo. 331 (1894); Fury v. Kempin, 9 Mo. App. 30 (1880), 79 Mo. 477 (1883); Smith v. Schmitz, 10 Neb. 600 (1880); Crabb v. Morrissey, 31 Neb. 161 (1891); Holmes v. Clark, 48 Barb. 237 (1867); Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522 (1871); Jackson v. Glaze, 3 Okla. 143 (1895); Thompson v. Lee, 3 Watts & S. 479 (1842); Garland v. Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756 (1826); Leman v. Borden, 83 Tex. 620 (1892); Maddox v. Dabney (Tex.) 27 S. W. 901 (1894); Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438 (1881); Hinds v. Keith, 57 Fed. Rep. 10, 13 U. S. App. 222 (1893); Astor v. Wells, 17 U. S. 4 Wheat. 466, 4 L. ed. 616 (1819); Prewit v. Wilson, 103 U. S. 22, 26 L. ed. 360 (1880); Bean v. Smith, 2 Mason, 252 (1821).

In Studabaker v. Langard, *supra*, Rhodes v. Green, 36 Ind. 7 (1871), *infra*, VIII., was distinguished upon the ground that in that case the vendee had actual notice of the vendor's fraud.

The title of a bona fide purchaser of lands for a valuable consideration is unassailable, whatever may have been the motives or intentions of the grantor in making the conveyance, where he had no notice of any fraudulent intent. Herring v. Wickham, 29 Gratt. 628, 26 Am. Rep. 405 (1878).

And rights of creditors of a fraudulent vendor to avoid the sale cannot be exercised against one who, without notice of the fraud, has in good faith purchased the property from the fraudulent vendee. Comey v. Pickering, 63 N. H. 126 (1884).

And one who purchases from a vendor, who entertains the intent to defraud his creditors, who pays a valuable consideration and has no notice of such intent, is a bona fide purchaser though he holds by an executory contract only, and not by deed. Studabaker v. Langard, *supra*.

So, the secret intention of a husband to defraud his wife in the sale of community property does not affect a purchaser who had no knowledge of such intention. Smitheal v. Smith (Tex.) 31 S. W. 422 (1895).

And a conveyance of land by a husband to his wife, for which she takes land in exchange, will not be set aside as fraudulent and void as against the husband's creditors in the absence of evidence that she knew of her husband's insolvency or indebtedness. Mehlhop v. Pettibone, 54 Wis. 652 (1882).

And a conveyance by a husband through a third person to his wife will not be set aside as fraudulent at the instance of judgment creditors, where it appears that the conveyance was for a good consideration and that she was innocent of fraud or notice of any intended fraud on the part of her grantor; and a refusal to nonsuit such judgment creditors is error, though as against creditors the conveyance might be converted into a mortgage where such relief would not be inconsistent with the case made by the complaint. Truesdell v. Sarles, 104 N. Y. 164 (1887).

So, a bona fide purchaser without notice, of a promissory note and mortgage given to secure it, who buys before the debt becomes due, is protected against a defense that the mortgage was made by the debtor in anticipation of bankruptcy and to defraud creditors. Murray v. Jones, 50 Ga. 109 (1873).

And a bill of sale of chattels to one who agrees to advance capital and property and carry on business with them and employ the vendor at a fixed rate, made with intent upon the part of the vendor to defraud his creditors, will not be set aside as fraudulent where that object was unknown to the vendee. Atwood v. Impson, 20 N. J. Eq. 150 (1869).

So, one who has money in the hands of another by whom a conveyance is made to her, charging her with the consideration on his books which she afterwards accepts, and which is in accordance with her desires, is a bona fide purchaser for a sufficient consideration, though it does not appear that she authorized the conveyance, where she has no actual knowledge of the grantor's intent to defraud creditors. Des Moines Ins. Co. v. Lent, 75 Iowa, 522 (1888).

And a finding that a vendee purchased in good faith will not be disturbed where the evidence tends to show that he had no information of his vendor's insolvent condition, and that the price paid was the full and fair valuation of the property purchased, though the evidence in some parts was sharply conflicting. Grunsky v. Parlin (Cal.) 42 Pac. 575 (1895).

In Hildreth v. Sands, 2 Johns. Ch. 35 (1815), however, it was said that a deed fraudulent upon the part of the grantor may be set aside though the grantee is a bona fide purchaser and ignorant of the fraud.

But in Sands v. Hildreth, 14 Johns. 493 (1817), which was the same case on appeal, the statement of the chancellor in the court below that there would be great difficulty in supporting a fraudulent deed, though the grantee was innocent, was said to be unnecessary to the decisions of the case, and the court expressed itself as inclining to a different opinion.

Where a debtor is entitled to a conveyance of a legal title to land, but abstains from receiving it under an agreement with the person in possession that it shall remain in him in order that it may not be made subject to the payment of his existing debts, the land may be regarded as conveyed with

there were eight or nine) of $500 each, due in successive payments, one each two months, beginning two months from the date of the sale. The stock was transferred to G. W. Sherman, he giving back to his brother a chattel mortgage thereon to secure these deferred payments. J. R. Sherman remained in and about the store, transacting business, to all appearances, as before, and made purchases of goods, which were charged to him, the same as before, excepting that G. W. Sherman employed the clerks. Before the goods were attached G. W. Sherman paid from the sales of the goods $300 additional in cash, and subsequently, and before the trial, turned back to his brother the accounts

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intent to defraud, and as subject to execution. Pennington v. Clifton, 11 Ind. 162 (1858).

III. *Effect of payment of full consideration.*

The payment by a purchaser of a fair consideration for the property purchased affords strong evidence of the good faith of the transaction, and while not conclusive it requires clear evidence of the existence of a fraudulent intent to overcome the presumption of honest motives arising therefrom. Nugent v. Jacobs, 103 N. Y. 125 (1886).

And an agreement by a vendee to pay a full price for the property purchased is a circumstance tending to repel an inference of fraud from other circumstances, and to show that the transaction was fair. Farmers' Bank v. Douglass, 11 Smedes & M. 469 (1848).

A sale made with intent upon the part of the vendor to defraud his creditors is not invalidated against the vendee thereby where he purchased in good faith and for a sufficient consideration. Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742 (1885).

And a conveyance made upon an adequate consideration will not be avoided unless it appears that it was made with an actual fraudulent intent upon the part of the grantor, and that the grantee was a party to the fraud. Union Bank v. Toomer, 2 Hill, Eq. 27.

The payment by a purchaser of an adequate consideration, however, does not show an absence of knowledge on his part that his vendor made the conveyance to delay and defraud his creditors. Wood v. Chambers, 20 Tex. 247, 70 Am. Dec. 382.

Though evidence bearing upon the question of the good faith of the transaction, it is not conclusive. It constitutes merely one circumstance to be weighed in connection with others that may be proved. Wilmerding v. Jarmulowsky, 85 Hun, 285 (1895).

And a purchaser, in order to be protected against creditors of a fraudulent vendor, must have been not only a purchaser for a valuable consideration but also a bona fide purchaser. Craig v. Zimmerman, 87 Mo. 475, 56 Am. Rep. 466 (1885); Glenn v. Grover, 3 Md. Ch. 29 (1850).

A fraudulent conveyance by a debtor is utterly void as to creditors under the statute of frauds unless made for a valuable consideration to a bona fide purchaser without notice of the fraudulent intent. Roberts v. Anderson, 3 Johns. Ch. 371 (1818).

And in order to sustain a sale made by the vendor with intent to delay, hinder, and defraud his creditors, as against such creditors, it must be made to appear that the purchaser paid a valuable consideration and was not chargeable with notice of his vendor's fraudulent intent. Brown v. Texas Cactus Hedge Co. 64 Tex. 396 (1885).

And participation by a vendee in the fraud of his vendor by accepting from him a conveyance of real estate with the intent to hinder, delay, or defraud the creditors of the vendor, renders the conveyance invalid as to such creditors though a full consideration has been paid. Carlton v. King, 1 Stew. & P. (Ala.) 472, 23 Am. Dec. 295 (1832); Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368 (1847); Chapel v. Clapp, 29 Iowa, 191 (1870); Harrison v. Jaquess, 29 Ind. 208 (1867); Wright v. Brandis, 1 Ind. 336 (1849); Liddle v. Allen, 90 Iowa, 738 (1894); Sweet v. Wright, 57 Iowa, 510 (1881); Biddinger v. Wiland, 67 Md. 359 (1887); Cooke v. Cooke, 43 Md. 522 (1875); Johnson v. Sullivan, 23 Mo. 474 (1856); Cason v. Murray, 15 Mo. 378 (1852); Stone v. Spencer, 77 Mo. 356 (1883); Potter v. Stevens, 40 Mo. 229 (1867); Burgert v. Borchert, 59 Mo. 80 (1875); Garesché v. MacDonald, 103 Mo. 1 (1890); Martin v. Estes (Mo.) 28 S. W. 65 (1894); Wake v. Griffin, 9 Neb. 47 (1879); Hedrick v. Strauss, 42 Neb. 485 (1884); Tootle v. Dunn, 6 Neb. 93 (1877); Wickham v. Miller, 12 Johns. 320 (1815); Eigenbrun v. Smith, 98 N. C. 207 (1887); Sabin v. Columbia River Lumber & F. Co. 25 Or. 15 (1893); Peeler v. Peeler, 109 N. C. 628 (1891); Renninger v. Spatz, 128 Pa. 524 (1889); Ashmead v. Hean, 13 Pa. 584 (1850); Briscoe v. Clarke, 1 Rand. (Va.) 213 (1822); Lowry v. Pinson, 2 Bail. L. 324, 23 Am. Dec. 140 (1831); Trotter v. Watson, 6 Humph. 509 (1846); Weisiger v. Chisholm, 28 Tex. 780 (1866); Harden v. Wagner, 22 W. Va. 356 (1883); Fisher v. Shelver, 53 Wis. 498 (1881); Gardinier v. Otis, 13 Wis. 461 (1861); Bott v. Smith, 21 Beav. 511 (1856); Holmes v. Penney, 3 Kay & J. 90, 26 L. J. Ch. 179, 3 Jur. N. S. 80 (1856).

Though an actual change of possession was had. Peck v. Land, *supra*.

And without reference to the time of the delivery of possession. Stone v. Spencer, *supra*.

So, where a purchaser makes a purchase with knowledge or notice of a fraudulent intent upon the part of his vendor the transaction is not bona fide and is invalid as to creditors though a full and valuable consideration was given. Smith v. Collins, 94 Ala. 394 (1891); Ziegler v. Carter Bros. 94 Ala. 291 (1891); Reeves v. Skipper, 94 Ala. 407 (1891); Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104 (1861); Ruffling v. Tilton, 12 Ind. 260 (1859); Howe v. Ward, 4 Me. 195 (1826); Biddinger v. Wiland, 67 Md. 359 (1887); Farmers' Bank v. Douglass, 11 Smedes & M. 469 (1848); Burley v. Marsh, 11 Neb. 291 (1881); Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 234 (1859); Metropolitan Bank v. Durant, 22 N. J. Eq. 35 (1871); Fullerton v. Viall, 42 How. Pr. 294 (1858); Roeber v. Bowe, 26 Hun, 554 (1882); Ashmead v. Hean, *supra*; Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331 (1857); Traylor v. Townsend, 61 Tex. 144 (1884); Humphries v. Freeman, 22 Tex. 45 (1853); Edrington v. Rogers, 15 Tex. 188 (1855); Mosely v. Gainer, 10 Tex. 393 (1853); Walcott v. Brander, Id. 419 (1853); Weisiger v. Chisholm, 22 Tex. 670 (1859); Edgell v. Lowell, 4 Vt. 405 (1832); O'Leary v. Duvall, 10 Wash. 666 (1895); Livesay v. Beard, 22 W. Va. 585 (1883); Bowyer v. Martin, 27 W. Va. 442 (1886); Clements v. Nicholson, 73 U. S. 6 Wall. 299, 18 L. ed. 786 (1867); Singer v. Jacobs, 3 McCrary, 638, 11 Fed. Rep. 559 (1882).

And though the purchaser's deed was duly recorded. Edrington v. Rogers, 15 Tex. 188 (1855); Mosely v. Gainer and Walcott v. Brander, *supra*.

Before suit brought by a creditor. Weisiger v. Chisholm, *supra*.

And though the grantee had no wish to defraud the creditors of the vendor. Edgell v. Lowell, *supra*.

A deed in which both grantor and grantee combined to perpetrate a fraud is void whether the consideration be valuable or voluntary. Brooks v. McMeekin, 37 S. C. 285 (1892).

And a transfer made with intent to defraud creditors, participated in by the purchaser, is invalid as against them without reference to the sufficiency of the consideration paid. Harrison v. Jaquess, 29 Ind. 208 (1867); Harden v. Wagner, 22 W. Va. 356 (1883).

which he had purchased with the stock, it is stated, for collection, and J. R. Sherman delivered back to his brother all of the $500 notes excepting three, although no further payments were made thereon. There is also testimony tending to show that about the 9th of September, 1893, the representative of one of the wholesale houses to which J. R. Sherman was indebted presented an account of $165 for payment, but J. R. Sherman told him that he could not pay this account, because he had not gotten his money yet from the sale of the stock. J. R. Sherman denied that the transfer was made with the intent to hinder, delay, or defraud his creditors, as did also his brother. The case was submitted to the

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And a sale made with intent upon the part of a vendor to hinder, delay, and defraud his creditors, is invalid if the intent be known to the purchaser or could have been known by the use of ordinary diligence, although the sale was made for a good and valuable consideration. Traylor v. Townsend, 61 Tex. 144 (1884).

So, an assignment of judgments taken by one who had notice of suspicious, unusual, and extraordinary circumstances which would have put him on inquiry, is void as to creditors, though he paid a full consideration. Tantum v. Green, 21 N. J. Eq. 364 (1869).

And a conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favor of a grantee who participated in the fraudulent intention, although made for a full consideration and without reference to the amount of property with which the grantor may be possessed. Wadsworth v. Williams, 100 Mass. 126 (1868).

And the fact that a sufficient consideration passed will not validate a deed executed and taken with the fraudulent intent to defeat the vested right of the wife of the grantor in the estate of her husband. Nichols v. Nichols, 61 Vt. 426 (1889).

So, a sale by a son to his mother, made with the intent of placing the property sold beyond the reach of the vendor's creditors, is fraudulent and void as against such creditors, where the mother was privy to the fraudulent design, though she paid a full consideration therefor. Gardinier v. Otis, 13 Wis. 461 (1861).

And a conveyance by a debtor to his brother for the purpose of placing his land beyond the reach of a judgment expected to be recovered in a slander suit then pending, in which fraudulent purpose the brother participated, is fraudulent and void though he paid the full value of the land. Rogers v. Evans, 3 Ind. 574, 56 Am. Dec. 537 (1852).

So a purchaser under a deed fraudulent on its face gets no title, though he paid a full consideration. Palmer v. Giles, 5 Jones, Eq. 75 (1859).

IV. *The intent necessary to constitute fraud.*

The intent of the parties and the effect of the conveyance upon the creditors of the grantor form the criterion to determine whether such conveyance is fraudulent. Corbitt v. Cutcheon, 79 Mich. 41 (1889).

Good faith in making the purchase is the essential feature in a suit to test the question as to whether a conveyance is fraudulent. Garahy v. Bayley, 25 Tex. Supp. 294 (1860).

The questions as to a purchase from a fraudulent vendor are whether or not the purchaser acted in good faith; if he did he is protected, if not, the goods in his hands are still liable for the debts of their real owner. Lane v. Starkey, 15 Neb. 285 (1883).

And whether the purpose of the grantee was to aid the grantor in perpetrating a fraud upon his creditors. Did he buy recklessly or with guilty knowledge, or, which is the same thing, with such knowledge as would put a prudent man upon inquiry? Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438 (1881).

And whether it was made bona fide for a valuable consideration, or whether it was fraudulently made as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors, in which case it would be void. Smith v. Moffatt, 28 U. C. Q. B. 486 (1869).

It would appear that the intent must be an illegal one,—that is, an intent to do or accomplish something that the law does not allow.

Thus, a notice to a grantee which will invalidate the conveyance must be a notice of an intent on the part of the debtor to hinder, delay, or defraud creditors in the legal sense of those words. Ellis v. Valentine, 65 Tex. 532 (1886).

And that an intent such as the statute prohibits prompted the parties in making a transfer is sufficient to invalidate it. Burgert v. Borchert, 59 Mo. 80 (1875).

But a purchase of the property of another by one who is so connected with it and the business in which it is used that he honestly supposes it necessary for the preservation of his business to purchase it, and does it for a full consideration for that reason and with no intent to aid the seller in a fraud upon his creditors, is valid as to the purchaser as against such creditors, though he knew that the object of the seller in making the sale was to defraud his creditors. Root v. Reynolds, 32 Vt. 139 (1859).

And a conveyance which is absolute in terms, made by a debtor with a hope of saving something which his creditors could not reach, not based upon any agreement but upon an expectation that the purchasers would deal honorably with him and give him something if they sold the property at an advance, is not fraudulent as against creditors where they did not know and had no reason to suppose that he was insolvent. Orwig v. Merrill, 69 Iowa, 733 (1886).

And knowledge of a purchaser that the seller is largely in debt, and that if no one would buy his goods his creditors would get their debts out of them, does not invalidate the sale where his object in purchasing was not to delay or hinder creditors but only to procure a good bargain or get something of which he was in want. Atwood v. Impson, 20 N. J. Eq. 151 (1869).

In Dewalt v. Doran, 21 D. C. 163 (1892), however, it was held that a purchase made with knowledge of facts which would put a prudent man upon inquiry and lead him to infer a purpose to defraud creditors, is invalid, though he made the purchase because he considered the property cheap.

It has been held that an attempt to prevent a sacrifice of a debtor's property is not such an intent to delay or defraud creditors as will invalidate a conveyance. Cason v. Murray, 15 Mo. 378 (1852).

And it was held that whether a sale by an embarrassed debtor was bona fide for the purpose of relieving himself from the necessity of a forced sale of his goods or for the mere purpose of protecting them from the claims of creditors, in which latter case it would be fraudulent and void, is a question for the jury. Clark v. Morrell, 21 U. C. Q. B. 596 (1862).

But a conveyance of property made by a debtor in embarrassed circumstances for the purpose of securing it from attachment, the purpose being known to the purchaser, would be void as against creditors, though the debtor might have believed that it would be better for his creditors to make the conveyance and intended that ultimately they

jury, evidently, on the theory that the evidence was such as made the question of the existence of fraud a question of fact for the jury to determine. And this theory of the case seems to have been considered proper on both sides,—at least, no objection seems to have been made to the court considering it in this way,—and it was so considered.

The only question raised in the case is as to the correctness of the instructions given by the court to the jury; and it is claimed that the court erred in refusing, on the application of plaintiff, to instruct the jury that, if the transfer was made by J. R. Sherman to defraud his creditors, it was also frandulent as to the vendee, G. W. Sher-

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should be paid. Kimball v. Thompson, 4 Cush. 441, 50 Am. Dec. 799 (1849).

And a sale by an embarrassed debtor to a friend and relative at an inadequate price and for less than the amount of his debts, after a secret conference, with the intention of protecting his property from being sacrificed by creditors at sales under legal process, will be deemed fraudulent, and can be upheld only as to the consideration paid which was actually applied to the payment of the vendor's debts. Barrow v. Bailey, 5 Fla. 9 (1853).

And substantially the same rule was declared in Borland v. Mayo, 8 Ala. 104 (1875), and Fullerton v. Viall, 42 How. Pr. 294 (1858), in which the intent was to enable the debtor to prefer certain creditors over others.

And a statement by a vendor that his object in making a sale of his property was to enable him to take his time to pay a designated creditor is sufficient to show that his object was to hinder and delay that creditor in the collection of his demand, and will invalidate the transfer where it appears that the purchaser was fully apprised of his object. Allen v. Berry, 40 Mo. 282 (1867).

The mere fact that the vendor intends to prefer a creditor in the use of the proceeds of the sale or that the purchaser knew of such intent, however, will not vitiate the sale. See *infra*, VII. c, *Knowledge of intended preference.*

It was held in England that a sale of property for a good consideration is not, either at common law or under the statute of 17 Eliz. chap. 5, fraudulent and void merely because it is made with the intent to defeat an expected execution of a judgment creditor. Wood v. Dixie, 7 Q. B. 892, 9 Jur. 796 (1845); Hale v. Metropolitan Saloon Omnibus Co. 28 L. J. Ch. N. S. 777 (1859).

And in Canada a conveyance made by a debtor to a third party for a valuable consideration and without notice of any fraudulent intent, intended to pass title, was held to be valid under 13 Eliz. chap. 5, notwithstanding the fact that the parties to the transaction intended to defeat a creditor who had obtained judgment. Dalglish v. McCarthy, 19 Grant Ch. (U. C.) 578 (1872).

But the rule in the United States would appear to be different.

Thus, a purchase of property which the sheriff was seeking to subject to the satisfaction of an execution against the vendor with a view to defeat the remedy of creditors is invalid, though a fair price is paid. Eigenbrun v. Smith, 98 N. C. 207 (1887).

So, a sale of land made by a vendor while an action was pending against him, for the purpose of preventing the collection of an anticipated judgment, is voidable, and will be set aside as to creditors where the purchaser was aware of the pendency of such action and participated with the vendor in his fraudulent purpose. Rogers v. Evans, 3 Ind. 574, 56 Am. Dec. 537 (1852).

And a bill of sale made with the purpose on the part of the vendor of preventing and defrauding the plaintiff, in an action of slander then pending, from reaping any benefit from the judgment, if one should be obtained, of which the vendee in the bill of sale had knowledge and in which he participated, is invalid as against such plaintiff in the slander suit. Cooke v. Cooke, 43 Md. 522 (1875).

And a conveyance of land by a husband during the pendency of an action for divorce and alimony, made with intent to defraud his wife of her right to support, is invalid as against the wife where it was received by the grantee with the same fraudulent design. Frakes v. Brown, 2 Blackf. 295 (1830).

And a sale made for the purpose of defeating the recovery of damages for a breach of promise of marriage is fraudulent and void where the purchaser had notice of the fraudulent intent, though the agreement for the sale was made before suit brought for the breach of promise, and an adequate consideration was paid and possession taken and the purchase money applied to the payment of the vendor's debts. Lowry v. Pinson, 2 Bail. L. 324 (1831).

So, in Colbert v. Sutton, 5 Del. Ch. 294 (1880), it was held that the knowledge of a purchaser of the existence of a judgment against his vendor does not invalidate the purchase unless he made it with a view to defeat the creditors' execution.

And, a conveyance by a debtor to his brother to avoid paying an anticipated judgment, the bonds taken for which were handed to his son for which the brother conveyed the property to the son, who surrendered the bonds, the property remaining in the possession and control of the debtor, will be deemed to have been made upon a trust for the use of the debtor, and will be held to be fraudulent and void as to creditors. Johnson v. Wagner, 76 Va. 587 (1882).

And a sale by an embarrassed debtor of all his real estate on the eve of judgments against him to his son-in-law, who had little means and gave a mortgage for the purchase money, who permitted the grantor to remain in possession and exercise control over the property and afterwards took a fraudulent conveyance of his personal property and removed from the county to avoid execution against the grantor, will be held to be invalid as against creditors in the absence of explanation. Jackson, Hooker, v. Mather, 7 Cow. 301 (1827).

So, a conveyance of real estate made with the intent upon the part of the vendor, known to the vendee, to delay, defeat, and hinder a particular creditor from obtaining his debt, though made for a valuable and full consideration, is fraudulent and void as against such creditors. Ashmead v. Hean, 13 Pa. 584 (1850).

And an assignment of mortgages with intent to delay and defeat the collection of a particular debt will not be set aside as to the creditor to whom that debt is due, unless the assignee participated in such fraudulent intent or had notice of facts and circumstances from which the fraudulent intent of the assignor was an actual and legal inference. Tantum v. Green, 21 N. J. Eq. 364 (1869).

And knowledge on the part of a purchaser of a general intent on the part of the vendor to defraud creditors will defeat the sale, as well as knowledge of a particular intent to defraud a particular creditor, and a creditor may avail himself of it though he might not have been a creditor at the time of the sale. Jordan v. Collins (Ala.) 18 So. 137 (1895).

So, an intent to defraud creditors, entertained by a vendor and known to the purchaser, is fatal to the validity of the transfer as against creditors, though the fraudulent purpose was secondary and

man, if he was in a position where a reasonably prudent man could and would have known of the fraudulent intent of the vendor, and that if the vendee had notice of such facts as would awaken the suspicion of a man of ordinary prudence, and lead him to make inquiry, which, if pursued, would have led to his full knowledge of the fraud of the vendor, he was chargeable with notice of the vendor's fraudulent intent. The plaintiff asked these instructions in different forms, so that the question as to whether or not the plaintiff was entitled to an instruction of this character is clearly raised. The court refused this request, but gave the instructions in a modified form, to the effect

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not primary. Louisiana Sugar-Ref. Co. v. Harrison (Tex.) 29 S. W. 500 (1894).

And a sale made by a debtor in failing circumstances, intending to use a part of the proceeds in payment of a certain debt, but intending further to hinder, delay, or defraud other creditors and not apply the whole to the payment of his debts, of which intent the purchaser had notice, is fraudulent and void. Sellers v. Bailey, 29 Mo. App. 174 (1888).

So, the fact that the result of a fraudulent deed is to secure the payment of a valuable debt equal or greater in amount than the property conveyed does not remove from the transaction the taint of fraud as against a grantee chargeable with notice of the wrongful intent. Cox v. Miller, 54 Tex. 16 (1880).

And although a loan with an agreement to secure a creditor, if the debtor finds himself failing, may be upheld, if there be the further purpose to give the debtor false credit and induce a creditor to rely upon it for payment, the conveyance, pursuant to such understanding, which hinders and defeats creditors, will be inoperative and void. Rencher v. Wynne, 86 N. C. 269 (1882).

V. *To what conveyances the rule applies.*

a. *Generally.*

It seems to have been generally assumed and tacitly admitted that the rule requiring participation by the purchaser in the fraudulent intent of the vendor to invalidate the transfer under statutes prohibiting fraudulent conveyances applies to all conveyances deemed to have been made for a valuable consideration. The question has arisen, however, with reference to a few peculiar classes or transfers, though it has usually taken the form of a question as to whether the transfer was one for value requiring such participation to invalidate it.

b. *Marriage settlements.*

A promise of marriage is a good and valuable consideration, sufficient to support a transfer by a man to his intended wife which will confer title upon her, notwithstanding his intent to defraud creditors, where she has no notice of such intent. Magniac v. Thompson, 32 U. S. 7 Pet. 348, 8 L. ed. 709 (1833); Bunnell v. Witherow, 29 Ind. 123 (1867).

And a deed made in consideration of marriage is valid as against existing creditors in the absence of bad faith upon the part of the wife, though not delivered until after the marriage is consummated. Wood & H. Bank v. Read (Mo.) 33 S. W. 176 (1895).

In order to render an antenuptial settlement a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. Magniac v. Thompson, *supra*; Prewit v. Wilson, 103 U. S. 22, 26 L. ed. 360 (1880); Bunnell v. Witherow, *supra*.

A conveyance in consideration of a future marriage makes the wife a purchaser within the statute of Elizabeth, and is good as against creditors if made bona fide and without notice on her part of fraud on the part of the grantor. Magniac v. Thompson, Baldw. C. C. 344 (1831).

And an antenuptial settlement made by a man upon his future wife in consideration of marriage is good against his creditors unless made with intent to defraud them and the intended wife was cognizant of his fraud, however much he may have been indebted, and though it conveys his whole estate. Herring v. Wickham, 29 Gratt. 628, 26 Am. Rep. 405 (1878).

A conveyance in consideration of marriage will not be presumed to be fraudulent either as to existing or subsequent purchasers, but it may be set aside and held void for actual fraud, though both parties must concur in it. Bonser v. Miller, 5 Or. 110 (1873).

And a conveyance of land made to an intended wife in consideration of her agreement to marry the grantor is not invalidated in the hands of the grantee by the fact that it was made with intent to defraud creditors, and the grantee became aware of such intent before the marriage was consummated. Prignon v. Daussat, 4 Wash. 199 (1892).

And a settlement by an embarrassed and insolvent debtor of the greater part of his estate, made in consideration of marriage, will not be set aside as invalid as against creditors, though the intended wife was aware of his embarrassment, where the marriage was honestly contracted after an engagement of several years. Fraser v. Thompson, 1 Giff. 49, 5 Jur. N. S. 669 (1859).

So, the continued occupation, after marriage by the husband, of land conveyed by him to his intended wife, and her neglect for some years to record the deed, and the mortgaging of the land by the husband and wife for the husband's benefit, do not raise a presumption of a fraudulent intent in making the conveyance. Page v. Kendrick, 10 Mich. 300 (1862).

And a marriage settlement made by one indebted before marriage, given in consideration of the promised marriage and of £10,000, the wife's portion, which was supposed to be more than enough to pay the debts of the settler, conveying all his real estate and likewise his household goods in trust for himself for life, the remainder to his wife for life, the remainder to his sons, which was approved by the master in chancery, the wife being a ward in chancery, the husband continuing in possession after the marriage,—is good as against creditors, and trustees therein are entitled to the possession of the goods. Cadogan v. Kennet, 2 Cowp. 432 (1776).

And an antenuptial settlement by an insolvent trader in which he covenanted to pay £500 to trustees to be held by them in trust for such persons as the intended wife should appoint, and subject thereto in trust for the intended wife, for her separate use and for the husband for life and then in trust for the survivor, including also certain property belonging to the intended wife, is good as against creditors upon his subsequent bankruptcy, where the intended wife was wholly unaware of the intended husband's insolvency. *Re* McBurnie, 1 De G. M. & G. 441 (1852).

But a settlement made by a debtor upon a woman with whom he had previously cohabited, after which he married her, the whole transaction having been made with intent to defraud his creditors, the wife being implicated in the transaction, is fraudulent and void as against such creditors. Bulmer v. Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. N. S. 942 (1869).

And a settlement by an insolvent upon a woman

that the jury could not find that the transfer was fraudulent and void as against G. W. Sherman unless they should find from a preponderance of the evidence that he had notice or knowledge of the fraudulent intent on the part of J. R. Sherman. It is claimed by plaintiff in error, and it is not disputed by the defendant in error, that it was the view of the learned judge who tried the case below that it was entitled to the instruction asked, but that it could not be given because of the decision of this court in the case of *Chandler* v. *Colcord*, 1 Okla. 260, where it was held erroneous to give the jury just such an instruction. If we considered the decision of *Chandler* v. *Colcord* upon this question to be

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with whom he had previously cohabited for several years and whom he subsequently married, for whom he conveyed all his real and personal estate to trustees upon certain trusts with a joint power of appointment among the children of the marriage, reserving no interest to himself but reserving a power of appointment which was immediately afterwards exercised in favor of an illegitimate daughter, the property remaining in his control, is fraudulent and void as against assignees in bankruptcy upon the issue of a flat in bankruptcy against him. Colombine v. Penhall, 1 Smale & G. 228 (1853).

So, in Croft v. Arthur, 3 Desauss. Eq. 223 (1811), it was held that a marriage settlement made when deeply in debt, covering a greater part of the grantor's property, on the eve of judgments, and not recorded, is void as to creditors.

c. *Assignment for creditors.*

It is not intended under this head to go into the question as to whether an assignment for the benefit of creditors constitutes a conveyance for a valuable consideration. The only decisions included are those which appear to turn upon the question of the necessity of participation of the assignee or beneficiaries in the fraud of the assignor to invalidate the assignment. Upon this question different courts seem to have arrived at directly opposite conclusions.

Thus, the rule in North Carolina is that the trustees of the beneficiary in a voluntary assignment to secure creditors are not purchasers for a valuable consideration who must know of or participate in the fraudulent intent of the assignor in order to render the transfer invalid. Savage v. Knight, 92 N. C. 493, 53 Am. Rep. 423 (1885).

And a conveyance to a trustee for the benefit of creditors is void if made with intent to defraud any of the vendor's creditors, though the trustee is ignorant of such intent. Eigenbrun v. Smith, 98 N. C. 207 (1887).

And an assignment by a debtor of what purports to be all his property, ostensibly to provide for the payment of his debts due to creditors, but with intent to hinder, delay, or defraud them or any of them, is fraudulent and void, though neither the trustee nor the *cestui que trust* had any knowledge of the corrupt intent. Woodruff v. Bowles, 104 N. C. 197 (1889).

So in Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522 (1871), it was held that a sale differs from an assignment in that there is a consideration passing to the vendor from the vendee, who becomes owner of the property in his own right, and the vendor obtains the purchase money, which is liable to the claims of creditors; and although such sales may be made on the part of the vendor with intent to hinder, delay, or defraud his creditors, the title of the vendee is not affected unless he had previous notice or knowledge of the fraudulent intent.

But the opposite rule that the fraudulent intent of the grantor alone will not avoid a deed of assignment for the benefit of creditors was held in Abercrombie v. Bradford, 16 Ala. 560 (1849).

And in Wise v. Wimer, 23 Mo. 237 (1856), it was held that fraud in an assignment for the benefit of creditors must be brought home to the assignee in order to invalidate it.

And in Pettit v. Parsons, 9 Utah, 223 (1893), it was held that fraud on the part of an assignor does not vitiate the assignment or affect the rights of the assignee and the beneficiaries of the trust who had no knowledge of the fraud and were in no way connected with it. To have such an effect there must have been a fraudulent contrivance on the part of the assignee or of the persons to be benefited by the assignment.

So, an assignment by a sole surviving partner of an insolvent firm, who is himself insolvent, of partnership assets for the benefit of joint creditors with preferences to some of them, is not rendered void because of the fraudulent omission of such partner from the schedule, of certain partnership property for its own benefit, the assignees and the beneficiaries of the trust being ignorant of the fraud. Emerson v. Senter, 118 U. S. 3, 30 L. ed. 49 (1885).

VI. *Necessity of injury to creditors.*

The rule in Louisiana is that in order to render a transfer made with intent to defraud creditors fraudulent, it must not only appear that the purchaser participated in the fraud, but it must also be shown that the alienation produced injury to creditors.

This was expressly held in Baudin v. Roliff, 1 Mart. N. S. 165, 14 Am. Dec. 181 (1823); Kenney v. Dow, 10 Mart. (La.) 577, 13 Am. Dec. 342 (1822); Sexias v. Citizens' Bank, 38 La. Ann. 424 (1886).

And in Chaffee v. Gill, 43 La. Ann. 1054 (1891), it was held that a purchaser of property from a debtor whom the purchaser knows to be insolvent, with notice that his purpose in selling was to deprive creditors of their recourse against it, will be set aside as fraudulent, where such purpose actually operates to their injury.

But in other states the rule would seem to be different.

Thus a transfer of property with the purpose on the part of the vendor to convert it into money in order to place it beyond the reach of his creditors, of which the purchaser had notice, either actual or constructive, at the time of the purchase, is not prevented from being fraudulent and void as to creditors by the fact that the vendor was solvent at the time and had sufficient property within reach of his creditors, independently of the goods in controversy, to meet his liabilities. Schmick v. Noel, 2 Tex. Civ. App. 90 (1893); Hudson v. Jordan, 108 N. C. 10 (1891); Wadsworth v. Williams, 100 Mass. 126 (1868).

And a sale of goods made by a debtor for the purpose of hindering, delaying, or defrauding his creditors, of which the purchaser had notice at the time of his purchase, does not devest the title to the goods of the vendor as against his creditors though he may have received therefor other property sufficient in value to pay his debts. Wallace v. Butts (Tex.) 31 S. W. 687 (1895).

VII. *Knowledge or notice sufficient to put purchaser upon inquiry.*

a. *Generally.*

Of course actual knowledge or notice of the vendee's fraudulent intent is sufficient to invalidate the sale as against creditors. See *supra*. II., *What constitutes participation.*

good law, no further consideration of this case would be necessary, but the matter would end at once by affirmance of the judgment of the court below. But we do not believe that the conclusion there reached on the proposition of law here involved was correct, either as a determination of what the law of fraudulent conveyances is in this territory by virtue of the adoption of the laws of another jurisdiction, or from a consideration of the decisions generally upon the question. We would, in fact, were it not for the *Chandler* v. *Colcord* decision, consider the question so well settled by the authorities as to make it entirely unnecessary for us to consider the matter at any length. But, this court having decided the law differently

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The general rule as to what information short of actual knowledge or notice will be sufficient for that purpose has been variously stated.

Thus, notice to a purchaser of a fraudulent intent of his vendor may be inferred from circumstances that would put an ordinarily prudent man upon inquiry. Wood v. Elliott (Ky.) 7 S. W. 624 (1888); Smith v. Collins, 94 Ala. 394 (1891); De Walt v. Doran, 21 D. C. 163 (1892); Thompson v. Duff, 19 Ill. App. 75 (1886); Hanchett v. Kimbark, 118 Ill. 121 (1886); Redhead v. Pratt, 72 Iowa, 99 (1887); Phillips v. Reitz, 16 Kan. 396 (1876); Bush v. Collins, 35 Kan. 535 (1886); Martin v. Marshall, 54 Kan. 147 (1894); Hough v. Dickinson, 58 Mich. 89 (1885); Eureka Iron & S. Works v. Bresnahan, 66 Mich. 489 (1887); Bedford v. Penny, 58 Mich. 424 (1885); Rupe v. Alkire, 77 Mo. 641 (1883); State, Friedman, v. Purcell (Mo.) 33 S. W. 13 (1895); State, Erhardt, v. Estel, 6 Mo. App. 6 (1878); Temple v. Smith, 13 Neb. 513 (1882); Bollman v. Lucas, 22 Neb. 797 (1888); Dodd v. Gaines, 82 Tex. 429 (1891); Blum v. Simpson, 71 Tex. 628 (1888); Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331 (1857); Hadock Bros. v. Hill, 75 Tex. 193 (1889); The Holladay Case, 27 Fed. Rep. 830 (1886); Bartles v. Gibson, 17 Fed. Rep. 293 (1883).

Which inquiry, made with ordinary diligence, would have led to knowledge of such intent. Jones v. Hetherington, 45 Iowa, 681 (1877); Kellogg v. Aherin, 48 Iowa, 299 (1877); Williamson v. Wachenheim, 58 Iowa, 277 (1882); Rindskopf v. Myers, 87 Wis. 80 (1894); Hooser v. Hunt, 65 Wis. 71 (1886).

This is the rule adopted by the principal case.

And the sale will be held fraudulent though the purchaser purchases because he considers the property cheap. De Walt v. Doran, 21 D. C. 163 (1892).

So, a vendee who purchases property from an insolvent or failing debtor, and pays him money, with knowledge of facts and circumstances of a suspicious nature sufficient to induce inquiry which if pursued would lead to the discovery of such intent, renders aid in consummating the purpose of the debtor sufficient to invalidate his purchase. Carter Bros. v. Coleman, 82 Ala. 177 (1886); Carter v. O'Bryan (Ala.) 16 So. 894 (1895); Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704 (1876); Dyer v. Taylor, 50 Ark. 314 (1887).

But in order to invalidate it, fraud must appear on the part of the vendor in making the sale, and knowledge of such fraud on the part of the purchaser at the time of purchasing, or knowledge of such facts and circumstances as ought to have put him upon inquiry and would have led to his ascertaining the truth. Hopkins v. Langton, 30 Wis. 379 (1872); Hooser v. Hunt, 65 Wis. 71 (1886); Lehman v. Kelly, 68 Ala. 192 (1880); Hinds v. Keith, 57 Fed. Rep. 10, 13 U. S. App. 222 (1893).

So, one who might have known of the debtor's intent to defraud his creditors by the exercise of ordinary diligence is not a purchaser in good faith within the statute of frauds. Garahy v. Bayley, 25 Tex. Supp. 294 (1860); Traylor v. Townsend, 31 Tex. 144 (1884); Dodd v. Gaines, 82 Tex. 429 (1891); De Walt v. Doran, 21 D. C. 163 (1892).

But a transfer will not be set aside as fraudulent against creditors unless the vendor intended thereby to hinder, delay, and defraud his creditors, and the vendee knew his intention at the time, or could have known it by the use of ordinary diligence and inquiry. Weis v. Dittman, 4 Tex. Civ. App. 35 (1893).

And that a vendee might have known of the fraudulent intent of his vendor by the exercise of ordinary diligence does not invalidate a sale as to creditors under Tex. Rev. Stat. art. 2465, providing that the vendee's title shall not be affected unless it appear that he had notice of the fraudulent intent, where knowledge on the part of the vendee of such intent or of any circumstances sufficient to put a reasonably prudent person upon inquiry does not appear. Houston & T. C. R. Co. v. Shirley (Tex.) 31 S. W. 291 (1895).

So, a purchaser of land is chargeable with notice of a fraudulent intent entertained by his grantor as against a creditor, though he had no actual notice or knowledge thereof, where there were facts within his knowledge which were calculated to arouse his suspicion and put him upon inquiry. Baker v. Bliss, 39 N. Y. 70 (1868).

But a sale by a debtor to one not a creditor, for an adequate consideration, is not invalid as to creditors unless it is made to appear that it was made with intent to defraud them, and that the purchaser participated in such intent or had knowledge of facts calculated to put him on inquiry. Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221 (1877); Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58 (1871).

So, all sales made by an insolvent debtor for money are fraudulent and void as to creditors where the purchaser knows or ought to know that the sale is made by the debtor for the purpose of putting the property sold beyond the reach of creditors. Oppenheimer v. Halff, 68 Tex. 409 (1887); Brittain v. Crowther, 54 Fed. Rep. 295, 12 U. S. App. 148 (1893).

And a purchase of property under circumstances which must have suggested to the purchaser that the object of the vendor was to transfer all his property in the state for value actually paid over before it could be attached or seized under a judgment recently obtained, is invalid as against such judgment creditor, although full consideration was paid and the purchaser had no actual notice of such intent. Green v. Tantum, 19 N. J. Eq. 105 (1868).

And that a debtor was indebted and converted the whole of his property liable to execution and sale, and that the vendee had reason to doubt, and did doubt, whether he did not intend to avoid the payment of his debts, are sufficient to render the sale void as to creditors. Avery v. Johann, 27 Wis. 246 (1870).

So, a sale or transfer of property by a debtor to another with intent to hinder, delay, or defraud his creditors, is void as against creditors where the purchaser has reasonable cause to believe that the transfer is made for that purpose. Hathaway v. Brown, 18 Minn. 414 (1872).

But to make a sale for a valuable consideration invalid as against the purchaser it must appear that he knew that the object of making it was to prejudice the rights of creditors, or that circumstances existed, of which he could not reasonably be ignorant, which indicated a dishonest object of the seller. Miller v. Lacy, 7 Houst. (Del.) 8 (1884).

And a purchaser is not affected by the fraudulent intent of an insolvent vendor unless he purchased with intent to aid him in carrying out his fraudulent design, or had knowledge of it, or notice of such facts or circumstances as would lead a reasonable man to the conclusion that fraud in

from what it is contended to be by plaintiff in error, the overruling of our former decision should be attended by such a consideration of the matter as to show that we are not only justified, but are required to do so. The question involved in the *Chandler* v. *Colcord* case in point in this was as to the correctness of two instructions given by the probate court, the one of which pertinent to the case at bar is as follows: "First. The court further instructs the jury, that when a transfer of property is made, with intent, on the part of the person making it, to hinder, delay, or defraud his creditors, and the party to whom the transfer is made had knowledge of the facts and circumstances, from which such fraudulent intent might reasonably

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fact existed or was intended. Tuteur v. Chase, 66 Miss. 476, 4 L. R. A. 832 (1889).

And a sale by an insolvent debtor for a good consideration, made with intent to defraud his creditors, is not invalid as against a purchaser who did not know of the existence of the debts due by the vendor, or of any fact that would create a suspicion on the part of a prudent man at the time of the sale that the vendor intended to defraud his creditors. Leman v. Borden, 83 Tex. 620 (1892).

Knowledge on the part of a purchaser of facts which are sufficient to put him on inquiry by reasonably exciting a just suspicion as to the honesty of the transaction is sufficient to charge him with notice of the debtor's fraudulent intent. Shealy v. Edwards, 75 Ala. 411 (1883).

And notice of fraud in fact, committed by a vendor to a vendee before payment of the purchase money, is binding upon him; and if the circumstances are such as to put him on inquiry, it will amount in law to notice. Farmers' Bank v. Douglass, 11 Smedes & M. 469 (1848).

The same rules are applicable in ascertaining the question as to whether a vendee had notice of the fraud upon the part of his vendor, as are applied for the purpose of determining the *bona fides* of a holder of a commercial paper. Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178 (1883).

And a purchaser from a fraudulent grantor, having sufficient notice to put him upon inquiry as a man of ordinary prudence and experience in business transactions, will not be allowed to protect himself as an innocent purchaser upon the ground of want of notice. Ringgold v. Waggoner, 14 Ark. 69 (1853).

And one who purchases goods under circumstances which would have put a man of common honesty and sagacity upon inquiry is bound to inquire, and if he neglects to do so, he is chargeable with all the facts due inquiry would have developed. Brittain v. Crowther, 54 Fed. Rep. 295, 12 U. S. App. 148 (1893); Walker v. Collins, 50 Fed. Rep. 737, 4 U. S. App. 406 (1892); Rupe v. Alkire, 77 Mo. 641 (1883).

It is sufficient to avoid a sale in favor of creditors if the facts and circumstances within the knowledge of the purchaser are such as to fairly induce the belief that he either knew of the fraudulent purpose of the vendor, or, having good reason to suspect, he purposely refused to make inquiry and remained wilfully ignorant. Singer v. Jacobs, 3 McCrary, 638 (1882).

A purchaser is not chargeable with knowledge of a fraudulent purpose on the part of his vendor, however, merely because he failed to avail himself of an opportunity of making investigation, which if made would have revealed the purpose. It is not his duty to inquire into the motives of the seller unless put upon inquiry. State, Peirce, v. Merritt, 70 Mo. 276 (1879).

And a purchaser from an insolvent is not chargeable with notice of the insolvency, or of his intent to defraud creditors, though reasonable inquiry on his part would disclose the existence thereof, unless the law casts on him the duty of making such inquiry; and such duty exists only when he has knowledge of facts which would naturally and reasonably be calculated to awaken suspicion. Kyle v. Ward, 81 Ala. 120 (1887).

To charge a purchaser with notice of the fraud of his vendor, the circumstances known by him must be such as ought reasonably to have excited his suspicion and led him to inquire. Baker v. Bliss, 39 N. Y. 70 (1868); Dodd v. Gaines, 82 Tex. 429 (1891).

There must appear to be in the nature of the case such a connection between the facts known and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter. Birdsall v. Russell, 29 N. Y. 320 (1864).

A purchaser for a full consideration is not chargeable with notice of a fraudulent intent entertained by his vendor where he does not appear to have been acquainted with any fact which might create a well-grounded belief as to the existence of such intent. Stearns v. Gage, 79 N. Y. 102 (1879).

And he is not bound to investigate as to the intent of his vendor until he knows something which would cause a reasonably prudent man, acting in good faith, to investigate the facts. Dodd v. Gaines, *supra*.

So, mere suspicion on the part of a purchaser that the vendor intends to defraud his creditors by the sale is not sufficient to put him on inquiry or vitiate his purchase. Tuteur v. Chase, 66 Miss. 476, 4 L. R. A. 832 (1889); Simms v. Morse, 4 Hughes, C. C. 579 (1880).

And it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect. Simms v. Morse, *supra*.

And a general rumor that a particular sale was fraudulent is not sufficient to show notice to the purchaser of the fraud of the vendor, and is not sufficient to put the purchaser on inquiry. Hodges Bros. v. Coleman, 76 Ala. 103 (1884).

And mere want of caution, as distinguished from fraudulent and wilful blindness upon the part of a purchaser, does not prevent him from being considered as a bona fide purchaser without notice, where there is no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent man. Woodworth v. Paige, 5 Ohio St. 70 (1855); Rupe v. Alkire, 77 Mo. 641 (1883).

Whether a purchaser was only unconscious, or, knowing enough to put a prudent man upon inquiry with regard to the purpose of the vendor, was wilfully ignorant, of the facts which he could have learned, is a question for the consideration of the jury. Rupe v. Alkire, *supra*; Dodd v. Gaines, 82 Tex. 429 (1890).

And a creditor is not put upon inquiry as to his debtor's solvency by the fact that the debtor on the creditor's application was willing to consent to the revival of his judgment so that it might be a lien on real estate acquired by the debtor subsequent to its date. Kemmerer v. Tool, 78 Pa. 147 (1875).

And a purchaser from an insolvent debtor is not as matter of law put upon inquiry and rendered chargeable with constructive notice of the debtor's insolvency or embarrassed condition, where he was offered the privilege of examining the vendor's books, but declined to do so because of his confidence in the debtor personally, though it would be sufficient to go to the jury. Stix v. Keith, 85 Ala. 465 (1888).

Unless a vendor is insolvent, the duty of inquiry by the purchaser would not necessarily arise from

See also 36 L. R. A. 683.

and naturally be inferred by an ordinarily cautious person, then such transfer is fraudulent and void as against the rights of the creditors." Concerning this instruction, the court held: "As to the instructions which appear to have been given at the instance of appellee, the first and third were erroneous and should not have been given. A fraudulent intent on the part of a vendor or mortgagor, to hinder, delay, and defraud his creditors, is not of itself sufficient to defeat the sale or mortgage. It is essential to that end that the vendee, or mortgagee, should participate in that design. The fraudulent intent must be mutual. *Meixsell* v. *Williamson*, 35 Ill. 529; *Herkelrath* v. *Stookey*, 63 Ill. 486." The matter for consideration in

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the character of the sale. Le Gierse v. Whitehurst, 66 Tex. 244 (1886).

In determining the question whether a vendee had knowledge of the fraudulent intent of his vendor, the jury should take into consideration the acts and declarations of the respective parties, and the facts and circumstances surrounding the sale, and if the knowledge of the vendee is sufficient to put him upon inquiry they may infer knowledge upon his part of such fraudulent intent. Greenwell v. Nash, 13 Neb. 287 (1878).

And the character of the person from whom information comes, and his relation and intimacy with the parties from whom direct information might be expected, and his connection with the particular transaction and facilities for obtaining information, and the degree of knowledge displayed by him, must all be considered upon inquiry as to whether they were sufficient to stimulate inquiry and put a purchaser upon notice; and the information itself must amount to something more than a vague and general statement that the title is defective. Hodges Bros. v. Coleman, 26 Ala. 103 (1884).

So, it has been repeatedly held and stated in a general way, that actual notice is not necessary, and expressions are to be found in some of the cases indicating that constructive notice is all that is required.

Thus, knowledge of a purchaser of the intent of his vendor to hinder or delay his creditors, which will invalidate the sale need not be actual, positive information or notice, but may be inferred from knowledge of facts and circumstances sufficient to arouse his suspicion and put him upon inquiry. Atwood v. Impson, 20 N. J. Eq. 150 (1869).

To constitute a purchaser a participant in the fraudulent intent of his vendor, it need not be shown that he had direct or positive knowledge of the fraudulent purpose, but it will be sufficient to prove that he had notice of such facts and circumstances as would naturally lead to a strong inference of fraud. New York F. Ins. Co. v. Tooker, 35 N. J. Eq. 408 (1882).

And a purchaser of goods from one who fraudulently obtained possession of them by purchase with intent not to pay for them, with notice of fact sufficient to put a reasonably prudent person on inquiry as to the fraud, will not be protected as against a bona fide purchaser without notice. Actual notice of the fraud is not necessary. Hanchett v. Kinbark, 118 Ill. 121 (1886).

So, it is not necessary that the grantee in a deed made to hinder or delay creditors should have actual knowledge of the debtor's intent to make it void. A knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry amounts to notice, and is equivalent, in contemplation of law, to actual knowledge, and makes him a party to the wrong. The Holladay Case, 27 Fed. Rep. 830 (1886).

To charge a purchaser with notice of the fraudulent intent of his vendor or to put him upon inquiry, which if omitted is equivalent, the purchaser need not have had at the time of the purchase actual knowledge of the fraudulent intent, or such evidence of it before him as would have been sufficient to establish the fact in a court of justice. Hopkins v. Langton, 30 Wis. 379 (1872).

And the term "notice" as used in Tex. Rev. Stat. art. 2465, providing that the title of a purchaser for a valuable consideration shall not be affected unless it appears that he had notice of the fraudulent intent of the vendor, is not restricted to actual notice, but the vendee is chargeable with notice of every fact he could have ascertained by proper use of the knowledge he actually possessed. Traylor v. Townsend, 61 Tex. 144 (1884).

And knowledge of a grantee of an indebtedness of his grantor may be inferred from circumstances. Positive proof of such knowledge is not necessary. Zimmerman v. Heinrichs, 43 Iowa, 260 (1876).

So, in Hodges Bros. v. Coleman, 76 Ala. 103 (1884), it was held that actual notice is not necessary if the purchaser is chargeable with constructive notice which may be inferred from the knowledge of suggestive facts which if followed up would lead to a discovery of the fraud.

And the rule in Arkansas is, that to avoid a sale it is not required that the purchaser should have actual knowledge of the fraudulent purpose of the vendor; it is sufficient if he had constructive notice. Singer v. Jacobs, 3 McCrary, 638 (1882).

And notice of circumstances sufficient to put a purchaser upon inquiry as to whether the seller intended to defraud his creditors is sufficient to invalidate the sale under the Dakota statute, providing that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. Shauer v. Alterton, 151 U. S. 607, 38 L. ed. 286 (1893).

So, the sufficiency of either actual or constructive notice is recognized in Singer v. Jacobs, *supra*; Shealy v. Edwards, 78 Ala. 176 (1884); Smith v. Collins, 94 Ala. 394 (1891); Ziegler v. Carter Bros. 94 Ala. 291 (1891); Reeves v. Skipper, 94 Ala. 407 (1891); McKinnon v. Reliance Lumber Co. 63 Tex. 30 (1885); Hutchins v. Chapman, 37 Tex. 612 (1872).

But an exception, perhaps more apparent than real, exists to this rule in several of the states, notably New York, Missouri, and Oregon.

Thus, the proviso of the New York statute relating to fraudulent conveyances, that its provisions shall not be considered in any manner to affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of a fraudulent intent of his immediate grantor or of fraud rendering void the title of such grantor, means that actual notice shall be given of the fraudulent intent, or knowledge of circumstances which are equivalent. Circumstances to put the purchaser on inquiry where full value has been paid are not sufficient. Stearns v. Gage, 79 N. Y. 102 (1879); Wilmerding v. Jarmulowsky, 85 Hun, 285 (1895).

And the term "previous notice" as used in the proviso of the statute of frauds for the protection of the title of a purchaser for a valuable consideration, unless it shall appear that he had previous notice of a fraudulent intent of his immediate grantor or of the fraud rendering void his title, means actual as distinguished from constructive notice. Farley v. Carpenter, 27 Hun, 359 (1882).

The doctrine of constructive notice does not apply so as to charge a purchaser of land who had

that case was, as is also in the case at bar, a question of notice, rather than the question of fraud itself. It was a question of good faith on the part of the transferee, rather than the question as to whether or not the transfer itself was in violation of the rights of creditors, and therefore void. The conclusion reached by the court, that the instruction there given, and designated as "first" of the two which were being considered together, was erroneous, is not, in our judgment, supported either by the authorities upon which the conclusion was based or by the law on the question. In the case of *Meixsell* v. *Williamson* the trial court was asked to instruct the jury that if they believed from the evidence that the mortgage

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paid a valuable consideration and was in fact innocent of any guilty knowledge, with notice that his grantor made the conveyance with intent to defraud creditors at large. Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178 (1883).

In Parker v. Conner, *supra*, Baker v. Bliss, *supra*, VII., was distinguished, the court saying that in that case the facts come very nearly if not quite up to actual notice, though the doctrine of constructive fraud is fully discussed.

And the rights of a purchaser are not to be affected by constructive notice of fraud of his vendor, unless it clearly appears that the inquiry suggested by the facts disclosed at the time would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. Birdsall v. Russell, 29 N. Y. 220 (1864).

So, in Missouri a sale, though made by the vendor with a fraudulent intent, will not be declared void unless the vendee had actual notice and knowledge of such intent. The knowledge had of facts, which, if investigated and followed out, would lead to knowledge of the fraud, is not sufficient, as it is not the duty of every purchaser to inquire into the motives of the vendor in making the sale. State v. Mason, 112 Mo. 374 (1892).

And the fact that a purchaser had such knowledge as would have excited the inquiry of a prudent man with reference to the claim of his vendor, though not sufficient to set aside the transfer, may be considered by the jury in determining the question whether he had actual notice. Sammons v. O'Neill, 60 Mo. App. 530 (1895).

And an instruction in an action to set aside a sale for fraud which predicates fraud upon the intent upon the part of the vendor, and only "good reason to know of such intent," by the vendee, is improper. State v. Mason, 112 Mo. 378 (1892).

So, in Oregon notice to a grantee of the fraudulent intent of his grantor must be actual. Lyons v. Leahy, 15 Or. 8 (1887); Coolidge v. Heneky, 11 Or. 327 (1883).

And in Seavy v. Dearborn, 19 N. H. 351 (1849), it was held that in the absence of circumstances attending a transfer of property from which the law presumes fraud, actual knowledge of the fraudulent intent of the vendor must be charged upon the purchaser in order to avoid such sale in favor of creditors.

Under this doctrine the question to be submitted to the jury where a sale for a valuable consideration is sought to be avoided because the vendee had notice or knowledge of a fraudulent intent of the vendor, is whether he had notice of such fraudulent purpose, and not whether he had knowledge of facts which would put a prudent person upon inquiry and lead to a discovery of fraud. Van Raalte v. Harrington, 101 Mo. 602, 11 L. R. A. 424 (1890); Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178 (1883); Coolidge v. Heneky, 11 Or. 327 (1883).

And not whether he was negligent in failing to discover the fraudulent intent. Parker v. Conner, *supra*.

But even in these states circumstances which should put a purchaser upon inquiry may be used as proof of actual notice, thus rendering the difference between the two rules more apparent than real.

Thus belief on the part of a person receiving property, that his vendor has not a sufficient amount remaining to pay his debts, is equivalent to actual knowledge of the fact for the purpose of testing the validity of the transfer. Pollock v. Van Camp, 74 Hun, 332 (1893).

And the proof of notice on the part of the purchaser of the fraudulent intent of the vendor, when it is necessary to establish it, need not be direct and positive, but such notice may be proved like any other fact in the case, by circumstances and legitimate inferences to be drawn from the whole transaction. Starin v. Kelly, 88 N. Y. 418 (1882); Philbrick v. O'Connor, 15 Or. 15 (1887); Van Raalte v. Harrington, *supra*.

And is a question of fact for the jury. Van Raalte v. Harrington, *supra*.

It is a question of fact and may be established by direct evidence or inferred from circumstances or from proof of the vendee's knowledge of facts calculated to awaken suspicion. Lyons v. Leahy, *supra*.

And knowledge of facts which should put a prudent man upon inquiry is sufficient to warrant an inference of actual notice of the fraudulent intent of the grantor. *Ibid.*

In Philbrick v. O'Connor, *supra*, however, the rule laid down in Coolidge v. Heneky, *supra*, that actual notice is necessary to make a grantee a party to a fraud of his grantor, and that constructive notice is not sufficient, was criticised, the court saying that it could not give its unqualified assent to that doctrine, and that the reason for the distinction between actual and constructive notice was not apparent.

And in that case the court held that a transfer by one against whom an action was pending for damages for shooting a man, of his property to a person in whose family he boarded, for a consideration of one third of its actual value, will warrant holding the deed fraudulent and void where the shooting by the grantor and the pendency of the action were widely known and talked of in the family of the grantee and the grantee was without means or regular employment.

So the degree of inquiry which devolves as a duty upon a person who proposes to make a purchase out of the usual course of the business of the seller depends upon the circumstances of the particular transaction, but reasonable inquiry must be made in all cases as to the right of the seller to make the proposed sale. Schulenburg v. Kabureck, 2 Dill. 132 (1873).

And a purchase from an insolvent debtor of his entire property without any inquiry as to the vendor's financial situation, where the vendee was well acquainted with him and in a position to have some knowledge of his business, is invalid as against the vendor's creditors, where the prosecution of such an inquiry to but a limited extent must have resulted in the acquisition of the knowledge that the sale would be invalid as to his creditors. Ullman v. Crenshaw (Tex.) 16 S. W. 1012 (1891).

So, when the facts and circumstances are such as to put a reasonably prudent man upon inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud who has every motive for concealing the truth, when better and more reliable sources of information are open to him. Singer v. Jacobs, 3 McCrary, 638 (1882).

And a purchaser who is put upon inquiry by no-

was not bona fide, but was made to hinder and delay creditors of said Meixsell, then the jury are to find the defendant not guilty. The supreme court held that the objections to this instruction were obvious, that "the intent of P. Meixsell to delay and hinder his creditors is not, under repeated decisions of this court, sufficient. This intent must be mutual. Both the mortgagor and mortgagee must harbor the intent." And in the case of *Herkelrath* v. *Stookey* the trial court instructed the jury that, if the mortgage was made to hinder, delay, and defraud creditors, it was void, even though the mortgagee had just claims against the mortgagor; and the court held: "If this instruction had been so framed as to require both the

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tice of suspicious circumstances cannot rely upon the opinion of an attorney that he will get good title, unless it is based on a knowledge of the facts. Hodges Bros. v. Coleman, 76 Ala. 103 (1884).

But a purchaser who made careful inquiry upon receiving notice of sufficient circumstances, and failed to discover any fraud on the part of his vendor, and satisfied himself that the sale was fair, will be protected although the original sale may be subsequently declared fraudulent. *Ibid.*

And a purchaser will be protected upon making inquiry and becoming reasonably convinced that the sale is fair and honest, though his informant did not know all existing facts tending to show fraud. *Ibid.*

And conveyances by a husband and wife for a valid consideration of land which had been previously conveyed by the husband to the wife without consideration and in fraud of creditors, cannot be assailed by judgment creditors, transcripts of whose judgments were filed in the county previous to the time of such conveyances but subsequent to the time of the conveyance from the husband to the wife, where the grantees were without actual knowledge of the fraudulent character of the conveyance from the husband to the wife. Sawtelle v. Weymouth (Wash.) 43 Pac. 1101 (1896).

So, the mere fact that a purchaser from a grantee under a conveyance founded upon the consideration of blood and marriage has notice that it is not founded upon a pecuniary consideration, is not sufficient to make it his duty at his peril to inquire whether the title of his grantor was not fraudulent, as he has the right to act upon the legal presumption that the deed was honestly made, unless some fact is brought to his knowledge calculated to raise suspicion in his mind that the conveyance was made with a fraudulent intent. Frazer v. Western, 1 Barb. Ch. 220 (1845).

And a conveyance of land by a husband and wife to the husband's brother-in-law, made with intent to avoid payment of a judgment against the wife for her tort, is good as against such judgment creditor where the brother-in-law took the conveyance at their request because of their inability to pay the taxes, assessments, and encumbrances thereon, although he knew nothing of the property and relied upon their statements as to title, value, and encumbrances. Mathiez v. Day, 36 N. J. Eq. 88 (1882).

b. Notice or knowledge of indebtedness or insolvency.

Fraud is not to be imputed to a purchaser of goods in good faith and for a valuable consideration because the vendor is embarrassed and insolvent. Ballard v. Eckman, 20 Fla. 661 (1884); State, Peirce, v. Merritt, 70 Mo. 276 (1879).

And a transfer may be fraudulent as to creditors though the debtor is not insolvent at the time. Arnold v. Peoples (Tex.) 34 S. W. 755 (1896).

And a conveyance, made with an actual purpose and intent to defraud creditors present and future, is invalid as against them in favor of a grantee participating in the fraudulent intent, without reference to the amount of property possessed by the grantor. Wadsworth v. Williams, 100 Mass. 126 (1868).

So, mere knowledge by a grantee that his grantor was in debt will not defeat the conveyance. Gamble v. Harris, 5 Del. Ch. 512 (1880); Wood v. Elliott (Ky.) 7 S. W. 624 (1888).

And a purchaser of goods on credit cannot be held responsible for a dishonest purpose of his vendor simply because he knows that the vendor owes debts. Lewis v. Rice, 61 Mich. 97 (1886).

And such knowledge, without record of the amount or his ability to pay, will not invalidate the sale, though the purpose of the vendor was to defeat his creditors, where the vendee did not participate in such purpose. Baughman v. Penn, 33 Kan. 504 (1885).

And knowledge by a purchaser that the seller is largely in debt, and that if no one would buy his goods his creditors would get their debts out of them, does not affect the validity of the sale to him where his object in purchasing was not to delay or hinder creditors but only to make a good bargain, or to procure something of which he was in want. Atwood v. Impson, 20 N. J. Eq. 150 (1869).

In order to invalidate the purchase it must be shown that he knew of the fraudulent intention, or that the circumstances were such as to put him upon inquiry. Wood v. Elliott (Ky.) 7 S. W. 624 (1888).

But evidence tending to prove that defendant in execution was indebted at the time of a sale by him is not to be excluded because there is no direct evidence that the purchaser had notice of such indebtedness. Stadtler v. Wood, 24 Tex. 622 (1860).

So, the knowledge of a purchaser of the existence of a judgment against his vendor will not affect the validity of a purchase of his personal property, unless he made it with the view to defeat the creditor's execution. Colbert v. Sutton, 5 Del. Ch. 294 (1880); Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec 348 (1811).

And the mere fact of a sale by a party in failing circumstances, of his property, to a purchaser having knowledge thereof, does not show fraud. Loeschigk v. Bridge, 42 N. Y. 421 (1870).

And knowledge on the part of a purchaser of the suspension or failure of a debtor, or of his being sued, does not necessarily invalidate a sale and deed made by him. Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58 (1871).

So, knowledge by a grantee that his grantor was insolvent does not tend to show knowledge of a purpose of the grantor to defraud creditors which will invalidate the conveyance. Albertoli v. Branham, 80 Cal. 631 (1889).

And does not put him upon inquiry for a fraudulent intent in making the sale. Mathews v. Reinhardt, 149 Ill. 635 (1894).

And is not sufficient to defeat it as fraudulent as against creditors. Durkee v. Chambers, 57 Mo. 575 (1874); Lowenstein v. Fudickar, 43 La. Ann. 886 (1891).

Even if the object of the vendor was to defraud his creditors, where such purpose was not known to him. Hughes v. Monty, 24 Iowa, 499 (1868).

No presumption arises from the known insolvency of the maker of a deed that the grantee knew of his intent to defraud creditors. Cannon v. Young, 89 N. C. 264 (1883).

The fact that a vendor was insolvent, and his insolvency was known to the purchaser when the property was purchased and the money paid, does not invalidate the sale unless it was made by the vendor with the intent to hinder, delay, or defraud his creditors, and the purchaser either had actual knowledge of such intent or had knowlege of facts from which a reasonably prudent man by proper

mortgagor and mortgagees to have participated in the fraudulent intent in order to avoid the mortgage, it would have been unobjectionable. The jury, however, would probably understand such an instruction as referring only to the intent of the mortgagor. A fraudulent intent on his part alone would not vitiate the instrument."

It will be observed that the decision in neither of these cases was upon the question as to whether, if the transfer was fraudulent,—that is, if it was a transfer which the party making the conveyance was prohibited by law from making, or if the conveyance was one which was made in violation of the rights of creditors,—the transferee must have had actual

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inquiry would have discovered such fraudulent intent. Dittman v. Weiss (Tex.) 31 S. W. 67 (1895).

Thus, a sale for an adequate consideration in cash, made to one not a creditor, with the intention of defrauding the vendor's creditors, will not be set aside as fraudulent where there is nothing to show that the purchaser had any knowledge of the vendor's fraudulent purpose, though he knew that he was notoriously insolvent, and the transaction was not in the usual course of his business. Lowenstein v. Fudickar, *supra*.

And a purchaser who knew at the time he purchased that his vendor was indebted to some extent, and asked him about it, and was told that he did not owe more than he could pay, making no further inquiry, is not put upon inquiry as to a fraudulent intent upon the part of the vendor where he owned at the time considerable valuable property, subject to execution, and was apparently in good credit. Cox v. Morrison (Tex.) 31 S. W. 85 (1895).

So, a sale upon credit at a fair price to a responsible vendee of the entire effects of an insolvent copartnership is not *per se* fraudulent as to creditors, though the vendee had knowledge of the insolvency. Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522 (1871).

And the purchase by a partner of his copartner's interest in the firm property is not void for fraud because the buyer had knowledge of his partner's insolvency, if he had no reason to suppose that his intention was to defraud creditors by the sale. Darland v. Rosencrans, 56 Iowa, 122 (1881).

And a sale of property, made to a son by a father when embarrassed with debts beyond his ability to pay, is not fraudulent and void as to creditors where the son honestly bought and paid a fair price. McCanless v. Flinchum, 89 N. C. 373 (1883).

And a son who takes a conveyance of all his father's real estate, knowing of his financial embarrassment, giving therefor a mortgage without a bond, and a check for $200, the father surrendering at the same time a note against him for the same sum, can hold the real estate against his father's creditors. First Nat. Bank v. Cummins, 38 N. J. Eq. 191 (1884).

Knowledge of the indebtedness or insolvency of the vendor, however, furnishes evidence of the existence of a fraudulent intent which, taken in connection with other circumstances and conditions, has been frequently held sufficient to put the purchaser upon notice and to invalidate the transfer.

Thus, sales made by an insolvent debtor to one who is not a creditor, having knowledge of the circumstances of his vendor and being in possession of information reasonably calculated to stimulate inquiry, and which if followed up would lead to the disclosure that the purpose of the seller is to put the property beyond the reach of or otherwise to delay, hinder, or defraud his creditors, is invalid as against creditors, though full consideration is paid. Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704 (1876).

So, as a general rule, a sale on credit to a purchaser, cognizant of the vendor's insolvency, is fraudulent, as the necessary effect is to hinder and defraud creditors. Clark v. Wise, 57 Barb. 416 (1870).

And knowledge upon the part of a purchaser that his vendor was largely in debt for the goods sold, in connection with a purchase on time extending beyond the time when the claims against the vendor became due, may be considered by the jury in connection with other facts in determining whether the conveyance was fraudulent. Hughes v. Monty, 24 Iowa, 499 (1868).

So, the notorious insolvency of a grantor at the time he executed a deed to his son-in-law is a circumstance tending to show that the grantee is a participant in the fraud of the grantor against creditors. Helms v. Green, 105 N. C. 251 (1890).

And a sale by a debtor to his brother-in-law at a time when the debtor was known to be in an embarrassed condition, in which two neighbors were called in to appraise the property and witness the execution of the receipt and conveyance, furnishes sufficient evidence of fraudulent collusion to invalidate the conveyance. Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704 (1876).

And a sister who purchases lands from her brother knowing that he is very destitute at the time, who was told by his wife that she had to give up everything and expected that a creditor would go and take their house, cannot be regarded as a bona fide purchaser. Keyser v. Angle, 40 N. J. Eq. 481 (1885).

So, a conveyance by a mother, engaged in mercantile business, to her son, who was her bookkeeper and knew that she was insolvent, the son giving his note for deferred payment, is fraudulent and void as a withdrawal of the lands from the reach of creditors, which the parties must have been conveying with a view to hindering and delaying them. Blum v. McBride, 69 Tex. 60 (1887).

And the fraudulent intent of a mother in conveying property to her sons will be deemed to have been participated in by them where it consisted of all her real property, and at about the same time she sold them all of her personal property, and they were at the time living with her and had knowledge of her indebtedness and the extent of her property, and after the conveyance the mother lived with them. Chapel v. Clapp, 29 Iowa, 191 (1870).

And a conveyance by a father-in-law to a son-in-law in consideration of a note of a third person then past due, which was transferred by delivery only and had never been collected, made two days before the execution of an assignment from the father-in-law to the son-in-law as trustee, is fraudulent and void as to creditors where the son-in-law had knowledge of the other's insolvency. Cummings v. McCullough, 5 Ala. 324.

So, a conveyance by a debtor of all his property except his homestead and personal property, of trifling value, to his wife and daughter for the purpose of covering the property and protecting it from creditors, will be deemed to have been made to aid his fraudulent purpose, where they must have known his large indebtedness and their explanation of the service from which they received the money was not satisfactory. Leich v. Dee, 86 Iowa, 709 (1891).

And a purchaser from a wife of premises, the purchase money for which had been paid mainly by her husband, taking the conveyance in her name with intent to defraud creditors, is chargeable with notice of such intent where he was a creditor of the husband, his debt having been owed for several years, and he had made ineffectual efforts to secure and collect it, and knew that the husband had paid a portion of the purchase

notice of such fraud and such fraudulent intent on the part of the maker of the transfer, or whether or not notice of such facts and circumstances as would put a reasonably prudent man on inquiry would have been sufficient to deprive him of the character of a bona fide purchaser. Manifestly, in order to make a transfer void as against the rights of creditors, there must be something more than simply fraud on the part of the parties m king the transfer. If the transferee has no notice, he is not, under the Illinois decisions, a participant in the fraud, and the conveyance cannot be held void as to him simply because the transfer is fraudulently made by the maker thereof; and an instruction which made the

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money and was indebted for the remainder, and suit had been brought to collect it, and that the husband owed other debts and demands. Baker v. Bliss, 39 N. Y. 70 (1868).

So, a sale of goods by a debtor in failing circumstances, to be paid for when the purchaser was able, is invalid as against creditors where the purchaser knew of the vendor's financial condition, or knew of such facts as were sufficient to put him upon inquiry, which would have enabled him by reasonable diligence to have ascertained such condition. Jacobs v. Totty, 76 Tex. 343 (1890).

And a creditor taking a transfer of a mortgage made by his debtor is chargeable with knowledge of his debtor's actual condition, where he held three notes against him upon which no interest had been paid for over five years. De Witt v. Van Sickle, 29 N. J. Eq. 209 (1878).

And evidence that one who had assigned his wages was insolvent and in debt to different parties who had on several occasions unsuccessfully attempted to garnish his wages, and that the assignee had notice of such facts, and that he had made such assignments regularly for several successive months to such assignee,—is sufficient, in the absence of anything to show a reason for his selling his time, to justify a finding that the assignment was a device to defraud his creditors, of which the assignee had notice. O'Connor v. Meehan, 47 Minn. 247 (1891).

So, a transfer of a stock of groceries and unsettled accounts by a firm of merchants who were financially embarrassed, of which the purchaser had notice, made in haste, without an inventory, the vendors and their clerks remaining in the store, claiming to be employed by the vendee and continuing to sell goods and collect accounts, will sustain a verdict that the sale was invalid for fraud, where the payment therefor was made by a check upon a bank with which the vendee was connected, which was deposited in the same bank to the credit of the wife of one of the members of the firm and the sister of the other, upon individual indebtedness which they claim to owe her. Golloher v. Martin, 33 Kan. 252 (1885).

And a sale made pursuant to a proposal by the vendor to sell his store and 12 acres of land and assign certain mortgages, saying that he had some debts of honor to pay, and that if he turned out all his personal property he could not pay them, and that he wanted to raise money for the purpose of obtaining a settlement of demands against him,—shows an embarrassed condition of the vendor, and its full disclosure to the purchaser and his willingness to aid in placing the property of the vendor in a situation in which it could not be reached. Blodgett v. Chaplin, 48 Me. 322 (1861).

And the knowledge of a purchaser who had known his vendor for many years that his general reputation for honesty was bad, and that he was not punctual in the payment of his debts, that the value of all his property possessed before he purchased the goods sold, and which could have been used in their purchase, did not exceed one half of their value, and that no change had occurred in his condition since the date of their purchase, and that his pretense that he must sell the entire stock at a great sacrifice to enable himself to pay the counsel defending him in another action was false, and that he was selling the goods for one half their cost in the height of the business season, and in less than ninety days after their purchase and about the time debts contracted in their purchase would be maturing, and that the goods might be disposed of at auction for more than the selling price,—is sufficient to put the purchaser upon inquiry as to the purpose of the vendor. Singer v. Jacobs, 3 McCrary, 638, 11 Fed. Rep. 559 (1882).

So, transfers taken with knowledge of the vendor's insolvency are void under the bankruptcy and insolvency laws prohibiting transfers by insolvents or in contemplation of insolvency.

Thus, a sale by an insolvent company to a purchaser who knew of its insolvency, of all its furniture and fixtures and of its interest under the lease it held of the premises where its business was carried on, is fraudulent and voidable as against the assignee in bankruptcy of such insolvent company. Brooks v. D'Orville, 7 Ben. 485 (1874).

And a transfer of goods by a trader for the purpose of raising money by selling his goods at an undervalue, not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors, to one who has notice, either by express information or from the nature of the transaction, that he is selling his goods for such purpose, is an act of bankruptcy, and the assignee of the trader may recover the goods from the purchaser. Fraser v. Levy, 6 Hurlst. & N. 16 (1860).

But a purchaser from a firm will not be held chargeable with notice of its insolvency so as to defeat a conveyance under the bankruptcy act, where it was known to him that they were doing a good business and had good credit and paid their paper with ordinary promptness, but he did not know the extent of their indebtedness. Rice v. Melendy, 41 Iowa, 395 (1875).

c. *Knowledge of intended preference.*

The knowledge on the part of a vendee that the debtor sells him his property to pay one creditor in preference to another does not vitiate the sale. Brown v. Smith, 7 B. Mon. 361 (1847).

And knowledge by a purchaser that his vendor intended, after paying certain debts with a part of his property, to apply a part or the whole of the residue to the payment of other just debts, though by way of preferences, will not vitiate the sale. Ellis v. Valentine, 65 Tex. 532 (1886).

Under statutes prohibiting preferences, however, the rule is different, but under such statutes the intent to prefer must have been known to the purchaser.

Thus, a transfer of property in which both vendor and vendee intended to prevent what they considered a sacrifice by sale under execution, and thus enable the vendor afterwards to give a preference to his own proper creditors over those to whom he was liable as surety, is invalid as a fraud upon creditors, hindered or delayed in the collection of their demands. Borland v. Mayo, 8 Ala. 104.

And a sale by vendors who were at the time insolvent, or knew themselves to be on the eve of insolvency, made with intent to defeat or delay their creditors, or to give to one or more a preference, is void unless it was made in the ordinary course of trade to an innocent purchaser. Gottwalls v. Mulholland, 15 U. C. C. P. 62 (1864).

transfer fraudulent simply because of the conduct of the person making the transfer, and which left entirely out of consideration the conduct of the transferee, was manifestly erroneous. The learned chief justice was probably drawn into the error which was committed in holding that the instruction under consideration in the case of *Chandler* v. *Colcord* was erroneous by giving too much consideration to the term "participation," as he drew it from the Illinois decisions, and gathering from them that the participation on the part of the transferee which would make the conveyance fraudulent must be some affirmative action on his part in consummating the fraudulent intent of the maker of the instrument. It does

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And a sale by an insolvent or embarrassed debtor with intent to give preference among creditors in the use of the proceeds is fraudulent as against creditors, especially where he sells on credit and the purchaser had knowledge or means of acquiring it. Lehman v. Kelly, 68 Ala. 192 (1880).

To make a sale of property by a failing debtor with intent to prefer some creditor invalid under the Delaware statute against fraudulent assignments, the purchaser must have had knowledge of the intention of the seller in so disposing of his property to prefer some of his creditors to others. Groff v. Cooper, 6 Houst. (Del.) 36 (1880).

d. *Inadequacy of price.*

Proof of inadequacy of price is not alone sufficient to establish a fraudulent intent upon the part of a vendor, participated in by the vendee, which will invalidate the transaction. Jaeger v. Kelley, 52 N. Y. 274 (1873); Wilmerding v. Jarmulowsky, 85 Hun, 285 (1895); Bierne v. Ray, 37 W. Va. 571 (1893).

Unless the inadequacy was so manifest as to shock the moral sense and create upon its mere mention a suspicion of fraud. Bierne v. Ray, *supra.*

A slight inadequacy of consideration is not sufficient to show notice of a fraudulent intent of the grantor upon the part of the grantee. Rusie v. Jameson, 62 Iowa, 52 (1883).

And the purchase of goods for less than their real value is not of itself evidence of fraud or circumvention on the part of the purchaser which will invalidate the sale, where he acted in good faith. Mathews v. Reinhardt, 149 Ill. 635 (1894).

The fact that the price given at a sale was below the actual value of the property does not authorize a conclusive presumption that either the vendor or the vendee was actuated by a fraudulent intent. Montgomery v. Wilson, 31 La. Ann. 196 (1879).

And a purchase from an insolvent vendor, though at an inadequate price, will not be deemed fraudulent unless participation on the part of the purchaser in the design of the vendor to defraud creditors is shown. Trieber v. Andrews, 31 Ark. 163 (1878).

If the consideration of the sale of real estate is valuable and substantial, it will sustain the grantee's title to the premises conveyed, where he is not chargeable with notice of a fraudulent intent on the part of his grantor, though it be inadequate as to amount. Wilmerding v. Jarmulowsky, *supra.*

One who claims to hold as a purchaser for value as against a creditor must prove a fair consideration,—not necessarily the full value but a price paid which does not cause surprise or warrant a suspicion of fraud or connivance on his part. Worthy v. Caddell, 76 N. C. 82 (1877).

Thus, that the purchase price of property at a sale was less than it might have sold for on credit does not of itself charge the purchaser with knowledge of the intent of the vendor to defraud his creditors. Douglass v. Douglass (W. Va.) 23 S. E. 671 (1895).

And a purchaser of real estate will not be deprived of his purchase solely because it appears that he believed that he was getting the property for less than he could sell it for. There must be other circumstances having a tendency to make a would-be buyer suspect that the offer to sell at a low price was induced, not by the necessities of the grantor but because of a desire to defraud others. Wilmerding v. Jarmulowsky, *supra.*

Even an inadequacy of price so great as to indicate fraud will not invalidate a sale made by one pressed for money and anxious to sell to a purchaser who buys because he regards the property cheap and a good bargain, where he purchases in good faith and did not know that the vendor was insolvent. Zick v. Guebert, 142 Ill. 154 (1892).

And a conveyance will not be set aside as fraudulent upon the ground of inadequacy of price, where the grantee purchased because she thought the property was cheap, and there is nothing to show that the cash value was greater than what she paid. Blish v. Collins, 68 Mich. 542 (1888).

And the fact of a small price is entitled to no weight as a basis of an inference of fraud where the sale was a sheriff's sale open to all bidders. Mead v. Conroe, 113 Pa. 220 (1886).

So, the fact that a merchant sold goods cheaper than other merchants generally in the same place, and that he sold some particular article, whether as a leader or otherwise, at or below cost, is not of itself such a suspicious circumstance that, if known to a purchaser of his goods, ought to have put him upon inquiry, and which if followed up would necessarily or actually lead to knowledge of the vendor's fraudulent intent. Hinds v. Keith, 57 Fed. Rep. 10, 13 U. S. App. 222 (1893).

And a transfer of property exceeding in value the consideration stated in the deed, which consisted of all the grantor's property, reserving benefits to the grantor by a bond for support, furnishes evidence of suspicious circumstances, but neither one nor all of such circumstances taken together is necessarily evidence of fraud on the part of the grantee. Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438 (1881).

So, in Pochelu v. Catonnet, 40 La. Ann. 327 (1888), it was held that a sale by an insolvent vendor to one not a creditor for a price in cash cannot be annulled at the instance of the vendor's creditors on the charge of similation, though the price was inadequate and the purchaser had knowledge of the vendor's insolvency.

And in First Nat. Bank v. Carter, 89 Ind. 317 (1883), it was held that an arrangement which is duly carried out, by which an insolvent debtor, with intent to defraud his creditors, procured an uncle of his wife to buy his lands worth $12,000 at a sheriff's sale for that sum and pay off the execution amounting to $1,559.92, and giving the land to the debtor's wife, the debtor receipting for the excess of the bid,—vests title in his wife good as against creditors, where the wife had no notice of the fraudulent intent, as she was not a volunteer.

And in Farmers' Bank v. Douglass, 11 Smedes & M. 469 (1848), it was held that a purchase of property worth nearly $200,000 for which the purchaser agrees to pay certain debts of the vendor amounting to about $13,000 less than the value of the property, leaving the general creditors of the vendor unpaid and nothing to pay them with, does not of itself show such a fraudulent intent as will require the cancelation of the sale.

But a grossly inadequate consideration in a conveyance by a debtor in failing circumstances is evidence of a fraudulent intent. Livesay v. Beard, 22 W. Va. 585 (1883); Hamet v. Dundass, 4 Pa. 178 (1846).

not mean this when used with reference to fraudulent conveyances. It does not mean that the vendee or mortgagee should do any act, in furtherance of the fraudulent design of the maker, other than the taking of the fraudulent conveyance with knowledge or notice, direct or constructive, that the conveyance is a prohibited one, and is made by the person who makes it with the fraudulent intent to hinder or defeat his creditors. The transferee is a participator in the fraud, where that term is used, if he takes the fraudulent conveyance under circumstances where the law will impute to him knowledge of the purpose of the maker

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And gives rise to a presumption of fraud therein. Bryan v. Kelton, 1 Tex. 415 (1847).

And notice to a purchaser of goods, of the intention of the seller to defraud his creditors, may be inferred from evidence that the price paid by the purchaser for the goods was less than their real value. Van Raalte v. Harrington, 101 Mo. 602, 11 L. R. A. 424 (1890).

Thus a sale of property for considerably less than the actual value is such evidence of fraud as requires explanation, and may, when coupled with other facts, be controlling proof of the fraudulent intent of the parties. Dodson v. Cooper, 50 Kan. 680 (1893).

And one who purchases an entire stock of goods at a considerable discount, where the effect of the proposed means of payment must be to hinder and delay if not defraud creditors of the seller, takes them at his peril. Beels v. Flynn, 28 Neb. 575 (1890).

And fraud may be inferred from circumstances, —such as the smallness of the consideration expressed as compared with the fair price of the property conveyed, the want of proof of any price having been actually paid, or circumstances attending the delivery and execution of the deed, etc. Hildreth v. Sands, 2 Johns. Ch. 35 (1815).

And the admission by both the vendee and the vendor that the sale was made with intent to defraud, participated in by the vendee, to two witnesses, and proof of the insolvency of the vendor, and that the property conveyed was all he owned, and that the conveyance was made when he was being pressed by his creditors, to his brother, for a grossly inadequate consideration,—is sufficient to warrant a finding that the conveyance was fraudulent and void. Weisiger v. Chisholm, 28 Tex. 780 (1866).

So, a purchase at an inadequate price by a minor son without means, residing with his father, will be held to be invalid where the grantor was generally known to be in failing circumstances and had previously transferred other property to his other children in fraud of creditors. Massie v. Enyart, 32 Ark. 257 (1877).

And where a father, unable to pay his debts, sells his property to his son for less than its reasonable value, the sale is presumed to be fraudulent as to creditors, but the presumption may be rebutted. McCanless v. Flinchum, 89 N. C. 373 (1883).

And the purchase of an estate of a tenant for life who was outlawed and had absconded is fraudulent and void as against creditors, and will be set aside in favor of his creditors where it was made at an undervalue and pending an action at law against the vendor, of which the purchaser had notice. Herne v. Meeres, 1 Vern. 465 (1687).

So, a sale by a merchant in failing circumstances of his entire stock in trade in his store to his brother for a greatly inadequate consideration, accepted by the brother after receiving notice by telegram that the debtor was flat upon his back, and creditors annoying him, consummated by the debtor without awaiting for the arrival of the brother, when no account of the stock was taken at or near that time, is fraudulent and void as to creditors. Stirling v. Wagner (Wyo.) 31 Pac. 1032 (1892).

And a transfer made in consideration of a debt previously discharged by a decree in bankruptcy, the amount of which was overstated in the deed and grossly inadequate as compared with the value of the property, the encumbrance also being overstated, made by a debtor to his mother-in-law, who was an inmate of his family, upon the understanding that she would ultimately convey the land to the debtor's wife, which she did, the grantor retaining full control and deriving all the benefit from the property sold, is fraudulent and void as against creditors. Newman v. Kirk, 45 N. J. Eq. 677 (1889).

And where an insolvent debtor, against whom suits were pending, conveyed lands to his brother for an inadequate price, the whole of which did not appear to have been paid, and the conveyance was kept secret for some time, the grantor continuing in possession, making erections and receiving rents and profits, the conveyance will be held to be fraudulent and void as against a subsequent purchaser of the land at a sale under execution against the grantor. Sands v. Hildreth, 14 Johns. 493 (1817).

And evidence of a purchase for an inadequate price for which the purchaser paid in cash though he had a bank account, by one who had never been in the business, and who, when it was first proposed to him, thought the matter a joke, and who made no inquiry as to whether the vendor firm was solvent or insolvent or as to the reason for the proposed sale made upon an appraisal of the property, on Sunday, when no one but the vendee, appraiser, and purchaser were present,—warrants a finding that the sale was fraudulent as to creditors, and should be set aside. Higgins v. Curtis, 44 N. Y. S. R. 194 (1892).

And one who purchased lands at a grossly inadequate price at a sale under execution, procured by the former owner with intent to defraud his creditors, is not a bona fide purchaser for a valuable consideration within the statute of frauds, though he had no actual knowledge of such fraudulent intent of the former owner. Worthy v. Caddell, 76 N. C. 82 (1877).

The question as to whether the disparity between the real value of the property sold and the consideration paid is such as to justify an inference that the parties entertained a fraudulent intent is one for the jury. Dodson v. Cooper, 50 Kan. 680 (1893); McCanless v. Flinchum, 89 N. C. 373 (1883).

And inadequacy of consideration is a circumstance to be considered by the jury in the determination of the question of good faith on the part of the vendee in making a purchase. Brown v. Texas Cactus Hedge Co. 64 Tex. 396 (1885); Jacobs v. Totty, 76 Tex. 343 (1890); Wilmerding v. Jarmulowsky, 85 Hun, 285 (1895).

Thus, the inadequacy of price in a sale by a failing debtor, of property worth from $3,800 to $4,000 for the sum of $2,000, is sufficient to take the case to the jury on the question of fraud, when coupled with circumstances of secrecy and concealment. Stern Auction & C. Co. v. Mason, 16 Mo. App. 473 (1885).

And a purchase of lands worth at least three times the consideration recited in the deed of conveyance constitutes a strong circumstance tending to show fraud and a secret trust. Bartles v. Gibson, 17 Fed. Rep. 293 (1883).

So, an assignment by an insolvent debtor of a claim of $1,200, which was a first lien upon a farm worth $13,000, for a consideration of $400, is evidence of fraud on the ground of inadequacy of

of the conveyance, without his actively taking part in the fraudulent design of the transfer other than the taking of it.

Bump, in his valuable work on Fraudulent Conveyances, on page 200, says: "If the grantee has notice of the debtor's fraudulent intent, the transfer is void without reference to his actual intent. The law in such case charges him with that guilty knowledge which makes him a participator in the fraud." Again, on page 202, he says: "If he has notice of such facts and circumstances, he is considered either to know the fraudulent intent, or purposely omit to make those inquiries which an ordinarily cautious and prudent man in the same situation would make. And in either case he

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consideration which should be submitted to the jury. Rhoads v. Blatt, 84 Pa. 31 (1877).

And a conveyance of land by a son to his mother, made during the pendency of a notorious litigation against him, for a consideration of at least $2,000 less than its real value, without an examination of the property, will be deemed to have been taken with knowledge of his fraudulent intent, in the absence of any explanation on her part of the badge of fraud against her. Dunn v. Wolf, 81 Iowa, 688 (1891).

But while the fact that the value of property transferred was $2,400 in excess of the consideration stated in the deed which was $4,000, tends to throw suspicion on the good faith of the grantee, taken alone it is not sufficient proof of fraud. Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438 (1881).

And the payment of $3,000 for $3,164.50 worth of goods is not so materially less than their value as to make the sale fraudulent as to creditors. Fargason v. Hall, 99 Ala. 209 (1893).

So, a purchase of goods for $1,000, and soon after selling them for $800, is not sufficient evidence of fraud to defeat the purchase though it is a circumstance against good faith. Jewett v. Cook, 81 Ill. 260 (1876).

And a purchaser for $1,200 of a stock of goods worth from $1,500 to $2,000, who after a short examination, satisfied himself that it was worth $1,500, is not chargeable with notice of fraud on the part of the seller as matter of law where he made inquiry as to the vendor's debts both of him and of one who suggested the purchase, although he made no inquiry of the clerk in the vendor's store. Jackson v. Glaze, 3 Okla. 143 (1895).

e. *Retention of possession.*

Fraud may be inferred in a transfer of property, from the grantor continuing in possession or exercising acts of ownership after the transfer. Hildreth v. Sands, 2 Johns. Ch. 35 (1815).

But where the validity of a sale is controverted on the ground of acts of ownership exercised by the vendor after the sale, the question does not depend simply upon his acts but rather upon what he did by permission of the grantee. Talcott v. Wilcox, 9 Conn. 134 (1832); Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1846); King v. Moon, 42 Mo. 551 (1868); Edwards v. Dickson, 66 Tex. 613 (1886); Earle v. Thomas, 14 Tex. 583 (1855); Bryant v. Kelton, 1 Tex. 415 (1848).

And a sale will be pronounced invalid for want of delivery to the vendee or continued possession by the vendor, not because the title is thereby rendered inchoate, but simply upon the ground that evidence of fraud is thereby furnished. Meade v. Smith, 16 Conn. 346 (1884).

But permitting a debtor to remain in possession of personal property conveyed by him three or four months is not *ipso facto* or *per se* evidence of a fraudulent intent. Byrd v. Bradley, 2 B. Mon. 239 (1842).

A vendee who permits his vendor to remain in possession of the property sold need not show that the vendor was not implicated in or guilty of fraud, if he was an innocent purchaser. It is sufficient if he was innocent of and did not participate in the fraud of the vendor, and had no notice thereof. Leque v. Smith (Minn.) 65 N. W. 121 (1895).

And it has been held that the mere fact that a creditor is permitted to remain in possession of land conveyed by him is not enough, when not corroborated by other circumstances, to subject the transaction to the imputation of fraud. Every v. Edgerton, 7 Wend. 259 (1831).

But permitting real estate or personal property to remain in the possession of the vendor after an absolute transfer or conveyance is evidence of fraud. Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368 (1847); Livesay v. Beard, 22 W. Va. 585 (1883).

And is a badge of fraud. Peck v. Land, *supra.*

And the concurrent possession of personal property by the vendor with the vendee after the sale is prima facie evidence of fraud. Stadtler v. Wood, 24 Tex. 622 (1860); Livesay v. Beard, *supra.*

And the question of the existence of a fraudulent intent upon the part of the grantee from the vendor's continued possession is one of fact. Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1846).

And is to be considered in connection with other circumstances indicating the existence of a fraudulent intent. King v. Moon, *supra.*

And the prevailing rule would seem to be that such retention of possession by the vendor is prima facie evidence of fraud.

This was held in Talcott v. Wilcox, 9 Conn. 134 (1832); Perkins v. Patten, 10 Ga. 241 (1851); Edwards v. Dickson, 66 Tex. 613 (1886); Howerton v. Holt, 23 Tex. 52 (1859); Earle v. Thomas, 14 Tex. 583 (1855); Bryant v. Kelton, 1 Tex. 415 (1848); Davis v. Turner, 4 Gratt. 422 (1848); Warner v. Norton, 61 U. S. 20 How. 448, 15 L. ed. 950 (1857).

Thus, the burden of proof to establish a purchase in good faith for value rests with the vendee where the sale of the goods is not followed by an actual and continued change of possession, the presumption in such case being that the sale was made with intent to hinder, delay, or defraud creditors of the vendor. Snyder v. Dangler, 44 Neb. 600 (1895); Leque v. Smith (Minn.) 65 N. W. 121 (1895).

And any use of the property not consistent with the objects of the deed would increase the force of the presumption. Howerton v. Holt, *supra.*

But the failure to deliver goods to the vendee at the time of a sale, though evidence of fraud, is prima facie only and may be explained by circumstances. Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348 (1811).

And it is subject to rebuttal by evidence showing that such possession is consistent, under the circumstances, with fair dealing. Edwards v. Dickson, Bryant v. Kelton, and Davis v. Turner, *supra.*

Permitting the vendor in an absolute conveyance of personal property to continue in possession thereof after the sale raises a legal presumption that the sale was fraudulent as to the vendor's creditors, which presumption casts the burden of proving the fairness and good faith of the transaction upon the purchaser. Curd v. Miller, 7 Gratt. 185 (1850); Snyder v. Dangler, and Leque v. Smith, *supra.*

And this can only be done by showing that the sale was fair and for a valuable consideration. Curd v. Miller, *supra.*

That the presumption may be rebutted by explanation is also recognized in Talcott v. Wilcox, Perkins v. Patten, and Warner v. Norton, *supra.*

Thus, the retention by the vendor of possession of goods capable of speedy removal for two days

is chargeable with participation in the fraud." So the question as to whether or not the transferee must participate in the fraud of the vendor in order to make a conveyance void does not determine the question in controversy. If that term is used to designate the conduct of the vendee or mortgagee which will make the transfer void, it does not determine that the instruction which was given by the lower court in *Chandler* v. *Colcord* was erroneous, for he is a participator if he takes it with knowledge of the fraudulent design and purpose of the person making the fraudulent conveyance. We do not think, however, that this is an apt word to use. Its ordinary meaning might be taken to imply the requirement of more activity

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after the sale thereof, and until they are seized under attachment, continuing under the same business sign, invalidates the sale as to creditors of the vendor. State, Baumunk, v. Goetz (Mo.) 33 S. W. 161 (1895).

And where a vendor of a chattel retains possession after an absolute sale, it is prima facie evidence, which becomes conclusive if unexplained, of a secret trust which is a fraud as to creditors; and that the sale was at first without any trust, but the goods were left with the vendor under a subsequent contract that he should retain possession and pay rent for the use of the goods, is not a satisfactory explanation. Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375 (1826).

And the retention of possession by an insolvent vendor of real estate after the sale, continuing to receive the rents and claiming the property as his own without objection from the vendee, is prima facie evidence that the sale was simulated, although the deed was duly recorded. Hancock v. Horan, 15 Tex. 507 (1855).

And permitting the personal property purchased at a sheriff's or marshal's sale to remain in the possession of the defendant in execution for two years or more is prima facie evidence of an intent to defraud creditors. Stovall v. Farmers' & M. Bank, 8 Smedes & M. 305, 47 Am. Dec. 85 (1847).

So, a sale by a debtor of his land without reservation, with a secret agreement with the purchaser reserving to himself the right to possess and occupy it for a limited time for his own benefit, is fraudulent and void as against creditors. Lukins v. Aird, 73 U. S. 6 Wall. 78, 18 L. ed. 750 (1867).

And a transfer by a debtor in failing circumstances of all her property for an inadequate consideration to a single creditor, who knows that other creditors are pressing for payment of their claims, and who allows the debtor and her husband to remain in possession and control of the property, making payment to creditors out of the rents and profits thereof, will be set aside as fraudulent and void as against creditors. Banner v. May, 2 Wash. 221 (1891).

So, the continuance of the vendor in the possession and occupation and full enjoyment of the premises sold, the same after the deed as before, and an absence of interest in the subject manifested by the vendee, together with the fact that the vendor was heavily indebted and suits were pending against him which were maturing to judgment, all of which the vendee knew, considered in connection with evidence with respect to the payment of the consideration stated in the deed, were held sufficient to warrant a finding that it was fraudulent and void as to creditors unless satisfactorily explained in Callan v. Statham, 64 U. S. 23 How. 477 16 L. ed. 532 (1859).

And an assignment providing that the assignor shall remain in possession of the property assigned and continue to sell it and collect the debts, the collection to be applied to replenish the stock, and providing for the renewal of the debts, and that if any of the debts shall not be paid, or if the assignee elect he may take possession of the property and dispose of it, is fraudulent and void as to creditors. Means v. Dowd, 128 U. S. 273, 32 L. ed. 429 (1888).

And an assignment by a debtor to trustees for the benefit of creditors, just before several executions were issued against his property, after which he remained with his clerks in possession of the goods, selling them as his own but accounting to the trustees, furnishes sufficient evidence to sustain a verdict in favor of a sheriff in an action of trespass against him for seizing such property as that of the assignor. Armstrong v. Moodie, 6 U. C. Q. B. O. S. 538 (1858).

So, an absolute conveyance by an insolvent debtor, who had been sued in a number of cases, of all his land and personal property to his son, who was a young man without property and a member of his family, for a consideration expressed but not paid or in any manner secured, the grantor remaining in possession,—is conclusive of a fraudulent intent to hinder and delay creditors which will invalidate the transfer. Ringgold v. Waggoner, 14 Ark. 69 (1853).

And a conveyance by a debtor to his brother to avoid paying an anticipated judgment, the bonds taken for which were handed to his son, and the brother, after having held the property about two years, conveyed it to his son, who surrendered the bonds, the property remaining in possession and under the control of the debtor, will be deemed to have been made upon a trust for the use of the debtor, and will be held fraudulent and void both as to existing and subsequent creditors. Johnson v. Wagner, 76 Va. 587 (1882).

And a sale by a person in embarrassed circumstances, of all his real estate, on the eve of judgments against him, to his son-in-law, who had little means and gave a mortgage for the purchase money, the grantor continuing in partial possession and exercising some control and the son-in-law acting in deference to his directions and actually taking a fraudulent conveyance of the grantor's personal property and removing it out of the county to avoid execution against the grantor, is sufficient, without explanation, to require a finding that the transfer was invalid as against creditors. Jackson, Hooker, v. Mather, 7 Cow. 301 (1827).

And a deed by an insolvent debtor who was being pressed by his creditors, conveying all of his visible property, except that which was exempt and that which was encumbered to its full value, to a young man with small pecuniary means, who was a relative of the grantor and about to marry his daughter, by the terms of which the purchase money was to be paid in instalments through a period of six years,—is fraudulent and void as to creditors, where the grantor remained in possession and a part of the land was conveyed by the grantee within a short time to the grantor's wife upon a fictitious consideration, and the parties united in raising money by mortgages on the land for their common benefit. Thames v. Rembert, 63 Ala. 561 (1879).

But the employment of a debtor by a creditor to whom he has conveyed his stock of goods by a bill of sale, to take charge of and sell the goods, is not fraud *per se*, but only a badge of fraud to be explained by circumstances. Peters Saddlery & H. Co. v. Schoelkopf, 71 Tex. 418 (1888).

And the presumption of fraud arising from a vendor's continued possession of property sold is discharged and rebutted by proof that the vendor held the property, not as his own, but as agent of the vendee for the latter's convenience or for the purpose of sale on his account. Troy Fertilizer Co. v. Norman (Ala.) 18 So. 201 (1895).

on the part of the transferee than is necessary to be shown, and it does not properly comprehend the great variety of cases in which the conduct on the part of the transferee will make the transfer which is fraudulent on the part of the person making it also fraudulent on the part of the person who takes the transfer. To make a transfer which is fraudulent as to the person making it also fraudulent as to the person taking it, requires nothing more to be shown than simply that the vendee had notice of such facts as would, under the law, prevent his taking it.

Our statutes defining the rights of debtor and creditor, and with reference to the law of notice, actual and constructive, are adopted

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So, the fact that after the execution of a bill of sale of a stock of goods, the vendor and all his employees were employed by the purchaser as before, and no sign was put up over the store indicating the change, is not sufficient to show that the transfer was made with intent to hinder, delay, cheat, or defraud creditors, where the vendor testified that the sale was made in good faith. McCreery v. Gordon, 38 Hun, 467 (1886).

And a sale by a debtor to his mother of personal property consisting of cattle and farming utensils, upon an agreement that the purchase money should be applied in payment of debts due from him, which was done, when the mother placed the property purchased upon a farm on which her son was the tenant, after which he used the property as before, furnishes no evidence of a trust between the vendor and the vendee, and is not invalid as calculated to deceive third persons and give the son a delusive credit. Talcott v. Wilcox, 9 Conn. 134 (1832).

So, the fact that a father purchasing all of the property of his son-in-law permits a small portion of it to remain for the use of his daughter does not conclusively establish his participation in a fraudulent intent in making a sale, except, at least, as to the portion remaining. Brown v. Foree, 7 B. Mon. 357, 46 Am. Dec. 519 (1846).

And a purchase by a judgment debtor of prior judgment liens against his debtor's real estate, including a judgment upon which an execution had been issued, and his purchase of such real estate at a sheriff's sale under such execution at a price considerably less than its actual value, after which he permits his debtor to remain in possession, furnishes no ground for an inference of a fraudulent purpose to hinder, delay, and defraud the creditors of his debtor. Mead v. Conroe, 113 Pa. 220 (1886).

Participation by a purchaser in the fraudulent intent of the seller is only necessary to avoid the transfer under How. (Mich.) Stat. § 6190, making a sale of personal property fraudulent as to creditors where possession is retained by the vendor, unless shown to have been made in good faith, where the sale is followed by an actual change of possession. Kipp v. Lamoreaux, 81 Mich. 299 (1890).

So, the bona fides of a sale of a stock of goods for a consideration of $1,000, by an insolvent vendor to a purchaser engaged in another business and unacquainted with the market value of the goods or the business purchased, who bought at the solicitation of a relative of the vendor, is a question of fact for the jury, where the evidence tends to show that there was a merely colorable, and not an actual, change of possession, and that the vendor was being pressed by other creditors, and that the whole value of the property did not exceed $500. May v. Walter, 56 N. Y. 8 (1874).

And the question as to whether a sale made by an execution debtor the day of the issue of the execution, under which the purchaser took immediate possession, where the collector of internal revenue was the same day called in and made a closing inventory and issued a license to the purchaser, the execution debtor being found in the store at the time of the levy in the capacity of employee, as claimed by the purchaser, was made with intent to defraud creditors,—is one for the jury. Gray v. Trent (Pa.) 16 Atl. 107 (1888).

In Hansen v. Berthelsen, 19 Neb. 433 (1886), however, it was held that a party purchasing property of a grantee thereof under a warranty deed of which the grantor remains in possession must ascertain at his peril by what right such possession is retained.

And in Burgert v. Borchert, 59 Mo. 80 (1875), it was held that a vendee of personal property must take actual possession, which must be open, notorious, and unequivocal and accompanied by the usual *indicia* of ownership, and there must be a complete change of control over the property to render the transfer good as against creditors.

f. Reservations and secret trusts.

A secret trust or reservation inconsistent with the terms of a conveyance of property is evidence of fraud if not satisfactorily accounted for, but is not conclusive evidence, and is not fraud *per se*. Oriental Bank v. Haskins, 3 Met. 332, 37 Am. Dec. 140 (1841).

Thus, a secret trust for the benefit of the assignor, accompanying an assignment of property by an insolvent debtor, is an indication of fraud, especially where the debtor transfers all the property he has that is subject to execution. Humphries v. Freeman, 22 Tex. 45 (1858).

And a conveyance by a debtor, absolute upon its face but attended with a secret trust, is fraudulent and void as against a judgment creditor in an action for trespass for acts done after the conveyance. Paul v. Crooker, 8 N. H. 288 (1836).

And an absolute deed duly recorded, which is modified by a separate written defeasance which is not recorded, creates a secret trust in favor of the grantor. Rock Island Nat. Bank v. Western Lumber Co. (Mo.) 34 S. W. 869 (1896).

So, an assignment by a failing and insolvent debtor securing to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering and delaying creditors, is void as being a fraud upon them. Means v. Dowd, 128 U. S. 273, 32 L. ed. 429 (1888).

And a conveyance made in trust for the grantor, and for the purpose of keeping the property out of the reach of his creditors or to enable him to make a subsequent disposition of it to such of his creditors as he should thereafter prefer or select, is fraudulent and void as against existing creditors. Fullerton v. Viall, 42 How. Pr. 294 (1858).

So, a secret reservation in a conveyance by an insolvent debtor of his land for a valuable and adequate consideration, of the right to use the land without payment of rent for a time, is evidence that the conveyance was made with a fraudulent intent. Livesay v. Beard, 22 W. Va. 585 (1883).

And a conveyance of lands by a debtor, made with a secret agreement or understanding that they should be held for his use, after which he takes the oath of insolvency, may be set aside as fraudulent at the suit of a creditor at whose suit he was not in custody. Bullock v. Gordon, 4 Munf. 450 (1815).

And a bill of sale conveying all of a debtor's property, absolute in form, under which the property is delivered, but upon a secret trust to pay certain secured creditors and to reconvey any property which might remain, will support a verdict that the sale was made with intent to hinder, de-

from Dakota; and there it was held, in *Gress* v. *Evans*, 1 Dak. 386, prior to the time we adopted its statute, that "actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find

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lay, and defraud creditors. Corbitt v. Cutcheon, 79 Mich. 41 (1889).

So, a conveyance made with the understanding that the grantee was to hold the property until such a time as the grantor desired, and convey it as he should direct, which was intended to hinder and delay the creditors of the grantor, the grantee knowing of such understanding and that the grantor was indebted at the time, is fraudulent and void as to creditors. Allison v. Hagan, 12 Nev. 38 (1877).

And a sale by a tenant to his landlord of all his interest in the farm under the lease, agreeing to manage the farm in the future as the servant of the landlord, which was kept secret, the tenant continuing to live upon the farm and manage the property as before lest his creditors should be alarmed, furnishes conclusive evidence of a secret trust attending the sale, rendering it void as to creditors. Trask v. Bowers, 4 N. H. 309 (1828).

And reserving the possession for one year, free of rent, as a part of the consideration for the sale of the property by a debtor in failing circumstances, constitutes the creation of a secret trust for his own benefit, which will render the conveyance fraudulent and void as to creditors. Lukins v. Aird, 73 U. S. 6 Wall. 78, 18 L. ed. 750 (1867).

And a conveyance of land by a debtor upon the understanding that the grantee shall hold it in trust for the grantor, and that as fast as moneys can be realized therefrom they shall be applied by the grantor to the payment of his debts, operates to hinder and delay creditors, and is void as against them, even if made for the purpose of protecting the property from forced sale and possible sacrifice on the process of creditors. Smith v. Conkwright, 28 Minn. 23 (1881).

So, a conveyance of property worth $6,000 for an express consideration of $2,500, accompanied by an agreement to reconvey in a year for the same amount, creates a trust in favor of the grantor, and is fraudulent and void as against the grantor's wife, who is about to prosecute a suit for divorce and alimony. Weber v. Rothchild, 15 Or. 385 (1887).

And a transaction by which an insolvent transferred his property to his business partner by whom it was transferred to the insolvent's brother without consideration in either case, after which the brother negotiated a loan of $600 upon the property which was worth $2,500, giving the $600 to the insolvent, which was claimed to have been used for the payment of some of his debts, is fraudulent and void, and will be set aside as creating a secret trust. Lyons v. Leahy, 15 Or. 8 (1887).

And a conveyance by a debtor to his mother-in-law, who was an inmate of his family, upon the understanding that she would ultimately convey the land to the debtor's wife, which she did, the grantor taking from the grantee a power of attorney by which he retained full control and derived all the benefit from the property, made in consideration of a debt previously discharged by a decree in bankruptcy, the amount of which was overstated in the deed and grossly inadequate as compared with the value of the property, the encumbrances being also overstated therein, is fraudulent and void as against the grantor's creditors. Newman v. Kirk, 45 N. J. Eq. 677 (1889).

And a purchase at a sheriff's sale for the use and benefit of the defendant in the execution in fraud of the rights of creditors is invalid as against creditors where the vendee purchased with a knowledge of such fraud, but would be good if he purchased without notice. Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271 (1851).

But a reservation of a benefit to the grantor which is incidental and partial will not invalidate a conveyance made for the actual and real use of the grantee as against the grantor's creditors, unless in fact it was made with the intent to defraud them. Wetherill v. Canney (Minn.) 64 N. W. 818 (1895).

And a conveyance by a father to a son in which a secret benefit is reserved by the grantor to himself will not be set aside as to creditors where the grantee took title without knowledge of such reservation and in the belief that the grantor was not indebted, or had by the transaction provided for the payment of all his debts, and he had no reason to believe otherwise. Howe Mach. Co. v. Claybourn, 6 Fed. Rep. 438 (1881).

And a transfer of a mortgage by a mortgagee for the amount due, to one who sometime afterwards resold the property to the mortgagor, does not tend to prove fraud as against the mortgagees where the transactions were distinct. Pugh v. Harwell (Ala.) 18 So. 535 (1895).

So a sale of cattle and farming utensils after which the vendor becomes the tenant of the vendee, and uses the property in the same manner as he had previously done, is not evidence of a trust between them, and is valid as against creditors. Talcott v. Wilcox, 9 Conn. 134 (1832).

And an agreement between a purchaser at a sheriff's sale and the defendant in the execution that he will convey the property to him upon being reimbursed for all moneys expended is not evidence of fraud. Mead v. Conroe, 113 Pa. 220 (1886).

And the fact that the grantee in a conveyance by an insolvent to his brother, made in consideration of an agreement by the latter to pay debts of the former, kept an account of receipts and expenditures in managing and disposing of the property, crediting himself with the amounts paid to the insolvent before the property was sold, which he submitted to such grantor, and that he paid him rent for the homestead property embraced in the deed, and finally sold the property to the grantor's wife for a nominal consideration, does not necessarily show the reservation of an interest in the property by the grantor. Baker v. Harvey (Mo.) 34 S. W. 853 (1896).

A conveyance by a debtor to his brother to avoid paying an anticipated judgment, however, the bonds taken for which were handed to his son, after which the brother conveyed the property to the son, who surrendered the bonds, the property remaining in the possession and control of the debtor, will be deemed to have been made upon a trust for the use of the debtor, and will be held to be fraudulent and void as to creditors. Johnson v. Wagner, 76 Va. 587 (1882).

So an offer by a creditor who has purchased property from his debtor upon a secret trust for the benefit of the debtor to surrender the property upon payment of his debt, does not make him a bona fide purchaser. Humphries v. Freeman, 22 Tex. 45 (1858).

actual notice. Or, to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice; and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits

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And taking and recording an absolute conveyance, and giving a separate written defeasance which is withheld from record, do not estop the transferee from attacking a like transaction by the vendor with another as creating a secret trust. Rock Island Nat. Bank v. Western Lumber Co. (Mo.) 34 S. W. 869 (1896).

The good faith of a transaction by which a purchaser of a farm at a sheriff's sale takes possession and afterwards buys from the execution defendant the property on the farm, and then leases the dwelling and the personalty to the wife of such execution debtor, who is his sister, and employs the execution debtor as a hired man on the farm, is a question for the jury. Renninger v. Spatz, 128 Pa. 524 (1889.)

In Lyons v. Leahy, 15 Or. 8 (1887), however, it was held that a conveyance made without consideration or upon some reservation for the benefit of the grantor or some person having no interest in the conveyance, or upon a secret trust, may be set aside without reference to the knowledge or intent of the grantee.

So, in Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375 (1826), it was stated absolutely that a trust in a sale of chattels is a fraud with respect to creditors.

g. Transfers out of the ordinary course of business.

Unusual circumstances outside of the ordinary routine of mercantile business,—such as great haste in consummating a sale, making it at an unusual time, and embracing in it the entire stock in trade of an established house, and an offer by the purchaser to resell at a price greatly below invoice rates,—are sufficient when known to the purchaser, to put him upon inquiry as to the bona fides and validity of the sale. Hodges Bros. v. Coleman, 76 Ala. 103 (1884).

And facts of an unusual or suspicious nature having reference to the transaction sought to be impeached, and so related to it that if faithfully pursued and inquired into would discover its true character, are sufficient to charge the purchaser with notice of a fraudulent intent of his vendor. *Ibid.*

Thus a sale by an insolvent debtor, not made in the usual and ordinary course of business, is sufficient to charge the purchaser with notice of such debtor's insolvency. Ohleyer v. Bunce, 65 Cal. 544 (1884).

And an assignment taken by one who had notice of suspicious, unusual, and extraordinary circumstances which should have put him upon inquiry, is void as to creditors, though he paid a full consideration. Tantum v. Green, 21 N. J. Eq. 364 (1869).

So, transfers made by a bankrupt not in the usual and ordinary course of his business are prima facie evidence that fraud upon the bankruptcy act was intended, and impose upon the purchaser the active duty of inquiring into the debtor's financial situation. Judson v. The Courier Co. 15 Fed. Rep. 541 (1883).

And a purchase of negroes out of the usual course of business when they had been run out of the state by the owner to avoid the payment of his debts, with a knowledge of the fact, paying mostly in cash, constitutes such a participation by the purchaser in the fraudulent design of the seller as will invalidate the transfer. Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104 (1861).

So, a sale by an insolvent merchant of all his stock of property is prima facie evidence of fraud as against the immediate vendee and all actual participators. Babbitt v. Walbrun, 1 Dill. 19 (1870).

And a sale by a retail vendor of liquors of his entire business in bulk is not a transfer in the ordinary course of business, and is therefore prima facie fraudulent and void as to creditors. Chevalier v. Commins, 106 Cal. 580 (1895).

And that the whole of a stock of goods was sold for less than it was worth, out of the usual course of trade, without any inventory having been taken, when the vendor appeared to be doing a prosperous business and had just bought goods to replenish his stock, and the seller required that the purchase money not paid in cash should be secured by notes, not payable to himself but to his brother, living in a distant state, and that they should be payable to bearer instead of to the payee, are sufficient to put the purchaser on inquiry as to the fraudulent intent of the vendor in making the sale. Blum v. Simpson, 66 Tex. 84 (1886).

So, secrecy in making a contract of sale is a circumstance from which, connected with other facts, fraud may be inferred. Warner v. Norton, 61 U. S. 20 How. 448, 15 L. ed. 950 (1857).

An unusual degree of secrecy in a sale by an insolvent is evidence of fraud, and the existence of such secrecy is a question of fact for the jury. Fishel v. Lockard, 52 Ga. 632 (1874).

And solicitude of a vendor in failing circumstances to conceal the transaction from one of his creditors, and anxiety on his part to remove the agent of the creditor from the store before any part of the goods were removed, communicated to the purchaser, are sufficient to put him upon inquiry as to the fraudulent intent of the vendor. Stern Auction & C. Co. v. Mason, 16 Mo. App. 473 (1885).

And a sale and disposal of paying investments and valuable property made to two persons, one of whom had been the overseer of the vendor firm for several years, and the other was the father-in-law of one of the partners, who were persons of small means relatively to the value of the things purchased, made upon a sudden proposition and consummated with an unusual celerity and with a confidence as to the precise objects bought existing at the moment of the sale and the value of the same, rarely found in ordinary business transactions, will be set aside as simulated with the cognizance of the purchasers, where the vendors continued to display an active interest in the affairs of the vendees after the sale. American Nat. Bank v. Viterbo, 46 La. Ann. 1313 (1894).

And a sale by an embarrassed debtor for an inadequate price, which was first spoken of on Saturday afternoon and concluded that night before an inventory of the articles sold could be taken, the purchaser paying $500 in cash that night upon a demand of the vendor without assigning a reason, the balance, which was expected to be about $250, being required to be paid after completion of the inventory, to a creditor, will be deemed to have been made with an intent to defraud creditors, participated in by the purchaser, which will invalidate it as against creditors. Adler-Goldman Commission Co. v. Hathcock, 55 Ark. 579 (1892).

So, a conveyance of his whole property by a person upon the eve of a decree being rendered against him for a large sum of money which would go far

to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

In *Young* v. *Harris*, 4 Dak. 367, decided in 1887, the following instruction: "I also instruct you that a transfer of personal property made with intent on the part of the seller to delay and defraud his creditors, and the party to whom the transfer is made has knowledge of the facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred by an ordinarily cautious person, is fraudulent and void against the rights of creditors,"—while it was held to be as liberal

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to his ruin, to his brother-in-law for a consideration equal to its full value, who, though a thrifty, industrious man, was not known to possess property sufficient to pay the purchase money, and who suffered the estate to remain in the possession of the former tenant, would be so strongly presumed to be fraudulent that it ought not to be supported. Venable v. Bank of United States, 27 U. S. 2 Pet. 107, 7 L. ed. 364 (1829).

But a purchase by a pawnbroker of a stock of goods of a trader, made for a good consideration and followed by due change of possession, is good as against creditors, though the purchase was made in a hasty manner and without making any inquiries whether the vendor was indebted or whether he wanted to sell in a hurry. Hale v. Saloon Omnibus Co. 4 Drew. 492, 28 L. J. Ch. N. S. 777, 7 Week. Rep. 316 (1859).

A sale made by a debtor out of the ordinary course of business, however, is not fraudulent *per se*, but is a circumstance tending to prove fraud. State, Peirce, v. Merritt, 70 Mo. 276 (1879).

It is only prima facie evidence of fraud, and may be overcome by proof that the grantor acted in good faith without knowledge of the insolvency. Bernheim v. Christal, 76 Cal. 567 (1888); Babbitt v. Walbrun, 1 Dill. 19 (1870).

And in Lowenstein v. Fudickar, 43 La. Ann. 886 (1891), a sale for an adequate consideration in cash, made with intent to defraud the vendor's creditors, was upheld in the absence of anything to show that the purchaser had knowledge of such intent, though he knew that the vendor was notoriously insolvent and the transaction was not in the usual course of his business.

h. *Sales on credit.*

Sales on credit are frequent in commercial transactions, and as a matter of course when standing alone furnish no evidence of a fraudulent intent. Taken in connection with the insolvency of the vendor, however, the rule is different; and while this does not establish fraud *per se*, such sales by an insolvent have frequently been treated as furnishing one of the elements of fraud by which the transfer is vitiated.

Thus, the insolvency of the seller of goods, and the fact that credit was given, are not sufficient to show a participation by the purchaser in an intent of the vendor to hinder, delay, or defraud his creditors which will vitiate the sale. Lienkauf v. Morris, 66 Ala. 406 (1880).

And an absolute conveyance by an insolvent debtor to an insolvent vendee, who has no knowledge of the vendor's embarrassments and who entertains no fraudulent intent upon a long credit, is not *per se* void, though it may be evidence of fraud to be considered by the jury. Beasley v. Bray, 98 N. C. 266 (1887).

The mere fact that an insolvent debtor may sell property on credit, even to one who knows of his insolvency, does not necessarily make the transaction fraudulent, as such a sale may be the best possible means of realizing on the property; but in such sales the absolute liability of the buyer should be fixed by the contract of sale leaving him subject to all the remedies creditors have in such cases. Jacobs v. Totty, 76 Tex. 343 (1890).

In Clark v. Wise, 57 Barb. 416 (1870), however, it was said that as a general rule a sale on credit to a purchaser cognizant of the vendor's insolvency is fraudulent, as the necessary effect is to hinder and defraud creditors.

And the custom of a merchant in carrying on a particular business to buy upon credit would ordinarily be sufficient notice to a purchaser of his whole stock that he was more or less in debt at the time of the sale. Le Gierse v. Whitehurst, 66 Tex. 244 (1886).

And a sale of chattels upon an agreement for an unusual extension of credit to the purchaser may be considered by the jury in determining the good faith of the transaction. Spaulding v. Adams, 63 Iowa, 437 (1884).

So, a purchase of goods on time extending beyond the time when claims against the vendor become due, by a purchaser who knew that the vendor was largely in debt for the goods sold, may be considered by the jury in connection with other facts in determining whether the transaction was fraudulent. Hughes v. Monty, 24 Iowa, 499 (1868).

And a sale of goods by a debtor in failing circumstances, to be paid for when the purchaser was able, is invalid as against creditors, where the purchaser knew of the vendor's financial condition, or of such facts as were sufficient to put him upon inquiry which would have enabled him by reasonable diligence to have ascertained such condition. Jacobs v. Totty, *supra*.

And a conveyance of all his property by a father, greatly in debt and in apprehension of a heavy judgment against him, to his son for a cash payment and deferred payments without interest, running through a period of fifteen years, providing that the son shall maintain the father and his mother during their lives, will be set aside as fraudulent as against creditors in the absence of any explanation consistent with honesty of purpose. Click v. Green, 77 Va. 827 (1883).

And notice to a purchaser of a mortgage of the insolvency of the mortgagor is notice of the corrupt purpose of the arrangement, where the sum secured did not bear interest for a year and part of the amount was not payable until eight years after its date, and the purchaser knew that it was a scheme by which the insolvent debtor had transferred all his tangible property to his son, who was without means, and who up to the time of the execution of the mortgage had lived as a member of his father's family. De Witt v. Van Sickle, 29 N. J. Eq. 209 (1878).

So, a purchase of a stock of goods without taking any inventory, by one unacquainted with the business or with the value of such goods, at 50 per cent of cost price, which was but 50 per cent of the indebtedness against the goods, giving negotiable, unsecured, and noninterest-bearing notes, of equal amounts, due in six, twelve, and eighteen months, is invalid as against creditors where it included all of the debtor's property. Roberts v. Radcliff, 35 Kan. 502 (1886).

And a transfer by a failing debtor to his son and clerk, taking notes without security, payable from three months to three years from date, with a view of placing his property in such a situation that his creditors could not take it under legal process and to compel them to take such notes, is such a hindering and delaying of creditors as will render the transfer void. Downing v. Kelly, 49 Barb. 547 (1867).

And a sale by a merchant of a stock of goods worth about $6,000 when his indebtedness was but little over half that sum, to his son who was with-

as the person attacking the conveyance on the ground of fraud could claim the law to be, was yet held to be proper as limiting and qualifying the expression "in good faith" used in another part of the instructions.

In *Shauer* v. *Alterton*, 151 U. S. 607, 38 L. ed. 286, the proper construction of the Dakota statute with reference to fraudulent transfers was before the Supreme Court of the United States. Concerning it, Mr. Justice Harlan, after referring to the construction placed upon the law in Dakota, and in holding that the instruction which was given by the trial court, under the Dakota statute, similar to that which was asked for by the plaintiff below, was proper, said: "A less stringent rule cannot be applied

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out property of value and had been in his employ for some time, at a time when his creditors were pressing, the consideration being promissory notes running from three months to three years, will be held to be fraudulent and void as against creditors, where shortly after the purchase the son went away to school leaving his father in possession under power of attorney. Kurtz v. Miller, 26 Kan. 314 (1881).

And a transfer by an insolvent who was being pressed by creditors, of all his visible property which was not exempt or encumbered to its full value, to a young man of small pecuniary means who was a relative and who was about to marry the grantor's daughter, by the terms of which the purchase money was to be paid in instalments through a period of six years, the grantor remaining in possession and the grantee conveying a part of it to the grantor's wife upon a fictitious consideration a short time afterwards and the parties uniting in raising money on the land for their common benefit,—is fraudulent and void as to creditors. Thames v. Rembert, 63 Ala. 561 (1879).

Knowledge by a purchaser of a stock of goods known to him to have been purchased by the vendor upon credit, that the vendor had plenty of other property to satisfy all the liabilities which the size and character of his business would induce anyone to suppose existed at any one time however, is sufficient to silence the inquiry which he would otherwise have been called upon to make by such knowledge that the goods were purchased upon credit. Le Gierse v. Whitehurst, 66 Tex. 244 (1886).

A purchaser of goods from an insolvent debtor for a fair price is not chargeable with notice of the insolvency of the vendor so as to invalidate the sale, by the fact that in making an inventory of the stock with a view of making the purchase he used invoices which showed that the goods had been bought upon credit, there being nothing to show that the goods were not then paid for. Smith v. Kaufman, 100 Ala. 408 (1893).

1. *Purchase pending action.*

A valid sale of property during the pendency of an action brought for the purpose of setting aside an alleged fraudulent sale of the same property to the detriment of a complaining creditor cannot be made either by the vendor or his vendee or both. New Orleans v. Marchand, 35 La. Ann. 222 (1883).

Persons claiming land, not parties to a suit, with a title derived *pendente lite*, are in no better condition than those under whom they claim. Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708 (1868).

And a purchaser *pendente lite* from one holding an alleged fraudulent conveyance acquires no title as against the claim in suit. Copenheaver v. Huffaker, 6 B. Mon. 18 (1845).

And a purchase by the wife of a mortgagor at a sale by the trustee under the mortgage, paying the purchase price with her own money during the pendency of the proceeding in which she was a party to set aside the mortgage upon the ground of fraud, does not make her an innocent purchaser, and she cannot hold as against creditors. Henry v. Harrell, 57 Ark. 569 (1893).

So, an assignment of choses in action, made by an execution debtor after proceeding for discovery, to an assignee having notice of such proceeding, is void as against a receiver subsequently appointed. Coleman v. Roff, 45 N. J. L. 7 (1883).

And one who purchases lands after a suit to foreclose a vendor's lien thereon has been pending for over five years is chargeable with constructive notice thereof, and is not entitled to protection against creditors. Hutchins v. Chapman, 37 Tex. 612 (1872).

And actual notice to a purchaser from a husband, that his wife has sued for a divorce and that she claims the property purchased, brings a case within the provisions of Ky. Rev. Stat. chap. 47, art. 3, § 12, providing that sales and conveyances made by a husband to a purchaser with notice and with intent to defraud and hinder the wife shall be void as against her. Williams v. Gooch, 3 Met. (Ky.) 486 (1861).

So, a purchaser of a fraudulent grantee with knowledge of a suit against the original vendor and of the relation between him and his immediate vendor, and of the fact that his vendor's deed was recorded just before judgment was entered in such action, is not an innocent purchaser, the facts being sufficient to put him upon inquiry. Hamlin v. Wright, 26 Wis. 50 (1870).

And a purchase of an estate of a tenant for life who was outlawed and had absconded, made at an undervalue pending an action at law against the vendor of which the purchaser had notice, is fraudulent and void as against creditors. Herne v. Meeres, 1 Vern. 465 (1687).

And a purchaser in good faith from a fraudulent grantee will not be protected as to purchase moneys paid by him after service of summons upon him in an action by a judgment creditor of his vendor's grantor to have the several sales adjudged fraudulent and his judgment declared a lien on the land. Hamlin v. Wright, *supra*.

The knowledge of a vendee at the time of his purchase, that a suit was pending against his vendor to recover judgment for a debt, however, is not of itself proof of a fraudulent intent on his part. Stewart v. English, 6 Ind. 176 (1855); Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58 (1871).

And the pendency of an action brought by a creditor against a mortgagor and a mortgagee to recover damages for conspiracy is not notice to a purchaser in good faith at a sale made under a chattel mortgage, of any infirmity in it, at least where the complaint has not been filed. Zoeller v. Riley, 100 N. Y. 102, 53 Am. Rep. 157 (1885).

So, in Peaslee v. Collier, 83 Mich. 549 (1890), a conveyance of a mortgaged homestead and other land by a husband to his wife in consideration of the release of her dower in other real estate owned by him and which he desired to dispose of, and of $200 claimed to be due her for improvements upon the homestead, was upheld where the only evidence tending to show fraud consisted of the fact that the deed was made during the pendency of a creditor's suit and when he was about to procure judgment.

But the pendency of suits against an indebted vendor at the time that a purchaser buys lands of him is a badge of fraud and a fact for the consideration of the jury in determining whether the purchaser bought with notice under the statute of Elizabeth. Colquitt v. Thomas, 8 Ga. 258 (1850).

And a sale of his property made by a defendant in execution pending litigation to prevent those

to the Dakota statute relating to transfers of property with intent to delay or defraud creditors. The plaintiff had the right, by a purchase of his brother's stock of merchandise, to obtain payment of his claims in preference to the claims of other creditors. But the statute of Dakota, however liberally construed in favor of purchasers from a fraudulent debtor, will not permit him to enjoy, to the exclusion of other creditors, the fruits of his purchase, when the sale was made with the intent to delay or defraud other creditors, if he had, at the time, actual notice of such intent or knowledge of such circumstances or facts as were sufficient to put a prudent person upon an inquiry that would have disclosed the existence of such intent upon

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suing him from making their claims, to a purchaser who had reasonable grounds to suspect that such was his object, is invalid as against the person suing him. Smith v. Wellborn, 75 Ga. 799 (1885).

And one who has a cause of action for the seduction of his wife is, in legal contemplation, a creditor of the wrongdoer, and in a suit to enforce a judgment obtained for such wrong, against real estate fraudulently conveyed, it is competent to introduce declarations of the grantee made before the deed was executed to him, showing his knowledge that such a right of action existed. Hunsinger v. Hofer, 110 Ind. 390 (1887).

And a conveyance by a debtor of all his attachable property while a reference is pending between the debtor and a creditor, when there was reason to presume that an award had been made against him, the debtor being permitted to use and deal with the property after the conveyance the same as before, of which he sold a large portion, the vendee making no effort to obtain the proceeds or to interfere with the management and disposition, in connection with declarations by both vendor and vendee that the vendor's determination was to avoid the payment of a designated creditor,—is sufficient to warrant the inference that the conveyance was taken simply to prevent such creditor from securing his demand. Hartshorn v. Eames, 31 Me. 93 (1849).

As to commencement of suit as notice to charge purchaser who has not paid all the purchase money, see *infra*, VIII., *Payment after notice.*

j. *Purchase pending attachment or execution.*

A conveyance at a time when the writ of attachment against the property of the grantor was in the hands of the sheriff, of the issuing of which the grantee had no knowledge and which was never levied, is not rendered fraudulent by such attachment proceeding. Lowry v. Howard, 35 Ind. 170, 9 Am. Rep. 676 (1871).

And an innocent purchaser for value from a fraudulent grantee who purchased subsequent to an attachment of all the original grantor's interest in real estate, which such original grantor had conveyed to the fraudulent grantee by deed recorded before the attachment, is not put upon notice and inquiry as to such previous transaction. Ashland Sav. Bank v. Mead, 63 N. H. 435 (1885).

But a purchase of property under circumstances which must have suggested to the purchaser that the object of the vendor was to dispose of his property for value before it could be attached or seized under a judgment recently obtained is invalid as against the judgment debtor, though he had no actual notice of such intent. Green v. Tantum, 19 N. J. Eq. 105 (1868).

And a bill of sale or deed is invalid as a fraud upon creditors when taken at a time when attachment had been levied on the vendor's stock and his career as a merchant was practically closed, and the vendee knew that there were other creditors, and the consideration consisted of legal services, most of which was earned in the litigation accruing out of the transaction. Liddle v. Allen, 90 Iowa, 738 (1894.)

And the negotiation by a debtor of a sale of all his property, in haste and at an unseasonable hour, after the refusal of another to purchase the goods, because he was expected to pay the purchase money to the debtor instead of to creditors, to whom the purchaser had offered to loan money to consummate the purchase, having knowledge that an attachment was about to issue, and urged the completion of the inventory as soon as possible, shows an active participation by the purchaser in the fraudulent intent of the vendor which will invalidate the conveyance. Carter Bros. v. Coleman, 82 Ala. 177 (1886).

And a sale by a fraudulent purchaser who had taken the property from a previous fraudulent vendor who intended to hinder and defraud his creditors, made to an employee who knew that an attachment was about to be levied thereon as the property of the fraudulent vendor, taking his notes therefor, does not make such employee a bona fide purchaser. Lane v. Starkey, 15 Neb. 285 (1883).

So, a bona fide sale of goods for a valuable consideration is not invalidated by knowledge that an execution is about to be issued against the property sold. Hale v. Saloon Omnibus Co. 4 Drew. 492, 28 L. J. Ch. N. S. 777, 7 Week. Rep. 316 (1859).

And the mere knowledge of a purchaser of the fact that the sheriff was seeking to subject the property purchased to the satisfaction of execution in his hands would not of itself invalidate the purchase. Eigenbrun v. Smith, 98 N. C. 207 (1887).

But if he purchased with a view to defeat the remedy of creditors in relation to the goods purchased, it would be invalid, though he gave a fair price. *Ibid.*

So, the levy of an execution issued upon a judgment against a third person rendered subsequent to a purchase by one holding under an executory contract is not such constructive notice to the purchaser of fraud on the part of the vendor as will render the sale invalid. Studabaker v. Langard, 79 Ind. 320 (1881).

And a sale by judgment debtors, with the consent of the judgment creditors, of property levied upon under execution, issued on confessed judgments, is not fraudulent and void as to other creditors in the absence of anything to impeach the judgments or the good faith of the purchaser who took the property. McEvony v. McCann, 31 Neb. 597 (1891).

One who purchases lands after allowing himself to be turned out of possession thereof on an execution against his father, which were worth more than $6,000, for $750, knowing that his father had been contesting the title for years, however, must be deemed to have been put upon inquiry and cannot be regarded as a bona fide purchaser without notice. Pitney v. Leonard, 1 Paige, 461 (1829).

As to levy of attachment or execution as notice to charge purchaser who has not paid all the purchase money, see *infra*, VIII., *Payment after notice.*

k. *Conveyance fraudulent on its face.*

Where a conveyance is fraudulent on its face, both parties will be deemed to have been cognizant of and participated in the fraud. Doe, Lassiter, v. Davis, 64 N. C. 498 (1870).

And a purchaser under a conveyance, containing upon its face evidence of a fraudulent purpose to defeat creditors, takes with notice of such purpose. Eigenbrun v. Smith, 98 N. C. 207 (1887); Palmer v. Giles, 5 Jones, Eq. 75 (1859).

the part of the vendor. The plaintiff could not properly have claimed a more favorable interpretation of the Dakota statute than was given to it by the court below. A statute that declares every transfer of property, made with intent to delay or defraud any creditor of his demands, void against all creditors of the debtor, would be wholly defeated in its operation if the rights of the transferee were not subject to the rule that 'whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led.' *Wood* v. *Carpenter*, 101 U. S. 135, 141, 25 L. ed. 807, 809; *Kennedy* v. *Green*, 3 Myl. & K. 699, 720." The case of *Shauer* v. *Alter-*

The title of a purchaser in good faith from an assignee for the benefit of creditors, however, is not affected, under 2 N. Y. Rev. Stat. p. 137, § 5, providing that the title of the purchaser shall not be affected unless it should appear that he had previous notice, by the fact that the fraudulent character of the assignment appeared upon its face, as the previous notice provided for refers to actual and not constructive notice. Wilson v. Marion, 25 N. Y. Supp. 1066 (1893).

l. *Knowledge of or notice to agent.*

The rule that notice to an agent or attorney is notice to his principal applies to notice to the attorney for a grantee of the insolvency or fraudulent intent of his grantor. Wiley v. Knight, 27 Ala. 326 (1855).

And notice to a husband who acted as agent of his wife in making a purchase, of the fraudulent intent of the vendor, is equivalent to a notice to the wife. Hart v. Sandv. 39 W. Va. 644 (1894).

So a purchaser at a public sale of lands, designed and carried out for the purpose of defrauding the creditors of the owner, cannot hold such lands as against such creditors, where the person representing him in the transaction had knowledge of such fraudulent intent, though he was not personally present and was ignorant as to the facts. Lund v. Equitable L. Assur. Soc. 31 N. J. Eq. 355 (1879).

And the knowledge of an attorney in whose hands a claim was placed for collection, that the debtor had given a mortgage for a large debt covering all his other property, and that there were other demands existing against him, some of which were in his hands and upon which he had vainly endeavored to obtain collateral security, is sufficient to put him upon notice as to the debtor's insolvency so as to invalidate a transfer made by him to his client, though he did not know positively that he was in failing circumstances. Wiley v. Knight, *supra*.

And a bill of sale prepared by a solicitor who acted for both parties to it and for himself, and who had previously ascertained that the person giving the bill of sale was considered by a sheriff's officer to be a swindler and a disreputable character, is fraudulent, and will be set aside upon the ground that the person taking the bill of sale had notice of all the circumstances, the knowledge of his agent being regarded as his own. Sykes v. Bond, 7 Jur. N. S. 1024 (1861).

But, as in cases of agency in general, the knowledge or notice must have been acquired or received by the agent while he was acting in that particular employment.

Thus, where one in the course of his business as agent, attorney, or counselor for another, obtains knowledge of facts from which a trust would arise, and afterwards becomes the agent, attorney, or counselor of a subsequent purchaser of the property to which the trust attached, in an independent and unconnected transaction, his knowledge is not notice to the person for whom he acts under the second employment. Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489 (1839).

And knowledge of a note broker of the fraudulent character of notes and a deed of trust sold by him does not affect the purchaser with notice, where he bought on the faith of the record title. Fury v. Kempin, 79 Mo. 477, 9 Mo. App. 30 (1880).

And the knowledge of one who acts as agent both for the firm of which he is a member and a corporation of which he is president, in a sale by the firm to the corporation, of the insolvency of the firm, will not be imputed to the corporation so as to render the transfer invalid as to creditors, where he is faithful to the interests of the corporation and his action is favorable to it. Seixas v. Citizens' Bank, 38 La. Ann. 424 (1886).

So, a sale made by an agent in contemplation of his principal's bankruptcy, for the purpose of raising money for such principal and another, is not an act of bankruptcy on the part of the principal where the purchaser did not know the sale to be fraudulent. Harwood v. Bartlett, 6 Bing. N. C. 61, 8 Scott, 171, 4 Jur. 73 (1839).

And a wife to whom a deed is made by a third person by the permission of her husband, who participated with the grantor in his intent to defraud other creditors, is not chargeable with complicity in her husband's intent where she purchased without any participation in or actual knowledge thereof, and the evidence does not show that he was her agent. Bruen v. Dunn, 87 Iowa, 483 (1893).

m. *Other circumstances and conditions.*

The following are cases tending to show what participation by a purchaser in the fraudulent intent of his vendor will invalidate the transfer, which do not fall within any of the above subjects, and do not appear to be readily susceptible of any logical classification.

The failure of a wife to sign a deed of conveyance is not sufficient to charge the grantees of her husband with notice that he made the conveyance to prevent her from recovering alimony in any suit she might commence therefor. Demarest v. House, 91 Hun, 290 (1895).

And a false statement of a consideration in a deed, made with a fraudulent intent on the part of the grantor, is not alone sufficient proof of the grantee's participation in such fraudulent intent, and is not enough to deprive the latter of her right to reimbursement out of the premises for actual payments to the grantor. Levi v. Welsh, 45 N. J. Eq. 867 (1889).

But a deed which was not delivered to the grantee in any other way than by the grantor's putting it on record raises a well-founded suspicion as to the bona fides of the transaction as to creditors, where the grantee some months after the date of the deed and when the title appeared therefrom to be in him, was present and participated in a negotiation for a loan of money to his grantor which was to be secured by a deed of the same land. Hudgins v. Kemp, 61 U. S. 20 How. 45, 15 L. ed. 853 (1857).

So, the fact that previous to a conveyance by a husband to his wife credit was given to the husband, and the creditor was not informed of the conveyance when a subsequent credit was given, is not evidence of fraudulent intent. Truesdell v. Sarles, 104 N. Y. 164 (1887).

And the fact that a purchaser of goods failed in business three months after his purchase is not of itself sufficient to uphold a finding of fraud in which he had participated. McCreery v. Gordon, 38 Hun, 467 (1886).

And entries in the books of a partnership of which a purchaser was a member, tending to show

ton was an appeal from a decision of the supreme court of the territory of Dakota, rendered also before we adopted the Dakota statute, and these citations and excerpts from decided cases will certainly be amply sufficient to show what the law is, and was, in the jurisdiction from which we have borrowed our statute, and what the law is, by adoption, here; and the rule, which we think the proper one, not only has the law itself ingrafted into the jurisprudence of this territory to support it, but is amply supported by the decisions of the highest courts in the states.

In *Hough* v. *Dickinson*, 58 Mich. 89, the trial court had given the following instruction: "(9) Fraudulent intent cannot be inferred by the

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his participation in the fraud of the vendor in making a sale, will not invalidate it as against creditors, in the absence of other evidence, where he denies the circumstances tending to implicate him. Williamson v. Williams, 11 Lea, 355 (1883).

So, that there was a piece of paper pasted on the back of one of several bonds and also of one of the coupons, and on being held up to the light the paper where some of the numbers of the coupons were appeared to be thin and worn, would not tend to excite suspicion or notice of a prudent purchaser as to the question of the seller's title. Birdsall v. Russell, 29 N. Y. 220 (1864).

And the return of a half dozen hogs by a purchaser of a stock of goods from an embarrassed and insolvent debtor, which were at first included in the sale but afterwards struck out by agreement, and the deduction of the agreed price from the purchase money to be paid, do not as a matter of law show a participation in the fraud of the grantor which will invalidate the sale, but are a matter for consideration of the jury in connection with the evidence explaining it. Smith v. Collins, 94 Ala. 394 (1891).

And an exchange of property by a debtor about to make an asignment for the benefit of his creditors with another, effected through a third person who acted as the friend and adviser of each, both of the parties having great confidence in his judgment and candor, not made secretly or hastily but after full negotiation and consideration, the deed being placed upon record as soon as it was made, will not be deemed fraudulent as against creditors of the debtor about to assign. Pillsbury v. Kingon, 36 N. J. Eq. 413 (1883).

But a corporation fraudulently organized by three persons for their own use and benefit, and to which they fraudulently transferred their property for the purpose of defrauding their creditors, such persons owning and controlling all the stock, cannot be regarded as an innocent purchaser who will be protected as against creditors. Clark v. Walter T. Bradley Coal, L. & C. Co. 23 Wash. L. Rep. 419 (1895).

And a conveyance by a merchant of all his stock to his brother who had acted as his clerk, followed by an offer by the purchaser to compromise with the creditors at 20 cents on the dollar, after which they retired to an adjoining county and the purchaser started up business for himself, employing the vendor as his clerk, will be regarded as a sham sale and a scheme to avoid the payment of the vendor's debts, where at about the same time he had sworn that he was worth $2,600 over and above his debts, liabilities, and exemptions. Catchings v. Harcrow, 49 Ark. 20 (1886).

And evidence of a transfer of notes given by a purchaser to a vendor, who had sold for the purpose of avoiding the payment of his debts to the purchaser's father-in-law and general adviser throughout the transaction, at a discount of 22 per cent, though the notes drew 10 per cent interest, made in the face of the statement of the vendor to both the purchaser and his father-in-law, that the notes were intended for his brother's benefit, and the return of the notes to the vendor a day or two before a writ of garnishment was served upon the father-in-law, after which the notes were purchased by the father-in-law's brother and placed in the father-in-law's hands for collection, who collected them,— strongly indicates, if it does not establish the fact, that the purchaser knew that it was the intention of the vendor in making the sale to avoid the payment of his creditors. Blum v. Simpson, 71 Tex. 628 (1888).

So, evidence that a debtor, who was being pressed for payment of claims against him, conveyed real estate to his son for an express consideration of $10,000, the son giving back the mortgage to his mother and borrowing $10,000 of his father-in-law, which he paid to his father, who paid it to his wife, professedly in payment of an old claim, and she gave it to her son, who returned it to his father-in-law, the father in the mean time having disposed of his other property,—is sufficient to show that the deed and mortgage were a part of a scheme to hinder, delay, and defeat the creditors of the father, and were therefore fraudulent and void. Nichols v. Morrow, 34 N. Y. S. R. 495 (1890).

And a transfer of western lands by a debtor to his brother, who was a man of small means residing in Boston, and having no money in the bank, and who never dealt in western lands and had no knowledge or notion of the value or the use of the lands purchased, and who had never seen the lands and had never been in the lumber business and took no means to ascertain their value and character and could not tell how he came by the $15,000 in cash which he claimed to have paid for them, and which he left in the care of his brother on the claim that he had enough to do and did not want to care for them,—furnishes sufficient evidence of a fraudulent purpose to warrant the cancelation of the sale. Bartles v. Gibson, 17 Fed. Rep. 293 (1883).

And recovery deeds made by a tenant for life and his son, who was tenant in tail male in remainder, purporting to assure the entailed property to the use of a trustee in trust to pay a certain mortgage with remainder to the use of the son and father upon designated trusts, with remainder to the father in fee, which were executed by the father with intent to defraud his creditors, which object was concealed from the son, after which the father became a bankrupt, are void as against creditors, and a grandson has no equity as against a purchaser from the son to have the trust in the deed performed. Tarleton v. Liddell, 4 De G. & S. 538 (1851).

VIII. *Payment after notice.*

To constitute one a bona fide purchaser for a valuable consideration he must be without notice of the rights and equities with which it is sought to charge him, not only at the time of the purchase but also at the time of the actual payment of the consideration. Marsh v. Armstrong, 20 Minn. 81, 18 Am. Rep. 355 (1873); McNichols v. Richter, 13 Mo. App. 515 (1883); Paul v. Fulton, 25 Mo. 156 (1857); Savage v. Hazard, 11 Neb. 323 (1881); Hutchins v. Chapman, 37 Tex. 612 (1872); Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221 (1877).

A purchaser who pays the purchase money after notice of the fraudulent purpose of his grantor is not entitled to protection against creditors of his grantor as a bona fide purchaser. Hunsinger v. Hofer, 110 Ind. 390 (1887).

And no one but a purchaser for a valuable consideration actually passed before notice of fraud can claim title to property which has been fraudu-

jury without proof, but it must be proved like any other act to the satisfaction of the jury; and unless such fraudulent intent is proved on the part of both Pier & Wagley and Hough & Wagley by a preponderance of evidence, the verdict of the jury should be for the plaintiffs." Concerning this, the court said: "The charge as given in the [illegible]th request is not in accordance with the rule as laid down by the courts upon that subject. A fraudulent intent on the part of Pier & Wagley, and notice or knowledge of such intent on the part of Hough & Wagley, are sufficient to avoid the sale, without any proof whatever of actual fraudulent intent on the part of these latter parties. It is generally held that knowl-

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lently disposed of by an insolvent or failing merchant. Bush v. Collins, 35 Kan. 535 (1886); Hedrick v. Strauss, 42 Neb. 485 (1894).

And payments made after such notice are made at his own risk, and may be recovered by creditors. Florence Sewing Mach. Co. v. Ziegler, *supra*.

So, one claiming to be an innocent purchaser without notice of the fraud of his vendor must show want of notice until after the actual payment of the purchase money. Duncan v. Johnson, 13 Ark. 190 (1852); Weber v. Rothchild, 15 Or. 385 (1887).

And the title of a purchaser will not be protected where he obtained knowledge of the vendor's fraudulent intent, or of circumstances sufficient to put him upon inquiry before payment of the purchase price. Massie v. Enyart, 32 Ark. 257 (1877); Hunsinger v. Hofer, *supra*; Parkinson v. Hanna, 7 Blackf. 400 (1845).

Thus, where the consideration money specified in a conveyance of real estate made by an insolvent was not paid at the time of the conveyance, it is the duty of the grantee, in ejectment by one claiming as purchaser at a subsequent sheriff's sale, to show that such consideration was afterwards paid, that it was a full price for the property, and that the purchase was not made with an intent to hinder and defraud creditors. Kaine v. Weigley, 22 Pa. 179 (1853).

And one who purchased a chattel mortgage from a brother of the mortgagor, making no actual payment thereon until he had been informed by the creditors of the mortgagor that the mortgage was invalid, is not entitled to protection as a bona fide purchaser, where he knew that the mortgagor was insolvent when he executed the mortgage. Burnham v. Dillon, 100 Mich. 352 (1894).

And a sale of land made for the purpose of defeating the recovery of damages for a breach of promise of marriage is fraudulent and void where the purchaser had notice of the fraudulent intent, though the agreement for the sale was made before suit brought for the breach of promise, and though the purchaser paid an adequate consideration and went into immediate possession, and the whole of the purchase money was in fact applied to the payment of the vendor's bona fide debts. Lowry v. Pinson, 2 Bail. L. 324, 23 Am. Dec. 140 (1831).

So, if a purchaser before full payment becomes chargeable with knowledge of the fraudulent intent of the seller, he is required to withhold the unpaid balance to meet the claims of creditors. Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704 (1876).

And a conveyance made with intent to defraud creditors, to an innocent purchaser who receives notice of the fraud while owing the purchase money or part thereof, will be set aside at the instance of the creditor to the extent of the unpaid purchase money. Rhodes v. Green, 36 Ind. 7 (1871); Perkins v. Swank, 43 Miss. 349 (1871).

And the creditors are not limited to proceeds supplemental to execution. Rhodes v. Green, *supra*.

A purchaser from an insolvent merchant who sells his stock for the purpose of defrauding his creditors is protected only to the extent of payment made or security or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor. Work v. Coverdale, 47 Kan. 307 (1891); Bush v. Collins, 35 Kan. 535 (1886); Hedrick v. Strauss, 42 Neb. 485 (1894).

And where lands are purchased from a debtor, and the purchaser pays a part of the purchase money before getting a deed, and learns before paying the balance of the purchase money, that the purchase money was not paid by the debtor for his purchase, and that he is insolvent, and that suits are pending against him, such facts may be submitted to the jury as evidence that he purchased with notice of the fraud. Colquitt v. Thomas, 8 Ga. 258 (1850.)

And one who purchases a stock of goods from an insolvent debtor, who sells for the purpose of defrauding his creditors, with no actual or constructive notice of such intent, and executes a bond to convey certain real estate as part of the purchase price, but subsequently, and before the execution of the conveyance, receives actual notice of such fraudulent intent, is not entitled to reimbursment as against attaching creditors for the real estate actually conveyed after such notice. Dodson v. Cooper, 37 Kan. 346 (1887).

It is not sufficient that the purchaser may have secured the payment of the purchase money. Weber v. Rothchild, 15 Or. 385 (1887).

But it would appear to be sufficient if he had given his negotiable promissory note therefor.

Thus a grantee, in order to hold lands as a bona fide purchaser for value, must show that the consideration has been actually paid, or that he had given a negotiable note therefor before receiving notice of the fraudulent intent of his grantor. Tillman v. Heller, 78 Tex. 597, 11 L. R. A. 628 (1890).

And a grantee in a deed made with intent upon the part of the grantor to defraud his creditors can only be protected to the extent of the money actually paid at the time he received notice of such fraudulent intent, unless notes given by him for such purchase moneys were negotiable. *Ibid.*

So, that property purchased by an innocent purchaser was attached in his hands before it was paid for, and before the notes given for the price had passed to innocent holders, does not affect him with notice of the fraud of the vendor. Nicol v. Crittenden, 55 Ga. 497 (1875).

And a purchaser at a sale made with the intent upon the part of the vendor to defraud his creditors, who is himself innocent, is not affected upon afterwards discovering such fraudulent intent, though he had not paid the purchase money and the notes given therefor had not passed beyond the control of himself and the seller, where it does not appear that he alone could control them. *Ibid.*

But a purchaser who gives his check for the purchase money with the understanding that it was not to be paid immediately, instructing his banker to withhold payment until further orders, who, after notice that the creditors of the vendor had attached the property, alleging fraud in the transfer, ordered the check paid, is not entitled to be considered a bona fide purchaser. Arnholt v. Hartwig, 73 Mo. 485 (1881).

And where a debtor made an assignment of his property, which was void on its face as against creditors, and a purchaser of the property of the assignee verbally agreed to pay for it at certain rates in his notes on time, but before making any payment or giving any notes the property was

edge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required, and the charge of the court went too far."

A very late expression of the rule in Kansas is found in the following language taken from the opinion in *Martin* v. *Marshall*, 54 Kan. 147: "That good faith is essential to support the sale cannot be questioned. If Martin & Co. knew of the fraudulent intent of the Pelletiers, and bought with that knowledge, they cannot claim to be bona fide purchasers. 'Knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry is, as a general proposition, equivalent to knowledge of the ultimate fact.' *Phillips* v. *Reitz*, 16 Kan. 396; Tiedeman, Pers. Prop.

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taken upon attachment against the fraudulent assignor, the verbal promise to pay is not sufficient to protect the title of a purchaser against such attachment. Dixon v. Hill, 5 Mich. 404 (1858).

So, an attachment of the property purchased as that of the vendor would appear to be sufficient to put the purchaser upon notice and charge him if he thereafter pays.

Thus, no one but a purchaser for a valuable consideration actually passed before notice of the fraud of the vendor can claim title to property which has been fraudulently disposed of as against attaching creditors. Bush v. Collins, 35 Kan. 535 (1886).

And a purchaser of property sold in fraud of creditors cannot be considered a bona fide purchaser where he had notice of a levy by an attaching creditor before payment of the purchase price. Young v. Kellar, 94 Mo. 581 (1887).

And where he takes possession but does not pay the purchase price until a suit is commenced by attachment against the vendor, based upon the charge that he had conveyed his property with intent to defraud his creditors, he does not occupy the position of a bona fide purchaser without notice of the attachment, though he had no knowledge of the fraudulent intent of the vendor at the time of the purchase. Cheek v. Waldron, 39 Mo. App. 21 (1890).

So, the levy of an execution by a creditor of a vendor upon goods sold and in possession of the purchaser puts him upon inquiry as to the good faith of the sale, and if he afterwards pays any part of the purchase money, he will not be deemed an innocent purchaser without notice as to such payment if the sale was fraudulent. Dougherty v. Cooper, 77 Mo. 528 (1883).

And an assignee of an account from a debtor who transfers it with intent to defraud his creditors is not entitled to be protected as a bona fide purchaser without notice in making payments upon the purchase price after service of summons upon him in a suit to set aside the transfer, although he purchased the claim in good faith without notice of any fraud. Stinson v. Racer, 2 Ohio, N. P. 316, 3 Ohio Dec. 421 (1895).

A sale made with the intent to hinder, delay, or defraud creditors of the vendor will be upheld, however, where the purchaser bought without notice of such intent, for a valuable consideration paid before receiving such notice. Dougherty v. Cooper, *supra;* Shealy v. Edwards, 78 Ala. 176 (1884).

And this rule does not apply so as to require a woman who has received a conveyance in consideration of marriage to refuse to marry the grantor upon receiving notice of his fraudulent intent prior to its solemnization. See Prignon v. Daussat, 4 Wash. 199 (1892), *supra*, V. b, *Marriage settlements.*

IX. *Application of purchase price to debts.*

A purchaser who knows, or has just reason to believe, his vendor to be insolvent, and who pays cash for the property, must see that it is applied to the discharge of the debts of the vendor in order to make valid the conveyance. Weis v. Dittman, 4 Tex. Civ. App. 35 (1893).

And the principal which requires a purchaser from a debtor known to be insolvent, to see to the application of the purchase money, requires him to see that it is lawfully paid. *Ibid.*

Thus, a purchaser who knowingly purchases from an insolvent debtor cannot escape liability to the debtor's creditors by the application by the debtor of the moneys paid for the purpose of preferring certain of his creditors above others after having made an assignment, as with the making of the assignment his right to prefer comes to an end. *Ibid.*

So, the fact that the result of a fraudulent deed is to secure the payment of a valid and bona fide debt, equal or greater in amount than the value of the property conveyed, does not remove from the deed the taint of fraud as against a grantee, chargeable with notice of the wrongful intent in its execution, and with participation therein. Cox v. Miller, 54 Tex. 16 (1880).

And a purchaser who co-operates with the vendor in the misapplication of purchase money which he knows is raised for the benefit of a third person, or either directly or indirectly aids the vendor in diverting the money, renders himself liable to the person defrauded to the extent of the funds employed. Bower v. Hadden Blue Stone Co. 30 N. J. Eq. 171 (1878).

And in Seligson v. Brown, 61 Tex. 180 (1884), it was held that a sale by a debtor in failing circumstances of his entire stock of goods for a fair consideration, with the express purpose of applying the proceeds to the payment of his debts, which is known by the purchaser to be his intent, is nevertheless illegal and void, as the law will not allow a purchaser thus to enable an insolvent debtor to avoid his creditors by giving money or negotiable bonds which cannot be reached by legal process.

But see cases set forth below.

Thus, a sale by a father in failing circumstances, of substantially all his property to his son for its fair market value without reserving any benefit, is valid though it was agreed between the parties that the price should be paid by the son directly to certain of the father's creditors, whose debts equaled the selling price. Eskridge v. Abrahams, 61 Ala. 134 (1878).

And a sale made to one not a creditor must be considered as one in the ordinary course of business when made for an adequate consideration in cash or its equivalent, and will not be vitiated by the fact that a portion of the price was subsequently applied to the discharge of the vendor's debt. Lowenstein v. Fudickar, 43 La. Ann. 886 (1891).

So, a purchaser of property from an insolvent debtor, paying for it with the negotiable promissory note of the purchaser without seeing that the consideration paid goes to the discharge of the debtor's debts, is not necessarily fraudulent as to creditors without reference to the interest of the parties. Hadock Bros. v. Hill, 75 Tex. 193 (1889).

And a sale by an insolvent debtor for cash, of goods representing all his assets, subject to execution to one who knew of his insolvency or might have known by the exercise of ordinary care, is not fraudulent in law, where the money received was applied to the debts of the vendor, unless there was an agreement at the time of the sale that the money should be so applied. Robertson v. Gourley, 84 Tex. 575 (1892).

Sales, § 329; *Schulein* v. *Hainer*, 48 Kan. 249."

By Mr. Justice Johnson, speaking for the court, in *Gollober* v. *Martin*, 33 Kan. 252, it is said: "Actual knowledge by a vendee of the fraudulent intent of the vendor is not essential to render the sale void. If the facts brought to his attention are such as to awaken suspicion, and lead a man of ordinary prudence to make inquiry, he is chargeable with notice of the fraudulent intent, and with participation in the fraud,"—citing *Phillips* v. *Reitz*, *supra*; *Kurtz* v. *Miller*, 26 Kan. 314; *McDonald* v. *Gaunt*, 30 Kan. 693.

In *Bollman* v. *Lucas*, 22 Neb. 796, Mr. Justice Cobb, in defining the rule of that state,

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A failing debtor may sell his property in good faith to obtain money to meet his obligations though creditors are thereby hindered and delayed. State, Friedman, v. Purcell (Mo.) 33 S. W. 13 (1895).

So, purchasers from an insolvent debtor of his stock of goods, notes, and accounts, cannot be held to a fraudulent intent in paying him a sum of money as the purchase price, where they had a reasonable expectation at the time that it would be used to pay his indebtedness, and it was in fact so used. Fargason v. Hall, 99 Ala. 209 (1893).

And a purchaser of a stock of goods at its reasonable value, who was informed of certain outstanding claims, which it was made a part of the contract that he should pay and which he did pay, turning over the balance of the purchase price to the vendor, is not chargeable with notice of the vendor's intent to defraud other creditors of whom he knew nothing and had been assured by the vendor that there were none. Kelly v. Schillinger, 102 Ala. 336 (1893).

And a sale of goods by a trustee who had appropriated a trust fund with the intention of applying the purchase money in replacing the trust moneys, which were misapplied, which intent was known to the purchaser, and the purchase money was to his knowledge immediately after its payment placed to the credit of such trust fund, is not a fraudulent transfer of property within the provisions of the bankruptcy act. *Ex parte* Stubbins, L. R. 17 Ch. Div. 58, 50 L. J. Ch. 547, 44 L. T. N. S. 877, 29 Week. Rep. 653 (1880).

So, an actual sale of goods for money, the vendor intending to use the purchase money in making a voluntary payment, the purchaser knowing of such intention, is not a fraudulent transfer within the provisions of the bankruptcy act of 1869. *Ibid.*

And a sale of cattle and farm utensils at their full value under an agreement that the purchase money should be applied in payment of the debts of the vendor, which was done, after which the vendor became the tenant of the vendee and used the property sold in the same manner as he had previously done, furnishes no evidence of a trust between the vendor and vendee, and is valid as against creditors. Talcott v. Wilcox, 9 Conn. 134 (1832).

And an exchange by an insolvent merchant of his merchandise for real estate of equal value which is subject to the demands of his creditors does not require the party with whom he exchanges to see to it that the land is applied in payment of his debts, though he is aware of his insolvency. Chessher v. Clamp (Tex.) 30 S. W. 466 (1895).

And in Jones v. Hudson, 23 S. C. 494 (1885), it was held that a purchaser from a trustee under a lost deed, authorized to make sales and reinvest the proceeds, is not bound to see the proper application of the proceeds.

But, where one purchases the whole of a debtor's property subject to execution, knowing that his vendor is largely indebted and has recently declared his intention not to pay, the mere fact that the debtor assures him at the time of the sale that one purpose of it is to enable him to pay debts will not purge the transaction of bad faith or relieve the purchaser from the duty to see to it that the purchase money is actually applied so far as is necessary to the discharge of such debts. Avery v. Johann, 27 Wis. 246 (1870).

And knowledge on the part of a purchaser that his vendor was unable to meet and discharge his debts as they became due in the ordinary course of his business, and that by such sale he would devest himself of all property not exempt from forced sale, and the payment to him of purchase money without seeing that it was applied by him to the payment of his debts, render the sale fraudulent and void as to creditors, though the debtor promises to apply the proceeds in payment of his debts and the purchaser believes that he will do so. Proetzel v. Buckstove & R. Co. (Tex.) 26 S. W. 1110 (1894).

X. *Effect of assumption of vendor's debts.*

A purchase of a stock of goods from an insolvent debtor for a sufficient consideration, including an agreement by which the purchaser pays debts of the vendor, is valid as against creditors, unless it was done for the purpose of aiding the debtor to delay or defraud his creditors. Sweet v. Wright, 57 Iowa, 510 (1881).

The right of a debtor to sell to a third party for a fair price, the latter agreeing to pay the consideration upon certain specified debts due by him, is equal to his right to prefer certain of his creditors by transferring property to them in satisfaction of their debts, which he may do provided he does not transfer more than is reasonably sufficient for the purpose. Sweeney v. Conley, 71 Tex. 543 (1888).

Thus a sale by an insolvent debtor to his brother in consideration of the agreement of the brother to pay debts of the insolvent amounting to more than the value of the property conveyed is not fraudulent as against a creditor whose debt was not included in the agreement. Baker v. Harvey (Mo.) 34 S. W. 853 (1896).

And a conveyance of land by a member of an insolvent partnership which made an assignment for the benefit of creditors upon the same day, in consideration for which the grantee assumed the payment of debts due from the grantor to third persons to about the amount of the purchase price, which assumption was accepted, will not be set aside as fraudulent and void as to creditors where the grantee did not know that the assets of the firm were insufficient to pay its debts, though he did know of the assignment. Smith v. Selz, 114 Ind. 229 (1887).

So, such a conveyance by an insolvent debtor, for which the grantee paid at least three fourths of the actual value by the redemption of certain wheat-warehouse receipts of the grantor, concerning which he was then liable to a criminal prosecution, and the discharge of certain obligations on which he was surety, do not warrant the conclusion that the conveyance was made or taken with intent to hinder, delay, or defraud creditors. Neal v. Foster, 36 Fed. Rep. 29 (1888).

And a conveyance made upon the consideration in part of the payment by the grantee of certain debts of the grantor and the future support of the grantor by the grantee is founded upon a valuable consideration, and consequently can be fraudulent only so far as the grantee is concerned, when *mala fides* are justly attributable to him. He must be cognizant of the fraudulent intent of the grantor if

and speaking for the court, said: "Throughout the series of instructions given at the request of the plaintiff, the jury are told, more or less explicitly, that while the sale of the goods by McClintock & Wilson may have been made with whatever fraudulent intent to hinder, delay, and defraud their creditors, although this fraudulent intent on their part may have been known to the plaintiff, yet if the purchase on his part was made bona fide and solely for the purpose of collecting a debt due him from them, then the sale is good and unaffected by the fraudulent intent of McClintock & Wilson. This is not the law as understood by this court. In the case of *Temple* v. *Smith*, 13 Neb. 513, cited by counsel for

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there was one. Henderson v. Hunton, 26 Gratt. 926 (1875).

And that notes taken for the unpaid price for goods sold absolutely and unconditionally were to be used in payment of the vendor's debts does not establish fraud in the sale as to creditors. Miller v. Kirby, 74 Ill. 242 (1874).

And in Farmers' Bank v. Douglass, 11 Smedes & M. 469 (1848), it was held that a purchase of property worth nearly $200,000, for which the purchaser agrees to pay certain debts of the vendor amounting to about $13,000 less than the value of the property, leaving the general creditors of the vendor unpaid and nothing to pay them with, does not of itself show such a fraudulent intent as will require the cancelation of the sale.

Though in that case it was also held that the fact that such a purchaser agreed to pay encumbrances, nearly if not quite equal in amount to the value of the property purchased, did not make him a bona fide purchaser without notice of his vendor's fraud, who would be protected by the statute of frauds.

But a conveyance by a debtor with intent to defraud a creditor, in which the grantee purchased with a view to aid that intention, is fraudulent and void, though the purchaser paid full value in satisfying bona fide debts of the debtor. Lowry v. Pinson, 2 Bail. L. 324, 23 Am. Dec. 140 (1831).

And a conveyance by a father owning property in excess of his indebtedness, of all his valuable property to his daughter, and his delivery to a son-in-law of a large sum of money in consideration of a promise by them to pay certain indebtedness, excluding therefrom other items of indebtedness of which they had knowledge at the time of the conveyance, is fraudulent and void as to creditors. Lewis v. Linscott, 37 Kan 379 (1887).

And a conveyance by a debtor to his brother, residing within a mile, of all his property including his household and kitchen furniture for a consideration of 30 to 40 per cent less than its real value, the purchaser assuming to pay certain debts for which he was bound as security, leaving other debts unprovided for, authorizes the conclusion that the purchaser participated in the fraudulent intent of the vendor, and will be held invalid as to creditors. Foster v. Grigsby, 1 Bush, 86 (1866).

It is a question for the jury, where a failing debtor has all of his property on which he obtained credit incorporated under a manufacturing charter and divided into shares between his father and himself, the father having afterwards paid debts of his son with his share of the stock, whether such transaction was done with intent to defraud creditors, and whether the father knew of or had reasonable grounds for suspicion of such intent. Planters' & M. Bank v. Willeo Cotton Mills, 60 Ga. 168 (1878).

XI. *Effect of relationship or intimacy of the parties.*

The fact that a vendor and purchaser are relatives raises no presumption of fraud in the transaction. Fraser v. Passage (Mich.) 30 N. W. 334 (1886).

Dealings of an insolvent debtor in property with his relatives are not necessarily fraudulent transactions. Blish v. Collins, 68 Mich. 542 (1888).

But see Reese v. Shell, and Satterwhite v. Hicks, *infra*, in this subdivision.

Thus the fact that the parties to a conveyance are mother-in-law and son-in-law does not show fraudulent collusion between them which will shift the burden of proof of bona fides to the purchaser. Tompkins v. Nichols, 53 Ala. 197 (1875).

And a conveyance to a grantee for an adequate consideration will not be deemed fraudulent merely because he was related to the grantors and afterwards released the property to them. Bradley v. Ragsdale, 64 Ala. 559 (1879).

And a purchaser will not be held chargeable with knowledge of the fraudulent intent of his grantor because the parties were brothers-in-law, and the grantor visited the purchaser for the purpose of making the sale, and the purchaser bought the land without having seen it, which was not worth as much as he professed to have paid for it, and he did not satisfactorily account for his acquisition of the money paid for it, and the grantor continued in possession, where the visit was brought about by a letter written by the purchaser, though it had been lost and was not produced in evidence and the grantor's continued possession was that of a laborer. Steele v. Ward, 25 Iowa, 535 (1868).

So, the mere fact that a purchaser from the holder of a conveyance founded upon the consideration of blood or marriage has notice that it was not founded upon a pecuniary consideration is not sufficient to make it his duty at his peril to inquire whether the title of his grantor was not fraudulent. He has the right to act upon the legal presumption that such deed was honestly made, unless some other fact is brought to his knowledge calculated to raise a suspicion in his mind that the conveyance was made with a fraudulent intent. Frazer v. Western, 1 Barb. Ch. 220 (1845).

And evidence that a purchaser of several insurance policies was a brother-in-law of one of the vendors whose place of business had been destroyed by fire, and that he traded with them and was treated as other customers were, and that he knew nothing of their business and made no inquiry, supposing that they were buying and selling for cash, and was not aware of the fact that they were indebted to any one except himself, and that a statement of their assets and liabilities showed notes and accounts amounting to $7,000, and the offer to sell was made for the express purpose of paying him and getting money with which to commence business, and that it was generally believed that they would begin business again,—will not authorize or support a finding that the purchaser had knowledge of such facts as would have aroused the suspicion of an ordinarily prudent man as to their fraudulent intent in making the transfer. Cooper v. Martin Brown Co. 78 Tex. 219 (1890).

But when the good faith of a debtor's transfer of goods is in question, the relationship of the parties to the transfer is a fact for the consideration of the jury. Hough v. Dickinson, 58 Mich. 39 (1885).

The jury, and not the court, are to weigh the fact of relationship of the parties to a transfer upon the question of the fraudulent intent of the vendee, and give it such effect as they may deem proper. *Ibid.*

And relationship or intimacy, in connection with other facts and circumstances, is often deemed sufficient to show fraud and invalidate the transfer.

Thus a conveyance of property of great value by an embarrassed debtor to a near relative in secret,

plaintiff in error, the court, in the opinion of the present chief justice, says: 'But where a purchaser has notice of the fraudulent intent of the person from whom he purchases, or has notice of such facts as would put men of ordinary prudence upon inquiry which would have led to a knowledge of the fraudulent purpose of the person selling the goods, he is not a bona fide purchaser,'—citing *Zuver* v. *Lyons*, 40 Iowa, 510; *Jones* v. *Hetherington*, 45 Iowa, 681; *Bradford* v. *Beyer*, 17 Ohio St. 388; *Brown* v. *Cutler*, 8 Ohio, 142."

The same rule is announced in *Dorrington* v. *Minnick*, 15 Neb. 397.

In *Hooser* v. *Hunt*, 65 Wis. 71, Cole, Ch. J., announces the well-settled rule of that state in

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will be presumed to be fraudulent, but where the parties testify to the fairness of the conveyance and deny any purpose to defraud, the question of the intent is for the jury. Helms v. Green, 105 N. C. 251 (1890); Reiger v. Davis, 67 N. C. 185 (1872).

And the neglect of near relatives to voluntarily explain suspicious circumstances connected with the conveyance between them will be deemed to be due to an inability to show conduct consistent with an honest purpose, and a presumption of fraud arises from their failure to explain and prove facts known to them tending to show good faith, if such facts existed. Helms v. Green, *supra*.

And the burden of proof rests with a wife who has received a fraudulent conveyance from her husband to show clearly that she acted in good faith, and was not only ignorant of, but had no grounds for reasonable suspicion as to her husband's fraudulent intent. Reese v. Shell, 95 Ga. 749 (1895).

And a purchase at an inadequate price by a minor son without means, residing with his father, from such father, will be held invalid where the father was generally known to be in failing circumstances and had transferred other property to his other children in fraud of creditors. Massie v. Enyart, 32 Ark. 257 (1877).

So, a deed by an insolvent father to his son in the presence of another son, nothing else appearing, raises a presumption of fraud as to creditors which will cast the burden of proof upon the grantee to protect his title by showing that he is a purchaser for value and without notice of his grantor's fraudulent intent. Tredwell v. Graham, 88 N. C. 208 (1883).

And the rule that he who alleges fraud must prove it does not apply to a case in which it is claimed by creditors that a sale was fraudulent in which the vendor and the subscribing witnesses and the purchaser were all brothers-in-law, and the vendor was indebted beyond his power to pay, and a writ had issued against him to recover a debt due from him. Satterwhite v. Hicks, Busbee, L. 105, 57 Am. Dec. 577 (1852).

And a conveyance by a debtor of all his property to a brother who lived with him and sustained intimate relations with him will be deemed fraudulent, although a valuable consideration was paid, where it appears that judgment had been obtained against the grantor, who said that the judgment creditor would never get a cent, as he would fix it so that he could not, and the deed was made on the day of the judgment but not delivered until after a motion for a new trial, and the grantor had received a large amount of cash therefor without applying any of it upon the judgment, and the grantee had said he had purchased his brother's place because he had got into trouble and did not want to have any property. O'Leary v. Duvall, 10 Wash. 666 (1895).

And the fact that a deed given by a father conveying all his property to his two sons purports to have been given for a valuable consideration, and the statements of the sons under oath that it was so given and was bona fide, will not sustain it as against the father's creditors where the circumstances as to the time, method, and consideration therefor were suspicious. Hoboken Bank v. Beckman, 36 N. J. Eq. 83 (1882).

In Hoboken Bank v. Beckman, *supra*, Fifield v. Gaston, 12 Iowa, 218 (1861), was distinguished on the ground that in that case a conveyance was not made to a son but to a stranger and creditor of the grantor for wages for work done for the latter, the consideration was proved, and the grantee claimed that the deed was merely a mortgage to secure his debt.

So, a purchase from an insolvent debtor of his entire property, subject to the payment of his debts, making a cash payment of $500 and giving notes for the balance, without making any inquiry as to the vendor's financial status, where the vendee was well acquainted with him and in a position to have some knowledge of his business, is invalid as against the vendor's creditors, where the prosecution of such an inquiry to but a limited extent must have resulted in the acquisition of the knowledge that the sale would be invalid as to his creditors and a fraud upon their rights. Ullman v. Crenshaw (Tex.) 16 S. W. 1012 (1891).

And a sale made by an embarrassed debtor to a friend and relative whom he summoned from a distance to him, purchasing at a price considerably less than the fair market price of the property, and less than the amount of his debts, after a secret conference with the avowed intention of protecting the property from being sacrificed by creditors at sales under legal process, will be deemed to be fraudulent, and will be upheld only as to the consideration paid which was actually applied to the payment of the debts of the vendor. Barrow v. Bailey, 5 Fla. 9 (1853).

So, a sister to whom a brother, during the pendency of an action against him for divorce and alimony brought by his wife, executes a note and trust deed for the purpose of preventing the wife from obtaining any benefit under her judgment for alimony, acquires no rights as against such judgment when obtained, although she previously held notes against her brother, where the new note and trust deed were not given to pay or secure them. Hall v. Harrington (Colo.) 44 Pac. 365 (1896).

And a verdict setting aside a transfer as fraudulent as against creditors will not be deemed contrary to evidence where it appears that the debtor, who was in failing circumstances, had transferred all that remained of his estate to his two sons, and that the payments for the land by the sons were proved only by themselves, though there were witnesses to the deeds and it appeared that some of them could have been proved by disinterested witnesses in another county, and there was no change of possession. Smith v. Wellborn, 75 Ga. 799 (1885).

A purchase by a woman who had been made a sole trader when her husband's affairs were embarrassed, of his property to a considerable amount, when she had pursued no separate business by which she might have acquired separate property, is bound to show from what sources she derived the funds to make the purchase, and in default of such showing her purchase will be declared fraudulent and void. Miller v. Tollison, Harp. Eq. 145, 14 Am. Dec. 712 (1824).

But the rule that it is the duty of a married woman, claiming against her husband's creditors, to show that her claim is bona fide and for a consideration growing out of her separate estate, does not apply in a case in which she does not claim through a judgment against him, but as grantee

the following language: "The words 'actual notice' in § 2243, Rev. Stat. and 'previous notice' in § 2324, Rev. Stat. are equivalent expressions; and the rule is stated in the opinion 'that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. Where the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had

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of another judgment creditor. Evans v. Kilgore, 147 Pa. 19 (1891).

Where a wife is a beneficiary in a deed of conveyance from her husband which is impeached by a creditor for fraud, it is scarcely to be supposed that the circumstances and intentions of the grantor were unknown to her. Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277 (1858).

As to effect of relationship or intimacy in connection with continued possession by a vendor, see *supra*, VII. e, *Retention of possession.*

XII. *Effect of fraud in other transactions.*

Other transactions occurring at or about the same time are not sufficient to show a participation by a grantee in the fraudulent intent of the grantor which will invalidate the conveyance as against the grantee, though they may be competent as proving the insolvency and fraudulent intent of the grantor. Hoyt & Bros. Mfg. Co. v. Turner, 84 Ala. 523 (1887).

And where it is contemplated to impeach a conveyance on the ground of fraud, evidence that the grantor made other conveyances at about the same time, which were fraudulent, is admissible to prove the grantor's fraudulent design, but cannot affect the grantee unless followed by evidence of his participation in some way in the fraud. Howe v. Reed, 12 Me. 515 (1855); Blake v. White, 13 N. H. 267 (1842).

A transfer by a debtor to his father and sister of promissory notes given by the purchaser of a stock of goods sold on credit, made several days after the sale without the purchaser's knowledge, however, does not show fraud on his part. Shealy v. Edwards, 75 Ala. 411 (1883).

XIII. *Registration and failure to record.*

The registry of a sheriff's deed made on execution under a judgment against one who had purchased lands and, to defraud his creditors, had the title made to another, who transferred the property to a third person without notice of the fraud, is not notice to such purchaser of the fraud. Registry is only notice to avoid purchases from the same grantor. Crockett v. Maguire, 10 Mo. 34 (1875).

And an examination by a purchaser of the records to see if there was any lien or encumbrances upon the land purchased does not show an absence of knowledge on his part that he would thereby enable his vendor to defraud his creditors. Wood v. Chambers, 20 Tex. 247, 70 Am. Dec. 382 (1857).

So, the failure of a purchaser to file a deed for record does not render the transaction fraudulent *per se*, though it is a circumstance to be considered in arriving at a conclusion as to the presence or absence of actual fraud. Klein v. Richardson, 64 Miss. 41 (1886), Overruling Hilliard v. Cagle, 46 Miss. 309 (1872).

And the failure of a grantee to file his conveyance does not tend to impeach the good faith of the transfer where it does not appear that it was purposely kept from the records and that any one was prejudiced by the delay. Crabb v. Morrissey, 31 Neb. 161 (1891).

So, the delay of a son in recording a deed given him by his father will not invalidate it as against creditors, where he did not know of any claims against his father or that he was in debt, embarrassed, or insolvent. Second Nat. Bank v. Merrill, 81 Wis. 142 (1891).

Withholding conveyances from record for several months after they were made is not a circumstance of fraud where the parties lived some distance away from the recording office and explained their failure to record. Bish v. Collins, 68 Mich. 542 (1888).

And the neglect of a wife for several years to record a conveyance made to her by her husband in contemplation of their marriage, together with his continued occupation of the lands conveyed after the marriage, and the mortgaging of the land by the husband and wife for his benefit, do not raise a presumption of fraudulent intent in making the conveyance. Page v. Kendrick, 10 Mich. 300 (1862).

XIV. *Purchases from fraudulent grantees.*

The rule was originally laid down by Chancellor Kent that a bona fide purchaser from a fraudulent grantee acquires no title by the conveyance against the creditors of the fraudulent grantor, as the object of the statute of frauds is to secure creditors from being defrauded by the debtor. Roberts v. Anderson, 3 Johns. Ch. 371 (1818).

But the contrary doctrine that a bona fide purchaser for a valuable consideration from a fraudulent grantee acquires good title to the property purchased as against creditors of the original vendor now seems to be well settled.

This was held in Paige v. O'Neal, 12 Cal. 483 (1859); Colquitt v. Thomas, 8 Ga. 258 (1850); Scott v. Purcell, 7 Blackf. 66, 39 Am. Dec. 453 (1843); Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105 (1833); Neal v. Williams, 18 Me. 391 (1841); Gordon v. Ritenour, 87 Mo. 54 (1885); Wineland v. Coonce, 5 Mo. 296, 32 Am. Dec. 320 (1838); Jackson, Bartlett, v. Henry, 10 Johns. 185, 6 Am. Dec. 328 (1813); King v. Trice, 3 Ired. Eq. 568 (1845); Thompson v. McKean, 1 Ashm. 129 (1830); Bean v. Smith, 2 Mason, 252 (1821).

In Bean v. Smith, *supra*, Roberts v. Anderson, *supra*, was criticised, the court refusing to follow it so far as it held that a purchaser in good faith from a grantee who took with intent to defraud creditors is not protected by the statute of Elizabeth.

And it was held that a bona fide purchaser for a valuable consideration is protected against creditors under the statute of frauds whether he purchased from a fraudulent grantor or a fraudulent grantee, in Howe v. Waysman, 12 Mo. 169, 49 Am. Dec. 126 (1848); Tootle v. Dunn, 6 Neb. 93 (1877); Anderson v. Roberts, 18 Johns. 515, 9 Am. Dec. 235 (1820); Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489 (1839); Mateer v. Hissim, 3 Penr. & W. 160 (1831).

Thus, to subject lands sold to a vendee and by him sold to another, to a judgment against the original vendor, the judgment creditor must show that the original vendor had sold with intent to defraud, and that both his vendee and the subsequent vendee had notice of such intent. Colquitt v. Thomas, 8 Ga. 258 (1850).

A fraudulent purchaser acquires title which is good until the vendor elects to rescind, and a sale by the purchaser for value to a third person, who is ignorant of the fraud, vests good title in the lat-

made the inquiry.'" This language was used in a case involving, as the one at bar does, the question of a fraudulent conveyance to hinder and delay creditors, and the case is fully parallel to the one at bar, because, as heretofore suggested, we have a statute with reference to actual and constructive notice in this territory, and which provides that (Stat. 1893, p. 2673) "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

In *Singer* v. *Jacobs*, 11 Fed. Rep. 559, Judge Caldwell, stating the opinion for the court, after holding that, to avoid a sale on the ground of fraud, it is not necessary that the purchaser should have actual notice of the fraudulent purpose of the vendor, uses the following language of Bigelow on Frauds (p. 288): "If facts are brought to the knowledge of a party which would put him, as a man of common sagacity, upon inquiry, he is bound to inquire; and, if he neglect to do so, he will be chargeable with notice of what he might have learned upon examination."

Bump, in his treatise on Fraudulent Conveyances, sums up the rule, on page 201, as follows: "It is not necessary that the grantee

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ter, even as against the original vendor. Levi v. Bray, 12 Ind. App. 9 (1895).

And property fraudulently conveyed under such circumstances as to create a trust in favor of creditors cannot be subjected to the payment of the grantor's debts as against one who purchased and paid a valuable consideration in good faith without notice of the fraudulent purpose. Carnahan v. McCord, 116 Ind. 67 (1888).

And a bona fide purchaser of property conveyed by a debtor in trust for his wife and family, though fraudulent as against creditors, which was sold by the *cestui que trust* prior to any interference on their part, will be protected in law. Sparrow v. Chesley, 19 Me. 79 (1841).

So, a bona fide purchase for value from the president of an insolvent corporation of property which he had purchased from the company for an antecedent debt due him is valid as against the creditors of the company, though the sale by the company to the president was void as to such creditors. Heroy v. Kerr, 2 Abb. App. Dec. 359 (1866).

And a bona fide purchaser for a valuable consideration of property consisting of all of the effects of a partnership which had been conveyed by the partners in payment of their individual indebtedness takes title as against firm creditors. Jewett v. Meech, 101 Ind. 289 (1884).

And the equitable title of a bona fide purchaser for a sufficient consideration, from a wife to whom the property purchased had been fraudulently conveyed by her husband, will be preferred and enforced in equity as against the claims of a creditor who has obtained judgment against the husband and levied on the lands conveyed. Phelps v. Morrison, 25 N. J. Eq. 538 (1874).

And a purchaser for a valuable consideration from a wife of property which had been paid for by her husband, who caused the conveyance to be taken in her name with the intent to hinder and delay his creditors, takes good title as against such creditors where he had no notice of the fraud. Carnahan v. McCord, 116 Ind. 67 (1888).

So, the title of a purchaser in good faith at a sale under a chattel mortgage is not affected by the fact that the mortgage was executed in pursuance of a conspiracy between the mortgagor and the mortgagee to hinder, delay, and defraud the creditors of the mortgagor. Zoeller v. Riley, 100 N. Y. 102, 53 Am. Rep. 157 (1885).

And the title of a bona fide purchaser from a fraudulent grantee, made before the lands were sold under an execution, issued on a judgment in favor of a creditor and against the original grantor, is superior to that of a purchaser under the execution. Young v. Lathrop, 67 N. C. 63, 12 Am. Rep. 603 (1872).

So, the title of a purchaser in good faith from an assignee for the benefit of creditors is not affected by the fact that the assignment is subsequently set aside as in fraud of creditors. Wilson v. Marion, 25 N. Y. Supp. 1066 (1893).

And an innocent purchaser of property which had been fraudulently conveyed to his grantor, who had paid but part of the purchase price, and who afterwards took an assignment of a judgment which had been obtained against the original fraudulent grantor and under which the lands had been levied upon and a bill of equity filed to set aside the sale, can be held only as an equitable garnishee to the amount of the judgment; but if he had in fact purchased the judgment at a discount, he would be allowed as a credit on the unpaid purchase money only the sum he had paid for the judgment with interest, as he could not be permitted to speculate upon the purchase. Tappan v. Harbison, 43 Ark. 84 (1884).

A purchaser of land from one claiming the same under a deed held to be fraudulent, however, stands in no better condition than the fraudulent donee himself, and cannot deed such lands with any other or greater effect than his grantor, unless his purchase was made for a valuable consideration and without notice of the fraud. Wade v. Saunders, 70 N. C. 270 (1874).

And a purchaser from a fraudulent grantee with notice of his fraud cannot be protected as a bona fide purchaser, and can acquire no better title than his immediate grantor had. Goshhorn v. Snodgrass, 17 W. Va. 717 (1881).

And where a subpurchaser from a vendee under a fraudulent conveyance had notice of facts sufficient to put him upon inquiry, the sale will be set aside though it is not shown that he had knowledge of the original fraud. Hoyt & Bros. Mfg. Co. v. Turner, 84 Ala. 523 (1887).

And a party claiming protection as a bona fide purchaser or mortgagee from a fraudulent grantee must deny notice of the fraud, although notice is not charged in the bill of the creditor. Manhattan Co. v. Evertson, 6 Paige, 457 (1837).

So, a purchaser of goods from one who obtained the goods by a fraudulent purchase takes them subject to the right of the original vendor to disaffirm, where he had knowledge of the means by which his vendor obtained them; but such knowledge would not affect his title if the first vendor elected to affirm the sale. Gray v. St. John, 35 Ill. 222 (1864).

And a purchaser of lands from a married woman, who knew that they had been conveyed by her husband to a third person for an alleged consideration of $4,000, and immediately thereafter were reconveyed to the wife for the same consideration, and that the husband was overwhelmed with debt at the time, and that the wife had no means to pay the $4,000, cannot be deemed a bona fide purchaser without notice. Smith v. Vreeland, 16 N. J. Eq. 198 (1863).

And one who purchases knowing that his vendor had not complied with the terms of his contract by which he purchased the goods sold, and that the original vendor insisted upon his right by reason of such default to retake the property, and states that he did not care what the original vendor claimed

shall have actual knowledge of the debtor's intent to delay, hinder, or defraud his creditors in order to render the transfer void. A knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on the inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice and is equivalent to actual knowledge in contemplation of law. . . . If he has notice of facts sufficient to put him on the inquiry, he cannot be deemed a bona fide purchaser." On page 203 he says: "It is not necessary that the debtor and the grantee shall be actuated by like motives to cheat and defraud the grantor's creditors. The motives and intentions of the debtor and grantee may be different. If the grantee has notice at the time that the debtor is transferring his property to delay, hinder, or defraud his creditors, it will make the transfer void although he has no wish to defraud them, for the motive is imputed to him as a fraud in law, and makes him a *mala fide* purchaser."

A consideration of the numerous cases cited can certainly leave no doubt but that the instruction on the question here in controversy, and which was in the case of *Chandler* v. *Colcord*, held erroneous, was correct, and that the instruction which was asked for in the court

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and did not try to find out, is chargeable with notice of such claim, and takes the title of his vendor as it is, subject to the claims of the original vendor. Thompson v. Duff, 19 Ill. App. 75 (1886).

So, one who purchases of a fraudulent grantee who had received a fraudulent conveyance from his brother, with knowledge of a suit against the original vendor, and of the relations between him and his immediate vendor, and of the fact that his vendor's deed was recorded just before judgment was entered in such action, is not an innocent purchaser, the facts being sufficient to put him upon inquiry. Hamlin v. Wright, 26 Wis. 50 (1870).

And a purchaser in good faith from a fraudulent grantee will not be protected as to purchase moneys paid by him after service of summons upon him in an action by a judgment creditor of his vendor's grantor to have the several sales adjudged fraudulent and his judgment declared a lien on the land. *Ibid.*

And a sale of a stock of goods and bank accounts by a fraudulent purchaser who had taken them from a previous fraudulent vendor who intended to hinder and defraud his creditors, made to an employee upon receiving information that an attachment was about to be levied thereon as the property of the fraudulent vendor, taking his notes therefor, does not make such employee a bona fide purchaser. Lane v. Starkey, 15 Neb. 285 (1883).

But the knowledge of a second vendee that a sale by a bankrupt to his first vendee embraced all of the stock of the seller, without more, will not make the purchase of the second vendee fraudulent in law. Babbitt v. Walbrun, 1 Dill. 15 (1870).

And that a purchaser from a fraudulent grantee who acquired the property in fraud of his grantor's creditors took title under a quitclaim deed is not conclusive evidence that he is not a purchaser in good faith and without notice. Mansfield v. Dyer, 131 Mass. 200 (1881).

So, a daughter who for a valuable consideration purchased from her mother land fraudulently conveyed to the latter by her father a year previous while he was largely indebted is not, in the absence of further evidence of fraud on her part, so chargeable with notice of the father's fraudulent purpose as to render the conveyance invalid. Leich v. Dee, 86 Iowa, 711 (1892).

And in Dalglish v. McCarthy, 19 Grant, Ch. (U. C.) 578 (1872), it was held that a bona fide purchaser from a grantee, who gave no consideration but took a conveyance which was fraudulent as to creditors, acquires title as against creditors, notwithstanding the fact that he had notice of the former fraud and purchased the property with a view of carrying out the intent to defeat creditors.

A purchaser who buys from an innocent grantee will be protected under the provisions of the statute of Elizabeth though he took with notice of a fraudulent intent upon the part of the original vendor. Colquitt v. Thomas, 8 Ga. 258 (1850).

XV. *Presumptions and burden of proof.*

The presumptions and burden of proof here considered are those relating to participation by a purchaser in the fraud of his vendor only, and not those relating to fraud in general.

The law presumes the possession of a vendee to have been rightfully acquired, and where it appears that a sufficient consideration was paid the transfer will be upheld, unless it appears affirmatively that he purchased in bad faith. Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742 (1885).

And a sale of property for a valuable consideration, accompanied by a bona fide change of possession, will not be presumed to have been made with intent to hinder, delay, or defraud creditors, without proof of fraud in which both parties participated. Dardenne v. Hardwick, 9 Ark. 482 (1849); Glenn v. Grover, 3 Md. Ch. 29 (1850).

And a purchaser will not be held chargeable with notice of the fraudulent intent of his vendor where the circumstances relied upon to prove his knowledge are just as consistent with ignorance as with knowledge. Steele v. Ward, 25 Iowa, 535 (1868); Muirheid v. Smith, 35 N. J. Eq. 303 (1882).

And the burden of proof rests with the attacking creditor to show fraud in a transfer and participation in the fraud of the vendee. Deering v. Collins, 38 Mo. App. 73 (1889); Van Raalte v. Harrington, 101 Mo. 602, 11 L. R. A. 424 (1890); Lipscomb v. McClellan, 72 Ala. 151 (1882).

And to show that it was made with intent to delay, hinder, or defraud his creditors, and that the purchaser had knowledge of such intention or had information of circumstances which ought to have put him on inquiry and which would have led to knowledge of such intent. Stix v. Keith, 85 Ala. 465 (1888); Lipscomb v. McClellan, *supra*; Smith v. Collins, 94 Ala. 394 (1891); Hodges Bros. v. Coleman, 76 Ala. 103 (1884); Knower v. Cadden Clothing Co. 57 Conn. 202 (1889); First Nat. Bank v. Carter, 89 Ind. 317 (1883); Kellogg v. Aherin, 48 Iowa, 299 (1878); Pettingill v. Jones, 30 Mo. App. 280 (1888).

Or of the debtor's financial condition. Smith v. Collins, *supra*.

And such knowledge must be proved as a fact, and not be imputed by any rule of law. Knower v. Cadden Clothing Co., and Van Raalte v. Harrington, *supra*.

And proof of the execution and the delivery of a deed by a debtor casts the burden of proof upon creditors to impeach it for inadequacy of consideration, or as intended to delay, defeat, or defraud creditors, though the same proof establishes that the grantor was in failing circumstances. Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400 (1831).

It is sufficient in the first instance for a creditor attacking a sale by his debtor as fraudulent to show the debtor's fraudulent intent in making it; then it is for the purchaser to show that he purchased for a valuable consideration; and his title would then be unimpeachable unless the creditor should

below should have been given. The jury were directly told that they could not hold the transfer void as to G. W. Sherman, even though they should find it was fraudulently made by J. R. Sherman, unless they should find that G. W. Sherman had notice of the fraud which J. R. Sherman was perpetrating upon his creditors, if his conduct was fraudulent. This did not go far enough, in view of the request made by the plaintiff. The plaintiff was entitled, on his request, to have had the jury directed that it was not necessary that G. W. Sherman should have had actual notice of the fraud of J. R. Sherman, if there was any, but that plaintiff was entitled to a verdict, if there was fraud in the transfer, and if G. W. Sherman had notice of such facts as would cause him, as a prudent man, to suspect the fraudulent conduct of the brother, if the jury should find there was any. The instruction there given, at least against the plaintiff's request, required too high a standard of proof in order to enable

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make it appear that he had previous notice of the debtor's fraudulent intent or that he participated in the fraud. Starin v. Kelly, 88 N. Y. 418 (1882); Tillman v. Heller, 78 Tex. 597, 11 L. R. A. 628 (1890).

An intent to defraud creditors will be presumed, however, where the parties knew that such would be the effect of the conveyance. Nichols v. Nichols, 61 Vt. 426 (1889).

As to presumptions and burden of proof under particular circumstances and conditions, and as to particular facts, see preceding particular subdivisions of this note.

XVI. *Effect of participation.*

A conveyance in which there is actual fraud, both parties participating, is utterly void *ab initio*, and will not be permitted to stand as security for any purpose. Henderson v. Hunton, 26 Gratt. 926 (1875).

And it should not be permitted to stand as security in the hands of the grantee for advances made on account of such conveyance to the grantor. Bean v. Smith, 2 Mason, 252 (1821).

And one who receives a conveyance of property from a debtor with knowledge that it was made with intent to defraud his creditors incurs the peril of losing that which he receives, without any right to reimbursement for what he may have paid. *Dictum* in Smith v. Selz, 114 Ind. 229 (1887).

And if any portion of the consideration recited in a bill of sale was not real but fictitious, the transfer would be fraudulent and void as against creditors as to the whole. Brasher v. Jamison, 75 Tex. 139 (1889).

So, a deed which is fraudulent in fact is void *in toto*, and cannot stand as security for grantees who had notice of the fraud. Livesay v. Beard, 22 W. Va. 585 (1883).

And a purchaser at a sheriff's sale made by means of a fraudulent combination with the judgment debtor cannot hold the property purchased as security for the money he has paid, though such money was his own. Stovall v. Farmers' & M. Bank, 8 Smedes & M. 505, 47 Am. Dec. 85 (1847).

And the creditors of a mortgagor to the state to secure a loan from the sinking fund, whose property is sold and who for the purpose of defrauding them agrees with the purchaser that he shall not reinstate the mortgage but hold the lands in trust for the mortgagor and permit him to redeem them whenever his relations with his creditors would permit, are entitled to have the property applied to the payment of their claims without refunding the amount paid by the purchaser. Musselman v. Kent, 33 Ind. 452 (1870).

But where a deed is merely constructively fraudulent, or where it appears that the grantee has acted bona fide and did not participate in the fraud, it will be permitted to stand as security for what is justly due to the grantee thereon, or for advances made by him subsequent to its execution. Henderson v. Hunton, *supra*.

And a purchaser of property from an absconding debtor with notice that he was selling to deprive creditors of their recourse to it will be entitled to restitution for that part of the consideration paid which enured to the benefit of the creditors by increasing the amount applicable to the payment of debts. Barker v. Phillips, 11 Rob. (La.) 190 (1845).

And a conveyance by a debtor with intent to defraud creditors, to a creditor, which is absolute in form, may be treated as security simply for an indebtedness to him, and the property ordered sold and the proceeds after discharging the grantee's debts subjected to the claims of other creditors, where the proof of fraudulent participation on the part of the grantee is not clear and satisfactory. Keeder v. Murphy, 43 Iowa, 413 (1876).

But a sale by an embarrassed debtor to a friend and relative at an inadequate price and for less than the amount of his debts, after a secret conference, with the intention of protecting the property from being sacrificed by creditors at sales under legal process, will be deemed fraudulent and can be upheld only as to the consideration paid which was actually applied to the payment of the vendor's debts. Barrow v. Bailey, 5 Fla. 9 (1853).

And an innocent purchaser of property which has been fraudulently conveyed to his grantor, who had paid but part of the purchase price, and who afterwards took an assignment of a judgment which had been obtained against the original fraudulent grantor and under which the lands had been levied upon, can only be held as an equitable garnishee to the amount of the judgment; but if he had in fact purchased the judgment at a discount, he would be allowed as a credit on the unpaid purchase money only the sum he had paid for the judgment with interest. Tappan v. Harbison, 43 Ark. 84 (1884).

So, a deed to several grantees jointly, executed by the grantor with intent to defraud his creditors, is void as to such grantees as had notice of the fraud, but may stand as security for the consideration paid by such grantees as had no notice. Livesay v. Beard, 22 W. Va. 585 (1883).

But where a father grants premises by joint deeds to his son and another, for which the third party pays a valuable consideration but the son pays nothing, and the fact of such want of consideration on the part of the son is known to the third party, the conveyance is wholly void as against creditors of the grantor at the date of the deed. Swartz v. Hazlett, 8 Cal. 118 (1857).

And the participation in the fraud of the vendor of one of several persons claiming title under a fraudulent bill of sale will prevent a recovery in an action of trover in which all were joined, the rule in such case being that unless all of the plaintiffs are entitled to recovery the verdict must be for the defendant. Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88 (1840).

A transfer by a debtor to a creditor which is fraudulent and void as having been made and received with intent to defraud creditors, however, does not invalidate a separate assignment to another creditor made at the same time. Crawford v. Neal, 144 U. S. 585, 36 L. ed. 552 (1891).

A grantee under a conveyance made and received with a fraudulent intent cannot acquire title by possession against creditors of the grantor. Beach v. Catlin, 4 Day, 284, 4 Am. Dec. 221 (1810).

F. H. B.

the plaintiff to sustain its charge of fraud against the vendee, G. W. Sherman.

The decision in the case of *Chandler* v. *Colcord*, therefore, so far as it involves this question, is overruled, and *the judgment of the court below in this case is reversed*, and a new trial granted, at the cost of defendant in error.

All the Justices concurring, except **Scott**, J., not sitting.

WASHINGTON SUPREME COURT.

Marian E. LA SELLE *et al.*, *Respts.*,
v.
J. H. WOOLERY *et al.*, *Appts.*,

(11 Wash. 337.)

1. **The exemption of community property from liability** for a separate and individual debt of the husband extends to a judgment against him rendered in another state for his individual debt long before the community property was acquired.
2. **Property exempt from levy and sale** on execution cannot be subjected to the payment of a judgment for a debt incurred in a sister state where the exemption laws are different.

(February 24, 1896.)

APPEAL by defendants from a judgment of the Superior Court for King County in favor of plaintiffs in an action to enjoin a sale of property which had been levied upon under an execution upon a judgment against plaintiff William La Selle. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Shank & Smith**, for appellants:

The presumption that the husband's debts are community debts is not limited to debts incurred within this state.

The presumption that a judgment against a husband is for a community debt, and so a charge upon community property, was first recognized in *Andrews* v. *Andrews*, 3 Wash. Terr. 289.

If the husband obtained any property by virtue of his exertions it would prima facie at least be the property of the community, and we think it must follow that in his efforts to obtain property it must prima facie be presumed that he acts for the community.

Oregon Imp. Co. v. *Sagmeister*, 4 Wash. 710, 19 L. R. A. 233; *Calhoun* v. *Leary*, 6 Wash. 21.

The presumption that property acquired by either husband or wife during the community is community property was first recognized in *Lemon* v. *Waterman*, 2 Wash. Terr. 493.

The presumption as to community property evidently arises generally from the nature of the case, and especially from the statutory definition of community property.

Gen. Stats. §§ 1387–1399; *Yesler* v. *Hochstettler*, 4 Wash. 349.

This presumption should not be limited to property accumulated within the state unless only such property can be community property —the presumption should exist wherever the law on which it is based can apply.

Ritchie v. *Carpenter*, 2 Wash. 512; *Freeburger* v. *Gazzam*, 5 Wash. 772.

Whatever the debt may have been called in Wisconsin it was in effect a community debt, and the laws of this state do not undertake to change the status or liability of such a debt merely by its coming across our border.

Andrews v. *Andrews*, 3 Wash. Terr. 289; *Littell & S. Mfg. Co.* v. *Miller*, 3 Wash. 483.

The debt was incurred by La Selle in the course of a business pursued for the common support of himself and his wife. It is in this just the sort of debt which the purpose and scope of the community law unquestionably makes a community debt.

Oregon Imp. Co. v. *Sagmeister*, 4 Wash. 710, 19 L. R. A. 233; *Brotton* v. *Langert*, 1 Wash. 80; *Columbia Nat. Bank* v. *Embree*, 2 Wash. 331; *Sadler* v. *Niesz*, 5 Wash. 182.

Messrs. **Remington & Reynolds**, for respondents:

All debts relating to the separate property of either spouse are separate debts unless jointly made; separate debts embrace all debts severally incurred by either spouse that are not made in the acquisition or for the benefit of community property, as well as those incurred by either spouse without the proper authority from the other.

2 Bl. Com. Sharwood's ed. 1882, 179, 399, 2 Cruise, Dig. title 18, chap. 1, §§ 1–3; 4 Kent, Com. 5th ed. 1844, 357, 362, 367; 2 Kent, Com. 350; *Bratton* v. *Langert*, 1 Wash. 73; *Stockand* v. *Bartlett*, 4 Wash. 730; *McGlauflin* v. *Merriam*, 7 Wash. 111.

To make a debt a community debt it must be identified with the community property.

Littell & S. Mfg. Co v. *Miller*, 3 Wash. 480; *Oregon Imp. Co.* v. *Sagmeister*, 4 Wash. 710, 19 L. R. A. 233; *Elma* v. *Carney*, 4 Wash. 418; *Calhoun* v. *Leary*, 6 Wash. 17; *Yesler* v. *Hochstettler*, 4 Wash. 349; *Freeburger* v. *Caldwell*, 5 Wash. 769.

The doctrine that all debts contracted during the marriage are prima facie community debts is solely derived from and follows as a necessary corollary of the rule that all property acquired during marriage is prima facie community property.

Calhoun v. *Leary*, and *Oregon Imp. Co.* v. *Sagmeister*, *supra*.

Under the common law, which was in force in Wisconsin where this debt was contracted, the husband's earnings were his separate property as fully and completely as though he had never been married.

Connors v. *Connors*, 4 Wis. 112; *Elliott* v. *Bently*, 17 Wis. 591; *Hamlin* v. *Jones*, 20 Wis. 536; Wis. Laws 1872, chap. 155, § 2; Sanborn & B. Anno. Stat. 2343.

NOTE.—In connection with the present case as to liability of community property for debts, see *note* on that subject to Oregon Imp. Co. v. Sagmeister (Wash.) 19 L. R. A. 233.

The wife had no control, no power of disposition, and no rights whatever in respect thereto. She was not, and could not in any manner be made, liable for any debt thus contracted by her husband.

1 Sanborn & B. Anno. Stat. §§ 2341–2344; *Feller* v. *Alden*, 23 Wis. 301, 99 Am. Dec. 173; *Dayton* v. *Walsh*, 47 Wis. 113, 32 Am. Rep. 757.

The laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it. No state or nation can by its laws directly affect or bind property out of its territory, or bind persons not resident therein.

Story, Confl. L. 6th ed. 1865, p. 8, § 7, p. 21, §§ 18–20; Sedgw. Stat. & Const. L. 1st ed. 1857, p. 69; Endlich, Interpretation of Statutes 1st ed. 1888, p. 233, § 169; *Green* v. *Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109; 3 Am. & Eng. Enc. Law, *Conflict of Laws*, p. 502, § 2, p. 508, § 3.

Property held by a community of interests once vested in the husband and wife as such cannot be devested by change of residence, but will be recognized as joint property in states where the community system is wholly unknown.

Story, Confl. L. 6th ed. 1865, §§ 184–187, 161 –171 (*b*), 176–178; 1 Bishop, Mar. & Div. 4th ed. 1864, § 405; Schouler, Dom. Rel. 1st ed. 1870, p. 67; Jacob. Dom. 1st ed. 1887, § 37; 2 Cord, Rights of Married Women, 2d ed. 1885, § 1116; 1 Bishop, Mar. Div. & Sep. 1st ed 1891, § 915; Freem. Co-Tenancy & Partition, 1st ed. 1882, § 132; *Kraemer* v. *Kraemer*, 52 Cal. 302; *Doss* v. *Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Dubois* v. *Jackson*, 49 Ill. 49; *King* v. *O'Brien*, 1 Jones & S. 49, Affirmed 57 N. Y. 653; *Hamlin* v. *Jones*, 20 Wis. 536; *Stevens* v. *Chouteau*, 11 Mo. 382, 49 Am. Dec. 92; *Sallee* v. *Chandler*, 26 Mo. 124; *Stokes* v. *Macken*, 62 Barb. 145; *Beard* v. *Busye*, 7 B. Mon. 144; *Saul* v. *His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *Hicks* v. *Pope*, 8 La. 554, 28 Am. Dec. 142; *Murphy* v. *Murphy*, 5 Mart. (La.) 83, 12 Am. Dec. 475; *Martin* v. *Boer*, 13 La. Ann. 369; *Avery* v. *Avery*, 12 Tex. 54, 62 Am. Dec. 513; *Castro* v. *Illies*, 22 Tex. 479, 73 Am. Dec. 277; *McCollum* v. *Smith*, Meigs, 342, 33 Am. Dec. 147; *Kneeland* v. *Ensley*, Meigs, 620, 33 Am. Dec. 168; *Hinman* v. *Parkis*, 33 Conn. 188; *Scheferling* v. *Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281; *Davis* v. *Zimmerman*, 67 Pa. 70; *Decouche* v. *Savetier*, 3 Johns. Ch. 190.

It being evident that property acquired in Wisconsin in incurring this debt for which the Wisconsin judgment was taken was there the separate property of William La Selle, and that it would be so recognized by all the states and nations to which that property might be removed, the appellants, wholly failing to identify the debt with community property, have no standing in court.

Story, Confl. L. 362; *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341.

The opinion upon the first hearing was delivered by **Hoyt**, Ch. J.:

Appellant William F. Collins, in a suit brought in King county against the respondent William La Selle, duly recovered judgment. To this action and judgment the respondent Marian E. La Selle, wife of said William La Selle, was not a party. Execution issued on said judgment, which was placed in the hands of J. H. Woolery, sheriff of King county, the other appellant. He made a levy upon a piece of real estate situated in King county, of which the paper title was in the name of said Marian E. La Selle. This suit was then brought by the respondents, and thereby they sought to enjoin the sale of the property levied upon, and to have it decreed that such property was not subject to the lien of the judgment. It was conceded that the property, though standing in the name of the wife, Marian E. La Selle, was the community property of herself and her husband, William La Selle. It was therefore, under the rule established by numerous decisions of this court, subject to the lien of the judgment against the husband alone, if the debt upon which such judgment was rendered was that of the community. It is equally well established by the adjudications of this court that such property was not subject to the lien of such judgment if the debt for which it was rendered was the separate debt of the husband. It must follow that the nature of the debt which was the foundation of the judgment is the material question to be determined upon this appeal. If it was that of the community, the sheriff should have been allowed to proceed to satisfy the judgment by a sale of the property. If it was the debt of the husband alone, the appellants were rightfully restrained from proceeding further against the property in question. The foundation of this judgment was one against the husband alone, made and entered in the state of Wisconsin, and the foundation of that one was a liability incurred by the husband to the appellant Collins in the prosecution of his business as a contractor and builder, and proprietor of a sash and door factory, and was for materials sold to him to be used in the construction of houses and to supply his factory. At the time this liability was incurred, and the judgment in Wisconsin rendered, the respondents were living together as husband and wife in the state of Wisconsin. Afterwards they removed from said state, and from a time preceding the date of the judgment rendered in King county had been living together as husband and wife in this state. The pleadings on the part of the respective parties enter with much detail into the circumstances surrounding these transactions, and also set up such of the statutes of Wisconsin as to the pleaders seemed necessary to determine the law of that state upon the question of the rights of the husband and wife to property there acquired, and upon the question of its liability for debts contracted by the husband alone.

Before entering upon a discussion of the rights of the respective parties growing out of the law of Wisconsin in relation to the liability of property for the debts of the husband, it is necessary to say a word as to a preliminary question. It has been held that under the laws of this state a debt incurred by the husband alone is prima facie a community debt, and for that reason is enforceable against the community property, unless it is made to appear by allegation and proof that the transaction which

gave rise to the liability had no relation to any business of which the community would have been entitled to the benefits. Is such presumption confined to debts incurred in this state? There can be li tle reason for so holding, for while it is true that it will not be presumed that a debt incurred elsewhere could be enforced against community proper y as such, for the reason that in most of the other states property of that kind is unknown, yet it is but reasonable to presume that under the laws of any of the states of this Union the business of the husband, though it may be in form for his own benefit, and relate only to property of which he is the legal owner, is in reality for the benefit of himself and his wife as a family, and that a liability incurred on account thereof is one which affects the substantial interests of the wife as well as the husband. This being so, there would seem to be good reason for holding that the presumption as to the liability of community property for the debts of the husband alone should extend to those incurred outside of as well as within this state. If we should hold this to be the law, it would probably make it unnecessary for us to discuss any other question raised by the briefs, since we are inclined to agree with the contention of the appellants that there is no sufficient allegation in the complaint to overcome the presumption in favor of the judgment. This question is, however, of such an important nature that it should only be decided in an action in which the rights of the parties can only be ascertained by its determination. We shall, therefore, make no further suggestion in relation thereto in this case.

The substantial question presented by the facts is as to the status of the debt which was the foundation of the judgment in Wisconsin in reference to the property of the husband, or the husband and wife, situated in that state. It appears from the statutes set out in the answer that in that state there is no such thing as community property, as understood here, nor is there any such thing as separate property of the husband, as defined by our laws. The wife alone could own separate property, and the provisions in relation to its acquisition were substantially the same, as in this state. All other property was that of the husband, whether it was acquired in such a manner as to make it, under our laws, his separate property, or that of the community. And all of his property, under the laws of that state, could be subjected to the payment of debts incurred by him alone. It will be seen from these provisions that a debt incurred by the husband could there be enforced against all of the property acquired by the husband and wife either before or after marriage, excepting such as, under the laws of that state, would be the separate property of the wife. This is substantially the result of the laws of this state as interpreted by former decisions of this court. In our opinion, the comity which one state owes to another goes to the substance rather than to the form of things. If a certain right is given in one state as to property of a certain nature, comity would require that those rights should be enforced in another state as to property of the same nature, though it might be called by a different name. In the state of Wisconsin, property which was acquired by the joint labors of the husband and wife, though called the property of the husband, was subject to the payment of debts incurred by the husband, in the prosecution of business for the support of the family. Property acquired in the same manner in this state belongs to the community, but is subject to a liability incurred by the husband alone in the prosecution of business for the same object. Hence, under the rule above suggested, comity requires that a debt which under the laws of that state could be enforced against property which, from the nature of its acquisition, would be that of the community in this state, should be here enforced against property belonging to the community. There is nothing in the policy of our legislation which will prevent the application of the rule above stated to the facts of this case. On the contrary, the general policy of this state upon the question of the liability of property of the community and of the respective spouses for debts incurred by the husband alone in the prosecution of any business is in substantially the same line as that of the state of Wisconsin. But whether it is or not, so long as the rights of the parties are adjudicated under the laws of this state, its citizens have no ground of complaint, whatever may be the result as to those of other states. And since what we have said has been founded upon our statute, and the rights adjudicated thereunder have been in the light of the facts shown by the record, the respondents cannot complain. The judgment will be reversed, and the cause remanded, with instructions to overrule the demurrer to the affirmative defenses pleaded in the amended answer.

Dunbar, Scott, and **Gordon,** JJ., concur.

On rehearing **Gordon, J.,** delivered the opinion of the court:

This cause was heard and decided by this court at the January term, 1895. Respondents' petition for rehearing having been allowed, and the cause reargued, a majority of the court are of the opinion that a wrong conclusion was reached at the former hearing. The case is fully stated in the former opinion, in the course of which opinion the court said, "If a certain right is given in one state as to property of a certain nature, comity would require that those rights should be enforced in another state, as to property of the same nature." Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this state, as against such property (*Harrison* v. *Sterry*, 9 U. S. 5 Cranch, 289, 3 L. ed. 104; Whart. Confl. L. § 324), we do not think it ought to be extended to property subsequently acquired in this state, although of the "same nature," and this principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale. *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192, 6 L. ed. 300. Upon this subject no less a writer than Story has said: "All the authorities in both coun-

tries [England and America], so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate." Story, Confl. Laws, § 428. "Any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place where the same is situate." Id. § 365. The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses, or otherwise, is fixed by the law of the state where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If, by the law of Wisconsin, it was the sole, individual debt of the husband it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce being by the law of Wisconsin, where it arose, merely the separate, individual debt of the husband, enforceable only against his separate, individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of the real property of the community acquired in this state long after the debt arose and judgment was rendered upon it. The doctrine of the common law is that: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act." Story, Confl. L. 8th ed. § 558. The settled rule is that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract, while the law of the place where suit is instituted upon the contract governs as to "the nature, extent, and form of the remedy; . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding; and the forms of judgment and execution." 2 Abbott, Law Dict. p. 36. In the case of *Blanchard* v. *Russell*, 13 Mass. 1, 7 Am. Dec. 106, the supreme court of Massachusetts, speaking by Chief Justice Parker, says: "But the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless from their tenor, it is perceived that they were entered into with a view to the laws of some other state. . . . The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a state other than that in which the contract was made. For the remedy must be pursuant to the laws of the state where it is sought; otherwise great irregularity and confusion would be introduced into the form of judicial proceedings." The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband (*Brotton* v. *Langert*, 1 Wash. 73; *Stockand* v. *Bartlett*, 4 Wash. 730); and it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this state. One result of such limitation would be that the court would be required, in every case, to resort to the law of the state where the debt arose, in order to determine what property in that state would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this state, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister state, where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and controlled by the *lex fori*, and not by the *lex loci contractus;* and to avoid interminable confusion the distinction must be observed.

For these reasons *the order and judgment of the Superior Court will be affirmed.*

Scott, Dunbar, and **Anders, J.J.,** concur.

Hoyt, Ch. J. dissenting:

The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband, residing in a sister state, possessed of ever so much property, which, though the title is vested in him, is held for the benefit of himself and wife, and would, from the manner of its acquisition, be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts, which may have been contracted on the faith of the property which he owned, by converting such property into cash, and removing to this state, and investing it in real estate. That the laws of one state should be so construed as to allow a debtor in another possessed of abundant means with which to pay all his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion, the conclusion reached upon the former hearing was the correct one, and should be adhered to.

SOUTH CAROLINA SUPREME COURT.

Re Will of Ellen Ann CRAWFORD, Deceased.

J. Adger SMYTH, Exr., etc., of Ellen Ann Crawford, Deceased, *Appt.*,
v.
Wilhelmina Crawford IRICK *et al.*, *Respts.*

(.....S. C.....)

The signature of the name of a subscribing witness to a will is not insufficient because it is written by another such witness in the presence and at the request of the former.

(March 23, 1896.)

APPEAL by the executor of the will of Ellen Ann Crawford, deceased, from a decree of the Common Pleas Circuit Court for Charleston County reversing a decree of the Probate Court admitting the will to probate. *Reversed.*

The facts are stated in the opinion and in that of the circuit court, which was as follows:

BUCHANAN, J.:

"Miss Ellen Ann Crawford, a resident of the city of Charleston, but temporarily residing in the city of Columbia, departed this life on the 2d day of February, A. D. 1892, leaving an instrument in writing, purporting to be her last will and testament, bearing date the 26th day of March, 1884. On the 10th day of February, 1892, the petition of J. Adger Smyth was exhibited to the court of probate for Charleston county. Such petition recited, in its second paragraph, 'that in the said last will and testament your petitioner, with others, is appointed executor,' and in the third paragraph, 'Your petitioner prays that the said instrument in writing be now admitted to probate as the last will and testament of the said Ellen A. Crawford, and that letters testamentary be granted to him.' That on said 10th day of February, 1892, the paper was probated and proved in common form by the testimony of Mrs. R. S. Forsythe, and subscribed by her in her own handwriting, and probate granted of the same. On the 29th day of May, 1894, Charlotta Hartnett, a niece of the said Ellen Ann Crawford, deceased, and one of the heirs at law and next of kin, and a person interested to invalidate the said paper as a will, presented her petition to the court of probate, praying that said alleged will be proved in due and solemn form. On the 30th day of May, 1894, Honorable A. G. Magrath, probate judge of Charleston county, directed a notice to J. Adger Smyth, notifying him that Charlotta Hartnett, through her attorneys, Messrs. W. M. Fitch and J. Walker Magrath, required the will to be probated in due and solemn form as required by § 1820 of the General Statutes of (1893) South Carolina, and requiring the said J. Adger Smyth, the executor who had qualified, to prefer a petition praying to be permitted to probate said will in due form. On the 18th day of June, 1894, the petition of J. Adger Smyth was preferred, and, among other things it alleged in the fifth paragraph thereof, that the only persons, in the knowledge of the petitioner, that would have been entitled to distribution of the estate of the deceased, had she died intestate, 'were the nieces of the said Ellen Ann Crawford, to wit: the said Charlotta Hartnett and Wilhelmina Crawford, now known as Wilhelmina Irick.' Whereupon a summons was directed by the probate judge to the said Charlotta Hartnett and Wilhelmina Crawford Irick, requiring them to answer the said petition within twenty days after the service thereof, exclusive of the day of such service. Service was duly acknowledged, and Mr. Fitch represented Charlotta Hartnett, and Mr. S. Dibble appeared as attorney for Wilhelmina Crawford Irick.

"Answers were put in for both Charlotta Hartnett and Wilhelmina Crawford Irick. The answers substantially admitted that the paper had been admitted to probate in common form on the 10th day of February, 1892, but deny that such paper was of any validity, inasmuch as formal execution of the same was not had as required by law, and that the alleged will was not 'subscribed by the witnesses in the manner and form required by law.' On the 15th day of April, 1895, Mr. A. M. Lee, attorney for J. Adger Smyth, gave written notice to the contestant, Charlotta Hartnett, 'that on the annexed affidavit and the record in this proceeding the undersigned will move before his honor, the judge of probate, on Monday, the 22d instant, at 11 A. M., for an order directing that Charlotta Hartnett do pay into court such amount as may be necessary to defray the expenses of the executors in the probate of the will of Ellen A. Crawford in solemn form.' The affidavit annexed set out, among other things, that the entire estate had been distributed; 'that, after the payment of all the debts and specified legacies, the executor, in the due course of administration, had distributed the exact rest and residue of the estate of the various residuary legatees in accordance with the directions of the will, holding, as trustee for several of the minor residuary legatees, their share of the residue, to which they were entitled under the will, until a guardian could be appointed for them, and also a certain sum, already agreed on with the probate court, as its fees and costs for closing the estate; that these amounts in his hands are not assets in his hands as executor, but merely temporarily held in trust for others by him;' 'that there are thus no funds in his hands whatever with which to defray the expenses of proving the will in solemn form;' that it will be necessary for the executor to obtain the presence of the witnesses to the will, one of whom resides in the city of Atlanta, state of Georgia; that the executor in his official capacity is in duty bound to go to other expenses also, and must act through counsel learned in the law in this matter; and that all such expenses he is unable, as executor, to meet and defray. Wherefore he prays that, before the executor be ordered to proceed with the proof of the will in solemn form of law, the said petitioner for the same Charlotta Hart-

NOTE.—Signatures by proxy are considered in a *note* to Lewis v. Watson (Ala.) 22 L. R. A. 297.

nett be directed to deposit in court, or with the executor, such amounts as may be necessary to defray the costs and expenses of the proceeding The motion was made and refused on the 22d day of April, 1895, after which proof was offered and testimony given for the purpose of proving the alleged will in due and solemn form.

"The evidence disclosed the fact that the signature of the third alleged witness to the will, Mrs. R. S. Forsythe, was made by Mrs. Cosgrove (then Miss M. G. Forsythe), her daughter, at the request of the mother; that Mrs Forsythe, the person whose name appears as that of the third witness, was accustomed to get her writing done by others; she could write whenever she wanted to; she did not touch the pen when her daughter was signing her name. This was admitted by the party in the case; and the sole and only question is, Can one witness subscribe a will for another witness by signing the name of such other witness thereto, without some actual contactual relation between them, and when such witness whose name is being written by proxy can write, and is under no physical inability preventing her from writing her own name in her own handwriting? Can a person be a witness by deputy? It is to be observed that there was no touching of the pen by Mrs. Forsythe while her daughter was writing her name as a witness to the paper. The daughter merely wrote it at the instance of the mother, and upon the part of the mother there was no further participation in the act. Was this a sufficient compliance with our statute which requires a subscription by the witness? In my opinion, it was not. A contrary construction would be a nullification of the very words, and an undermining and sapping of the purpose of the statute, and its validity and efficacy would be emasculated and gone. To say that one witness can 'subscribe' his name by the hand and in the exclusive manual act of another, when such witness can write, is to encourage forgery and put a direct premium upon fraud. To say that under these circumstances there was a compliance would be tantamount to a virtual repeal and a direct impairment of the integrity of the written law,—a relaxation without warrant of authority. I am well aware of the existence of some decisions that appear to make against the contention, but that such difference is more apparent than real an examination in connection with the wording of the various acts, and their application to the particular facts and circumstances of each particular case, will show. Bear in mind that there is no analogy to be drawn from cases where the pen was touched, for here there was no contractual participation whatever, or any reasoning or construction to be drawn from the fact that a testator is allowed to sign by the hand and in the exclusive handwriting of another, for this is permitted by the very words of the act itself. Here the proxy completed the whole of the operation as fully as Mrs. Forsythe could have done herself, and as if it had been done by her alone, one person completing the whole signing of the alleged third witness.

"There is no unanimity in the works of Jarman, Redfield, and Schouler upon the subject, nor is there any harmony in the annotations of such of those works as have been recently edited upon the point. Nor do the cases of *Adams* v. *Chaplin*, 1 Hill, Eq. 265; *Welch* v. *Welch*, 9 Rich. L. 133; *Wooster* v. *Wooster*, 4 Rich. L. 409; *Sampson* v. *White*, 1 McCord, L. 55; *Ex parte Leonard*, 39 S. C. 522,—throw any light upon the subject. The exact point seems never to have been raised in this state before. The cases mainly relied upon to sustain the execution of the will are *Jesse* v. *Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Upchurch* v. *Upchurch*, 16 B. Mon. 102; *Montgomery* v. *Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419; *Chase* v. *Kittredge*, 11 Allen, 59, 87 Am. Dec. 687; *Lord* v. *Lord*, 58 N. H. 7, 42 Am. Rep. 565; and *Re Strong's Will*, 3 Connoly, 574. In *Jesse* v. *Parker* the witness made his mark. In *Montgomery* v. *Perkins* the witness held the pen as the draftsman wrote the names. In *Upchurch* v. *Upchurch* the two witnesses whose names were written by Joseph Upchurch could not write, and, even if it were the sound doctrine that where the witness could not write his entire subscription may be made by another for him, this case would be inapplicable here, inasmuch as Mrs. Forsythe could write her name very well, and did subscribe her name very legibly, nearly eight years after, to the affidavit before the judge of probate. In *Re Strong's Will* there was not only a statute differing from ours, but the witness 'was incapacitated from writing, by reason of a felon on his right hand.' The criticism on *Upchurch* v. *Upchurch* is in point. The effect of *Lord* v. *Lord* (if the statutes were the same), being put by the court upon the maxim, *Qui facit per alium facit per se*, scarcely carries with it any authority. How this maxim can be invoked to sustain an act which is required by law to be done personally, I do not understand. Schouler, Wills, § 339, note 7, expresses disapproval of the views announced in this case. These cases do not justify the contention of the executor, while the other case (*Chase* v. *Kittredge*) is directly against the execution of the will, and shows that such paper is of no force or effect. That there were only two witnesses, in contemplation of law, to the paper proposed as a will the following authorities fully maintain: *Horton* v. *Johnson*, 18 Ga. 396; *Riley* v. *Riley*, 36 Ala. 496; *McFarland* v. *Bush*, 94 Tenn. 538, 27 L. R. A. 662; *Re McElwaine's Will*, 18 N. J. Eq. 499; *Re Downie's Will*, 42 Wis. 66; *Pawtucket* v. *Ballou*, 15 R. I. 58; *Meehan* v. *Rourke*, 2 Bradf. 385; *Ragland* v. *Huntingdon*, 1 Ired. L. 561. While courts always lean to the support of a will, if the law has been complied with substantially, yet where there is an entire absence of a formal requirement of the act the courts will not hesitate to say so, and declare its total invalidity. Any other construction would be a frittering away of the statute. It is therefore declared that the paper proposed is no will, for lack of compliance with the statute. It is ordered that the appeal from the probate court be sustained, and that the order of that court finding a will be set aside."

* *Mr.* **A. M. Lee,** for appellant:

One who appoints a proxy or deputy names a person who is to act in the absence of the

principal. But where a party requests an act to be done in his own presence and in his own name, by another, then this other is not acting by deputy or proxy, but his act is the act of the principal himself.

Story, Agency, ¶¶ 50, 51; *Kidder* v. *Prescott*, 24 N. H. 267; *Cushman* v. *Wooster*, 45 N. H. 410; *Upchurch* v. *Upchurch*, 16 B. Mon. 102; *Davenport* v. *Parsons*, 10 Mich. 42, 81 Am. Dec. 772, note; *Prince* v. *Dickson*, 39 S. C. 477.

Our courts have shown an evident inclination to carry out the spirit of the statute, and to affirm, if possible, the validity of a will. Hence it has been held that a subscribing witness may sign with his initials, or make his mark, or do anything else which would indicate his presence at the execution of the will.

Adams v. *Chaplin*, 1 Hill, Eq. 265; *Welch* v. *Welch*, 9 Rich. L. 133; *Wooster* v. *Wooster*, 4 Rich. L. 409; 1 Jarman, Wills, 213; 1 Wms. Exrs. & Admrs. 82.

From 1849 down to the present time a series of decisions emanating from courts of the most respectable authority have held that the signature of a witness to a will made for him at his request in his presence by another person is a valid act of his own; inasmuch as it is done by one acting under his authority and as his other self,—his hand, so to speak.

Jesse v. *Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Upchurch* v. *Upchurch*, *supra*; *Montgomery* v. *Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419; *Chase* v. *Kittredge*, 93 Mass. 59; *Lord* v. *Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Re Strong's Will*, 2 Connoly, 574; 1 Redf. Wills, p. 229.

The word "handwriting" as used in this section of the statute requiring proof of handwriting is equivalent to the "signatures" of the parties and used interchangeably.

Hopkins v. *Albertson*, 2 Bay, 484; *Sampson* v. *White*, 1 McCord, L. 55; *Adams* v. *Chaplin*, 1 Hill, Eq. 265; *Wooster* v. *Wooster*, 4 Rich. L. 409; *Ex parte Leonard*, 39 S. C. 522.

Mr. **Samuel Dibble**, for respondent Wilhelmina C. Irick:

The words of the statute are: "Sec. 1988. All wills and testaments of real and personal property shall be in writing and signed by the party executing the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator and of each other by three or more credible witnesses, or else they shall be utterly void and of none effect."

A distinction is made in this statute between the duties of the testator and the witnesses. The testator may sign himself or expressly direct another to sign for him. No such privilege is mentioned in the statute as pertaining to the subscription of the witnesses. The minimum number of subscribing witnesses requisite is placed at three. The words are "three or more." *Dunlap* v. *Dunlap*, 4 Desauss. Eq. 311.

The act of subscription must be the manual act of the witness.

1 Jarman, Wills, 5th Am. ed. pp. 213–216; Schouler, Wills, 2d ed. §§ 330–332, 338, 339; 1 Redf. Wills, 3d ed. *229–231; *Harrison* v. *Harrison*, 8 Ves. Jr. 185; *Addy* v. *Grix*, Id. 504; *Harrison* v. *Elvin*, 3 Q. B. 117; *Horton* v. *Johnson*, 18 Ga. 396; *Riley* v. *Riley*, 36 Ala. 496; *Simmons* v. *Leonard*, 91 Tenn. 183; *McFarland* v. *Bush*, 94 Tenn. 538, 27 L. R. A. 662; *Re Downie's Will*, 42 Wis. 66; *Re McElvaine's Will*, 18 N. J. Eq. 499; *Pawtucket* v. *Ballou*, 15 R. I. 58; *Meehan* v. *Rourke*, 2 Bradf. 385; *Ragland* v. *Huntingdon*, 1 Ired. L. 561; *Re Cox's Will*, 1 Jones, L. 321; *Re Losee's Will*, 13 Misc. 298.

The performance of an act which is personal in its nature cannot be delegated.

Mechem, Agency, § 19.

Messrs. **William M. Fitch** and **J. Walker Magrath**, for respondent Charlotta Hartnett:

Upon occasion of proving a will in solemn form if it appear to the judge of probate that the witnesses to the will or any of them are dead or insane, proof of the handwriting of the witnesses so dead or insane, and of the handwriting of the testator, shall be admitted by the judge of probate as prima facie evidence that the testator did execute the will in question in the presence of the witnesses thereto.

S. C. Rev. Stat. 1893, § 2004.

The handwriting of a dead witness must be proved.

Hopkins v. *De Graffenreid*, 2 Bay, 191; *Hopkins* v. *Albertson*, Id. 484; *Sampson* v. *White*, 1 McCord, L. 55; *Duncan* v. *Beard*, 2 Nott & M'C. 400; *Wooster* v. *Wooster*, 4 Rich. L. 409.

The signature of R. S. Forsythe as a witness to the alleged will, being written by her daughter, M. G. Forsythe, was not the actual signature of R. S. Forsythe, and there were but two actual witnesses' names subscribed to the paper.

1 Jarman, Wills, § 213, note.

The statute in this state is taken from the old English statute of frauds; and this court has several times in this state, when a construction of the statute was to be had, gone back and adopted the English rules of construction.

Adams v. *Chaplin*, 1 Hill, Eq. 266; *Ex parte Leonard*, 39 S. C. 518.

The word "subscribe" is from *sub*, under, and *scribo*, to write, and is defined, "to sign in witness or attestation by writing one's name beneath. To sign the name in token of assent to what is written above."

1 Wms. Exrs. & Admrs. p. 129.

In determining whether a will was executed in conformity to the statute, courts will not consider the intention of the testator but that of the legislature.

Re Conway's Will, 124 N. Y. 455, 11 L. R. A. 796.

As the statute requires the witnesses to subscribe the instrument in the presence of the devisor, their subscription cannot be a signature made by some other person or by themselves at some other time and adopted for the occasion.

1 Redf. Wills, 4th ed. 1876 § 230, and notes; *Moore* v. *King*, 3 Curt. Eccl. Rep. 243; *Re Goods of Kilcher*, 6 Notes of Cases, 15; *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160; *Chase* v. *Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Re Goods of Eynon*, L. R. 3 Prob. & Div. 92; *Ex parte Leroy*, 3 Bradf. 227.

If a witness cannot write, his hand may be guided by another person or another person may write the witness's name while the witness holds the top of the pen.

1 Jarman, Wills, 5th Am. ed. 1880, p. 215; *Re Goods of Kilcher, supra; Moore* v. *King*, 3 Curt. Eccl. Rep. 243, 2 Notes of Cases, 45, 7 Jur. 205; *Re Cope's Goods*, 2 Rob. Eccl. Rep. 335; *Re Goods of White*, 2 Notes of Cases, 461, 7 Jur. 1045; *Re Goods of Meade*, 1 Notes of Cases, 456.

One witness cannot subscribe for the other. 1 Wms. Exrs. & Admrs. 7th ed. 1877, p. 127; *Re Goods of White*, and *Ex parte Leroy*, *supra; Horton* v. *Johnson*, 18 Ga. 396; *Re Cope's Goods*, *supra*.

To make a valid subscription and attestation there must be either the name of the witness or some mark intended to represent it.

1 Wms. Exrs. & Admrs. p. 128; *Hindmarsh* v. *Charlton*, 8 H. L. Cas, 160; *Charlton* v. *Hindmarsh*, 1 Swab. & T. 433; *Re Goods of Sperling*, 3 Swab. & T. 272.

By English construction of the statute of frauds the witness must himself sign or subscribe, and the signature cannot be made by some other person for him.

Schouler, Wills, 2d ed. 1892, § 339.

In the United States the doctrine as generally expounded denies, like that of the English cases, that a witness to a will signs or subscribes so as to satisfy the statute without some manual act on his part by way of attestation.

Schouler, Wills, § 339; *Chase* v. *Kittredge*, 93 Mass. 49; *Campbell* v. *Logan*, 2 Bradf. 90; *Meehan* v. *Rourke*, Id. 385; *Ex parte Leroy*, 3 Bradf. 227; *Re Losee's Will*, 13 Misc. 298; *Re McElwaine's Will*, 18 N. J. Eq. 499; *Re Downie's Will*, 42 Wis. 66; *Pawtucket* v. *Ballou*, 15 R. I. 58; *Ragland* v. *Huntingdon*, 1 Ired. L. 561; *McFarland* v. *Bush*, 94 Tenn. 538, 27 L. R. A. 662; *Riley* v. *Riley*, 36 Ala. 496; *Horton* v. *Johnson*, 18 Ga. 396.

McIver, Ch. J., delivered the opinion of the court:

The only question in this case is whether the will of Ellen A. Crawford, offered for probate in due form of law, was duly attested. The facts in the case are, in the main, undisputed, and are sufficiently set forth in the decree of the judge of probate (which should be incorporated in the report of this case), in which he held that the will was duly attested, and admitted the will to probate. From this decree the parties who, it seems, would have been entitled to recover in case there was no will, appealed to the court of common pleas, and the appeal was heard by his honor Judge Buchanan, who rendered judgment reversing the decree of the judge of probate; and from that judgment J. Adger Smyth, named as executor in the will, appeals to this court, upon the several grounds set out in the record, which, with the judgment of Judge Buchanan, should be incorporated in the report of this case. The only question in the case is whether the fact that one of the persons whose names appear as subscribing witnesses to the will did not in fact write her own name, but requested her daughter, one of the other subscribing witnesses, to write it for her, rendered the attestation by that witness void and of no effect. The undisputed fact is that R. S. Forsythe, whose name appears as one of the subscribing witnesses to the will, appeared before the judge of probate on the 4th day of February, 1892, when the will was offered by the executor for probate in common form, and subscribed her name to the usual affidavit in such cases, in which, among other things, the deponent stated "that she was present and did see the said instrument of writing duly executed by the said Ellen Ann Crawford, . . . and that R. S. Forsythe [the deponent] and M. G. Forsythe and S. W. Forsythe, in the presence of each other and of the said Ellen Ann Crawford, and at her request, signed their names as witnesses to the due execution of the same." For, while one of the grounds of appeal from the decree of the judge of probate imputes error to him "in considering any proof or evidence offered at the proof of the will in common form," it appears from the case that when the testimony as to this matter was offered no objection was interposed; and indeed, as we understand the decree of the judge of probate, he does not base his conclusion upon the fact that the witness R. S. Forsythe made the affidavit above referred to, but merely states that fact as a part of the history of the case. On the contrary, his conclusion is based upon the conceded facts that the name of R. S. Forsythe, as one of the subscribing witnesses to the will, was written by her daughter in her presence and at her request, in the presence and at the suggestion of the testatrix, which he held was a sufficient signing by the said R. S. Forsythe. In this conclusion we fully concur. There can be no question that a will may be duly attested by a witness who, being unable to write his name, makes his mark. This is held even in England. *Harrison* v. *Harrison*, 8 Ves. Jr. 185, and *Addy* v. *Grix*, Id. 504, which cases have been recognized in this state several times. *Adams* v. *Chaplin*, 1 Hill, Eq. 266; *Ray* v. *Hill*, 3 Strobh. L. 303, 49 Am. Dec. 647. Indeed, this proposition does not seem to be contested by counsel in this case. But they contend for the efficiency of an attestation; as, for example, by touching the end of the penstock or penholder while another guides the pen in making the mark. It seems to us that attributing to this useless ceremony of the witness' touching with his finger the end of the penholder while another guides the pen the efficiency claimed for it would be investing a useless form with much more importance than it deserves. What possible security this empty ceremony will afford against fraud, it is impossible to conceive; for the essential fact, as it is claimed, of the touching of the end of the penholder, must necessarily be proved by parol evidence, in order to show the participation of the marksman witness in the act of signing, and why may not the fact that the name of the witness was written by another in his presence, and at his request, be proved by the same kind of evidence? The one affords the same, if not better, protection against fraud than the other. The testimony in this case leaves no doubt of the fact that the names of the three persons selected by the testatrix as witnesses of her will all appear on that paper in the appropriate place; and the fact that the name of one of those witnesses was not written with her own hand, but with the hand of another, at her request and in her presence, seems to us quite as good an attestation as if the mark of such witness had been made by another, she

going through the useless ceremony of touching the end of the penholder with her finger while the other guided the pen in making the mark. If the name of a person is signed to a note, receipt, or deed by another, in his presence and at his request, the law would regard it as the act of the person whose name is thus signed. Why? Because, though the physical act of signing is done by another, yet such act having been done in the presence and at the request of the person whose name is there written, it is regarded as his act. *Qui facit per alium facit per se.* While one partner cannot bind his copartner, ordinarily, by deed, yet if he signs the name of the copartnership to a deed in the presence of his copartners, and with their assent, they are bound. *Stroman* v. *Varn*, 19 S. C. 307. Analogy, therefore would lead us to the same conclusion as reasoning from the nature of the case has done.

There being no direct authority in this state, so far as we are informed, upon the precise point which we are called upon to decide, we naturally seek for light from the authorities elsewhere. But those authorities seem to be conflicting, and we must follow those which appear to us to be based upon the better reasoning. Some of the cases which have been cited attach great—and, as we think, undue—importance to the participation by the witness in the mere physical act of signing or making the mark, while other cases, with good reason, as we think, attach but little importance to that circumstance. In *Jesse* v. *Parker*, 6 Gratt. 57, 52 Am. Dec. 102, one of the attesting witnesses wrote the names of the other two witnesses, in their presence and at their request, and the court held the attestation good. The court, in delivering its opinion, after saying that it had been settled that a witness may attest a will by making his mark, proceeded as follows: "The validity of such an attestation depends upon the signing of the name of the witness by his authority, and in his presence, and not upon the fact of his making a mark, or doing some manual act in connection with the signature. The making of a mark would furnish little, if any, means of verifying the signature; and the doing of some manual act in connection with the signature would furnish no additional safeguard, appearing on the body of the instrument, against those frauds which it was the object of the statute (29 Car. II.) to prevent." The case of *Upchurch* v. *Upchurch*, 16 B. Mon. 102, is to the same effect. So, also, is the case of *Lord* v. *Lord*, 58 N. H. 7, 42 Am. Rep. 565, in which we find this language: "One object of the statute [which, the court had previously said, is copied substantially from that of 29 Car. II.] in requiring an attestation of a will is, to insure identity, and prevent the fraudulent substitution of another document. Another object is, to surround the testator with witnesses to judge of his capacity. 2 Greenl. Ev. § 691; *Upchurch* v. *Upchurch*, before cited. And all these purposes are as readily attained in the case where the name of the attesting witness is written by the agent at the request of the principal as where the latter makes his mark, or holds a pen guided by another hand." The same doctrine was held in a comparatively recent case in New York,—*Re Strong's Will*, 2 Connoly, 574 (decided in 1891),—where the cases of *Jesse* v. *Parker*, and *Upchurch* v. *Upchurch* were recognized and followed.

It is contended, however, that the doctrine laid down in the cases above cited only applies where the witness whose name is written by another is unable to write, and does not apply to the present case, where the testimony shows that the witness was able to write. We can see no reason whatever for such a limitation of the doctrine, especially where it appears that the witness was at the time temporarily incapacitated from writing. Indeed, in the case last cited (*Re Strong's Will*) the doctrine was applied where the witness was only temporarily incapacitated from writing "by reason of a felon on her hand." In a California case [96 Cal. 598]—*Re Guilfoyle's Will*,—which we find reported in 22 L. R. A. 370, with full and instructive *notes*,—we find the following language, which is very pertinent to the point: "Persons who know how to write may become physically incapable of writing their names by reason of rheumatism, or paralysis of the hands, and other causes besides general physical debility, though of sound mind; and it seems unreasonable that the legislature intended to exclude all such persons from the privilege of subscribing a will or other instrument by a mark. The language of the Code is, 'when the person cannot write.' This fairly includes all persons who are unable to write from any cause, even though they know how to write." In this case the judge of probate finds, as a matter of fact (and there is no exception to this finding), "that Mrs. Forsythe was aged and very nervous, and wrote with such difficulty that her almost universal custom was to have her daughter, Miss Forsythe, sign all papers for her, and do all her writing; and for this reason, and in accordance with this habit, she requested her daughter to sign her name to the will as a witness on this occasion." Accordingly the daughter did sign her name in her presence, and in the presence of the testatrix and the other subscribing witnesses; Mrs. Forsythe, as the testimony shows, leaning over her at the time, and thus practically participating in the physical act of signing, if that were necessary. The fact that Mrs. Forsythe was able to sign her own name to the affidavit which she made for proof of the will in common form cannot affect the question, for the obvious reason that such affidavit was made about eight years after the execution of the will,—long after she had been relieved from the causes which produced the extreme nervousness from which she was suffering at the time the will was executed. The circuit judge seems to have fallen into an error in supposing that the cases upon which we rely were based upon statutes differing from ours. An examination of those cases will show that the statutes there considered were substantially the same as ours, so far as the question here involved is concerned. So, too, his remark as to signing by proxy is misleading, for that implies that the agent or proxy signs in the absence of the principal, while here the conceded fact is that the name of Mrs. Forsythe was written by her daughter in her presence, and at her request.

The judgment of this court is that *the judgment of the Circuit Court be reversed*, and that the decree of the judge of probate be affirmed.

CALIFORNIA SUPREME COURT.

Lorraine W. DE LA MONTANYA, *Respt.*,
v.
James DE LA MONTANYA, Jr., *Appt.*

(.....Cal.....)

1. Constructive service of summons cannot give jurisdiction in a divorce suit to award alimony and the exclusive custody of the children where the defendant and the children are outside of the state and do not appear, even if their domicil is within the state.

2. A motion to vacate a judgment rendered without jurisdiction may be made without the defendant's submitting himself to the jurisdiction of the court or showing a meritorious defense, as required in cases under Code Civ. Proc. § 473.

3. An appeal from an order refusing to set aside a judgment rendered without jurisdiction will not be denied on the ground that the judgment was appealable.

(*McFarland and Van Fleet, JJ., and Beatty, Ch. J., dissent.*)

(March 24, 1896.)

APPEAL by defendant from an order denying his motion to vacate that portion of a judgment which had been entered against him in a divorce proceeding which granted the plaintiff alimony and the custody of the minor children. *Reversed.*

The facts are stated in the opinion.

Messrs. **Dorn & Dorn,** for appellant:

The judgment, in so far as it relates to any matter except the divorce, and so far as it relates to the custody of children and alimony, is void.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565; 5 Am. & Eng. Enc. Law, p. 751; *Gould* v. *Crow*, 57 Mo. 200; *Garner* v. *Garner*, 56 Md. 127; *Kline* v. *Kline*, 57 Iowa, 386, 42 Am. Rep. 49; Brown, Jurisdiction, § 79; Cooley, Const. Lim. *405; Freem. Judgm. § 584.

As soon as a citizen of the state crosses its border, intending not to return, its courts lose then their jurisdiction over his person, and cannot, by any subsequent service of process, acquire the power to render a judgment against him which will bind him personally in another state.

2 Freem. Judgm. 570; *Amsbaugh* v. *Exchange Bank*, 33 Kan. 100; *Mastin* v. *Gray*, 19 Kan. 458, 27 Am. Rep. 149.

No state has authority to invade the jurisdiction of another and by service of process compel parties there resident or being to submit their controversies to the judgments of its courts.

Cooley, Const. Lim. 403, 404; *Beard* v. *Beard*, 21 Ind. 321.

The modern view as to jurisdiction of courts under constructive service, indicated in the case of *Pennoyer* v. *Neff*, is applicable here.

Grover & B. Sewing Mach. Co. v. *Radcliffe*, 137 U. S. 287, 34 L. ed. 670.

The mere fact that it is alleged in the complaint, and found by the lower court, that plaintiff and defendant were at the time of the commencement of the action and at all times thereafter domiciled in the state of California, does not conclusively establish such fact.

10 Coke, 75.

The proceeding in the case at bar is a direct attack upon the judgment.

People v. *Mullan*, 65 Cal. 396; *People* v. *Greene*, 74 Cal. 400; *Reinhart* v. *Lugo*, 86 Cal. 395; Works, Jurisdiction, p. 119.

Where the jurisdiction of a court, no matter what the nature of its jurisdiction may be, is directly brought in question, its authority to act may be attacked and disproved, no matter what may appear on the face of its records.

Works, Jurisdiction, § 144, rule 6.

The jurisdiction of the court is not established by a mere assertion of jurisdiction in the judgment.

Sichler v. *Look*, 93 Cal. 600; *McKinlay* v. *Tuttle*, 42 Cal. 577; *Yolo County* v. *Knight*, 70 Cal. 436; *Lyons* v. *Roach*, 84 Cal. 30.

A domicil may be changed although the person on departure cherishes a secret purpose of returning at some indefinite time in the future.

Johnson v. *Smith*, 43 Mo. 499; *Stratton* v. *Brigham*, 2 Sneed, 420; *Harris* v. *Firth*, 4 Cranch, C. C. 710; *Hallet* v. *Bassett*, 100 Mass. 167; *Ringgold* v. *Barley*, 5 Md. 186 59 Am. Dec. 107, 111, note; *Atty. Gen.* v. *Pottinger*, 30 L. J. Exch. 284; *Mitchell* v. *United States*, 88 U. S. 21 Wall. 350, 22 L. ed. 584; *Merrill* v. *Morrissett*, 76 Ala. 433; *Whitney* v. *Sherborn*, 12 Allen, 111; Dicey, Domicil, 80; *Jennison* v. *Hapgood*, 10 Pick. 77.

If a person has actually removed to another place with an intention of remaining there for an indefinite time and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.

Story, Confl. L. § 46; *Re High*, 2 Dougl. (Mich.) 524; *State* v. *Frest*, 4 Harr. (Del.) 559; *State* v. *De Casinova*, 1 Tex. 407; *State* v. *Groome*, 10 Iowa, 309; *Frost* v. *Brisbin*, 19 Wend. 11, 32 Am. Dec. 423; *Bradstreet* v. *Bradstreet*, 7 Mackey, 229; Jacobs, Domicil, § 134.

Removal from the state for the sole purpose of escaping arrest is sufficient to give domicil in the new state if the change is in fact made with the intent to acquire a new residence, either permanent or of indefinite duration.

Young v. *Pollak*, 85 Ala. 439; *Greene* v. *Windham*, 13 Me. 225; *Eck* v. *Hoffman*, 55 Cal. 502.

A foreigner may establish a domicil in France without authorization.

Jacobs, Domicil, § 346; *Bremen* v. *Freeman*, Id. § 351, and note; *Harral* v. *Harral*, Freem. Domicil, § 356, and note.

Jurisdiction is not merely the power to preside in a cause and to render some judgment therein, but it also includes the power to render the particular judgment which was rendered.

Ex parte Lange, 85 U. S. 18 Wall. 163, 21 L.

NOTE.—As to the validity of personal judgments rendered upon constructive service of process, including cases as to alimony, see *note* to Moyer v. Bucks (Ind.) 16 L. R. A. 231.

ed. 872; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 316, 19 L. ed. 932.

Want of jurisdiction may be shown as to the subject-matter, the person, or, in proceedings *in rem*, as to the thing.

Thompson v. *Whitman*, 85 U. S. 18 Wall. 465, 21 L. ed. 900; *White* v. *White*, 7 Gill & J. 210; Freem. Judgm. 4th ed. § 570; *Seamster* v. *Blackstock*, 83 Va. 235; *Loaiza* v. *San Francisco City & County Super. Ct.* 85 Cal. 28, 9 L. R. A. 37; *United States* v. *Walker*, 109 U. S. 258, 27 L. ed. 927; *Re Yarbrough*, 110 U. S. 653, 28 L. ed. 274

Defendant was compelled to take an independent proceeding by which the facts in contradiction of the recitals of the record could be shown to the lower court, and could be brought to the attention of this court upon the appeal.

This court has entertained jurisdiction and has considered direct appeals from an order refusing a motion to set aside and vacate a judgment.

People v. *Thomas*, 101 Cal. 572; *People* v. *Blake*, 84 Cal. 611; *Sacramento County* v. *Central P. R. Co.* 61 Cal 251; *Malone* v. *Big Flat Gravel Min. Co.* 93 Cal. 391.

Upon an appeal from a final judgment an order made in the cause which is itself by statute made the subject of a distinct appeal cannot be reviewed.

McCourtney v. *Fortune*, 42 Cal 387; *Bailey* v. *Sloan*, 65 Cal. 388; *Jenness* v. *Bowen*, 77 Cal. 310; *McCormick* v. *Belvin*, 96 Cal. 183; *Hallock* v. *Jaudin*, 34 Cal. 172; *People* v. *Mullan*, 65 Cal. 396; *People* v. *Greene*, 74 Cal. 400; *Fairbanks* v. *Lamokin*, 99 Cal. 429.

Messrs. **Garber, Boalt & Bishop,** for respondent:

The judgment in question is conclusive on appellant notwithstanding the absence of himself and the children from the state.

A judgment *in personam* is valid though based on constructive service by publication only, when against parties domiciled within the state, though temporarily absent therefrom, and the service is according to the law of such state.

2 Black, Judgm. § 908; 2 Freem. Judgm. § 570; Cooley, Const. Lim. pp. 403, 404; Sedgw. Stat. & Const. L. 2d ed. 476, Pom. note; *Flint River S. B. Co.* v. *Foster*, 5 Ga. 194, 48 Am. Dec. 272; *Beard* v. *Beard*, 21 Ind. 321; *Burnam* v. *Com.* 1 Duv. 210; *Biesenthall* v. *Williams*, Id. 329, 85 Am. Dec. 629; *Cassidy* v. *Leitch*, 2 Abb. N. C. 315; *Huntley* v. *Baker*, 33 Hun, 578; *United States Trust Co.* v. *United States F. Ins. Co.* 18 N. Y. 200; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287, 34 L. ed. 670.

A removal to another country merely to bring or to avoid a divorce suit or the like, or for any other temporary purpose *sine animo manendi* but with a view to returning to the former place of abode after a longer or shorter sojourn abroad, works no change of the legal domicil of a party, especially of his domicil of origin.

Jacobs, Domicil, §§ 114, 115, 124, 151, 173, 181, 195, 286, 362, 449, 451; Story, Confl. L. §§ 41, 44, 46; Amos, Jurisp. 1st Eng. ed. p. 377; 2 Bishop, Mar. & Div. ed. 1891, §§ 102, 105; Wbart. Confl. L. § 228; Foote, Private International Jurisp. pp. 22, 31, 43; 1 Burge, Com. on Colonial & Foreign Laws, p. 40; 2 Black, Judgm. § 929; *State* v. *Fleak*, 54 Iowa, 429; *Neff* v. *Beauchamp*, 74 Iowa, 92; *Shannon* v. *Shannon*, 4 Allen, 134; *Leith* v. *Leith*, 39 N. H. 20; *Hood* v. *State*, 56 Ind 263, 26 Am. Rep. 21; *Hoffman* v. *Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *People* v. *Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea* v. *O'Dea*, 101 N. Y. 23; *Colburn* v. *Colburn*, 70 Mich. 647; *Still* v. *Woodville*, 38 Miss. 646; *Taylor* v. *Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Von Hoffman* v. *Ward*, 4 Redf. 244; *Lord* v. *Colvin*, 4 Drew. 366; *Pitt* v. *Pitt*, 4 Macq. H. L. Cas. 627.

A judgment *in rem* or quasi *in rem*, based solely on constructive service by publication, is valid and conclusive, not only upon the parties thereto, but upon all the world if the court has control of the *res*.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *La Fetra* v. *Gleason*, 101 Cal. 246.

A judgment in a divorce suit awarding the custody of minor children of the marriage to one of the parties is unquestionably, so far as it affects the custody of the children, a judgment *in rem*.

Re Newman's Estate, 75 Cal. 214; Bishop, Mar. & Div. ed. 1891, § 1189; *Wakefield* v. *Ives*, 35 Iowa, 238.

Even if a judgment between parents for the custody of their minor children were not *per se* a judgment *in rem* it certainly is so where, as here, it is coupled with a judgment for divorce between such parents.

Brenot v. *Brenot*, 102 Cal. 294.

Alimony is a mere incident or appendage of a divorce suit, the direct foundation whereof is the modification or destruction of the status of the marriage.

2 Bishop, Mar. & Div. ed. 1891, § 69.

A decree of divorce not allowing alimony is no bar to a subsequent petition for alimony for the reason that it is not "essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed."

Cox v. *Cox*, 19 Ohio St. 502, 2 Am. Rep. 415.

The presence of the children within the state was not necessary to give the court jurisdiction to adjudge the exclusive custody of them to the mother.

People, Allen, v. *Allen*, 40 Hun, 611; *Re Newman's Estate*, *supra*.

The children here were at all times domiciled in California and this was at the furtherest all that was necessary to sustain the judgment for their custody.

Jacobs, Domicil, § 229; Story, Confl. L. § 46.

Neither parent had the right of custody to the exclusion of the other.

Cal. Civ. Code, § 198.

The father's removal of the children to Paris, France, without the knowledge or consent of the mother, could not possibly effect a change of their previous domicil.

One not entitled to the custody of a child, even though he or she be its parent, cannot change its domicil, especially by a clandestine, fraudulent, or wrongful removal.

Jacobs, Domicil, §§ 242, 243; Foote, Private International Jurisp. 2d ed. pp. 22, 23; 4 Phillimore, International Law, 3d ed. pp. 58, 59 *Taylor* v. *Jeter*, 33 Ga. 195, 81 Am. Dec. 202

Johnson v. *Copeland*, 35 Ala. 521; *Re Afflick*, 3 MacArth. 95; *Hestand* v. *Kuns*, 8 Blackf. 347, 46 Am. Dec. 481; *Lacy* v. *Williams*, 27 Mo. 280; *Von Hoffman* v. *Ward*, 4 Redf. 244.

This motion is not maintainable because not made under Code Civ. Proc. § 473, and the judgment is not void on its face as to matters in question.

People v. *Greene*, 74 Cal. 400; *Moore* v. *Yolo County Super. Ct.* 86 Cal. 495; *Jacks* v. *Beldez*, 97 Cal. 91.

An appeal will not lie from an order refusing to vacate a judgment or order which is itself appealable.

Henly v. *Hastings*, 3 Cal. 341; *Eureka & T. R. Co.* v. *McGrath*, 74 Cal. 49; *Kubli* v. *Hawkett*, 89 Cal. 638; *Harper* v. *Hildreth*, 99 Cal. 265; *Sutton* v. *Symons*, 100 Cal. 576.

An appeal from an order refusing to modify such an appealable judgment or order cannot be maintained.

Swain v. *Burnette*, 89 Cal. 564.

An appeal will lie from a judgment by default, based on service by publication or otherwise, without any motion to set it aside or other proceeding against it in the court below.

Howard v. *Galloway*, 60 Cal. 10; *Sharp* v. *Daugney*, 33 Cal. 505; *Sichler* v. *Look*, 93 Cal. 600.

Appellant is precluded from questioning the jurisdiction of the court as to the custody of children and alimony, by admitting its jurisdiction as to the divorce.

1 Freem. Judgm. 4th ed. § 330; *Bouchaud* v. *Dias*, 3 Denio, 243; *Francis* v. *Wood*, 81 Ky. 16.

Temple, J., delivered the opinion of the court:

This is an action to obtain a divorce, in which the plaintiff also asked for the exclusive custody and control of two children, the issue of the marriage, and also for permanent alimony, as well as for a suitable allowance to enable her to prosecute this action. The defendant and the children, who were, of course, infants, were absent from the state when the suit was commenced, and have ever since remained absent. No personal service of the summons was had on the defendant, and he did not appear in the action. An attempt was made to serve the summons by publication. It is claimed that the service was void because not made as required by the laws of this state, but I shall assume that such attempt at a constructive service was in accordance with the statute in every respect. The defendant was born, and during his whole life had lived, in this state. He left the state on the 20th day of November, 1893, with two children of plaintiff and defendant, proceeding to New York, and on the 9th day of December, 1893, left New York for Paris, France, where he arrived with his children on the 19th day of December. January 4, 1894, he made application to the ministry of justice of France for express permission to be domiciled in France. Such permission was granted on the 14th day of July, 1894. Since December 19, 1893, defendant has resided in France with his children, and neither he nor either of the children have since been within the state. This suit was commenced two days after the departure of the defendant from the state, and it is claimed that defendant left the state and took the children for the express purpose of evading the jurisdiction of the courts of this state. As stated, the defendant did not appear in said action, and, the publication of summons having been made, in due time the default of the defendant was entered, and the court proceeded to hear the cause; and on the 16th day of May, 1894, judgment was rendered against defendant, wherein it was adjudged (1) that the marriage be dissolved; (2) that the exclusive custody, care, and control and education of the children be awarded to plaintiff; and (3) that plaintiff "shall have the right, at such time in the future as she shall be advised, to apply to the court for such suitable allowance and sum to be paid her by said defendant for her support during her life, and such further sums as may be necessary in order to enable her to make proper compensation to her attorneys and counsel in said action, and to enforce this decree and judgment. On the 7th day of September, 1894, on due notice, the defendant moved the court for an order (1) vacating the judgment in so far as the same relates to alimony, or any provision for the support of plaintiff, or for the support of the children of plaintiff and defendant; (2) vacating the judgment so far as it relates to the care, custody, and control of the children; (3) vacating the judgment so far as it relates to alimony, or allowance for the support of plaintiff or the children,—and for an order striking out from the judgment all the provisions relating to or providing for alimony, or support for the plaintiff or the minor children of plaintiff and defendant, or awarding or providing for the custody, care, or control of the said two minor children. The motion was based upon the claim that the court had no jurisdiction over the subject-matter of this action, in so far as it relates to the matters, subjects, and things hereinbefore specified, and had no jurisdiction or power or authority to make any order or judgment in relation to the subject-matters and things aforesaid, and had no jurisdiction over the person of the defendant sufficient to enable, authorize, or empower it to make any order, judgment, or provision in relation to said subject-matters and things, and that said defendant was at the time of the commencement of this action, and ever since has been, and now is, without the jurisdiction of the said court, and without the territorial limits of the state of California, and has never been served with process herein personally, and no service of process has been had herein to enable the court to make any order, judgment, or provision in regard to the subjects, matters, and things aforesaid, and that said infant children of plaintiff and defendant were not at the time of the commencement of this action, and never since have been, and are not now, within the state of California. In support of the motion, various affidavits were read, showing the above facts and others.

Appellant here bases his claim for reversal upon three grounds: First, that the proof of publication shows that constructive service has never been had according to the statutes of this state, and that, therefore, the judgment is wholly void; second, the defendant and children were at the time of the attempted service of summons domiciled in France, and

therefore the court had no jurisdiction to award the custody of the children to plaintiff, or to provide for alimony; and third, that the mere fact that the defendant and children were without the territorial limits of California when the action was commenced deprives the court of jurisdiction, even admitting that defendant and the children are domiciled in California, and the constructive service of summons was in all respects regular. Respondent admits the facts in regard to the departure of defendant from the state with the children, but claims that, as matter of law and fact, it appears that the domicil of the defendant and children is, and has always been in California; and she contends that, such being the case, the court acquired jurisdiction, not only to grant the divorce to her, but to enter a judgment *in personam* against the defendant, valid at least in California. She also contends that the judgment awarding to plaintiff the custody of the children is *in rem;* that it is valid, because it is a mere incident to the divorce; and that, upon a dissolution of the marriage, it was necessary to provide for the children. Furthermore, she insists that there is no judgment for alimony, or for an allowance of any kind.

Conceding that the defendant and the children are all domiciled in California, although in fact absent from the state at the time of the commencement of the action and since, and that the constructive service of summons was sufficient to give the court jurisdiction to grant the divorce, did the court have the power to award to plaintiff the exclusive custody of the children, and to allow alimony? I have concluded that it had no such power. Some cases are cited which seem to hold that a personal judgment obtained by constructive service of the summons is valid within the state, although the defendant may have been in fact absent from the state at the time of such service. As to most of these cases, it may be said that such statements are entirely *obiter*, the question before the court being as to the extraterritorial effect of such judgment. In such cases the argument is, in general, that, conceding the validity of the judgment within the state where rendered, another state will not recognize its validity, because it will not permit the process of another state to be served within its territory, so as to compel one resident there, or in fact being there, to answer a writ issued by the courts of such foreign state. It is a sort of an invasion of a state to serve a foreign writ there at all. The logic would require the courts to go further, and hold that such judgment is wholly void. Constructive service upon a party who is within the state does not raise the question. The question there is simply whether a defendant had such reasonable opportunity to be heard as will constitute due process. The leading case upon subjects of this character is *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565. Counsel for respondent contends that it is not there held that jurisdiction to enter a personal judgment cannot be obtained over one domiciled in the state by constructive service, when such defendant is absent from the state at the time of the attempted service, but only that such service is not good against a defendant who is not only without the state, but is actually domiciled elsewhere. Domicil has never, so far as I am aware, been made the test of jurisdiction to render a personal judgment. The question there is always whether there has been due process,—whether the defendant has had a reasonable opportunity to be heard. Substituted service may be valid upon those within the state when the same service would be void as to those without the state. As to those within the state, the question would be whether it has afforded a defendant a reasonable opportunity to be heard. But the process cannot go beyond the state, and compel any person in another state to resort to the state where the action is pending, there to make his defense. No service will be recognized, made there, whether actual or constructive. It is as much an invasion of a foreign jurisdiction to serve a citizen of the state in which the action was brought, temporarily resident there, as it would be to summon from its borders a citizen of such foreign state. If such things could be done, who would determine where the domicil of a particular person really was? Domicil often depends upon secret intention. It would be a most unsatisfactory test. I am aware that it is often said by courts and law writers that domicil is the test of jurisdiction in divorce. This doctrine was built up mainly, if not entirely, to prevent parties really residing in a state from going to another for the purpose of getting a divorce. So far, its effect has been beneficent; but it is obvious, after all, that what in these cases is called domicil is not domicil. As between states, it would be no test at all, unless it is domicil as defined in international law. To concede that each state may give a different definition, or to speak of domicil for the purposes of divorce, as is often done, is to concede that the test is not domicil. These writers and the courts say the test is "actual, bona fide domicil." Since every person always has a domicil, and can have but one, how does "actual and bona fide domicil" differ from "domicil?" It is meant, I presume that domicil and actual residence must coincide. Where, then, is the jurisdiction in those cases where they do not? One may be domiciled in California who never was within the state, and never had thought of going there. Or he may be domiciled therein years after he has left without the intention of returning. Persons have in California exercised for years all the rights of citizens, and even held high office, who according to Phillimore, Jacobs, Dicey, and other writers on the law of domicil, never had a domicil here, because they at all times had a fixed and definite intention of returning to their domicil of origin. Had the wife of such a person obtained a divorce while he was here exercising the rights of a citizen of the state, would the courts of any state declare such a decree void upon proof of the existence of such intention? If, not, then domicil is not the test of jurisdiction, even as to the status of the litigants, and certainly not in personal actions. Jurisdiction is derived from the Constitution and laws creating the court, and I know of no limitation in the Constitution of the United States upon the power of a state to give to its courts jurisdiction over all persons found within its borders. Certainly it has not imposed any such limitation as the test of domicil. Domi-

cil is the test of personal rights in regard to inheritance, but, unless made so by local law, is not important as affecting the relation of the individual to the government. The relation of the individual to the government depends upon actual presence within the territorial limits of a country, and upon citizenship or allegiance.

But I cannot understand *Pennoyer* v. *Neff* as counsel do. It is true that, in the case in which the judgment there under consideration was rendered, the defendant was said to have been a nonresident, and presumably was domiciled abroad, but that circumstance seems to have been treated as one immaterial in the discussion. The judgment there was personal, and jurisdiction was obtained, if at all, by constructive service of summons. I use the term "constructive service" for convenience, although it does not constitute service at all when the defendant is without the state. No property has been attached. The conclusion is based upon a proposition of international law laid down at the outset: "No state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L. chap. 2; Wheaton, International Law, pt. 2, chap. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject persons or property to its decisions." The idea seems to be that the state has no jurisdiction over either persons or property not within its territory and that to allow it to summon one from another state is an encroachment upon the independence of such state. The judge then cites the case of *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931. In that case Justice Miller was considering a judgment obtained by W. G. Brownlow against Reynolds and others for false imprisonment. Brownlow made affidavit to the effect that the defendants had fled from the state, or so absconded or concealed themselves that the ordinary process of law could not reach them. Thereupon, under the statutes of Tennessee, the plaintiff caused an attachment to be issued, and due publication to be made. Default was entered, and a judgment, personal in form, against defendants. The land attached was sold, and the case before the court was ejectment, brought by the original owner against the purchaser under the judgment, who had taken possession. The question was as to the validity and effect of the judgment. The court proceeded to state that the proceeding, in case the defendant did not appear, was strictly *in rem;* that if he appeared, it then became *in personam.* It was there said: "That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit." After making a quotation which includes the above, Judge Field proceeds: "The fact that the defendants in that case had fled from the state, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not nonresidents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance." The judge then proceeds to add that to the doctrine stated in the citation all the judges of the court agree. I understand this to be a deliberate statement to the effect that domicil and residence, or both, are immaterial, as, indeed, they must be, if, as appears all through the opinion, the basis of the doctrine is that process cannot run beyond the limits of the state. I might make further quotations from this opinion, but it is too familiar to the profession to require it. An impartial consideration of the opinion will, I think, convince any one that it holds that process cannot be served upon anyone without the state. And the same doctrine is announced in *Galpin* v. *Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959, where it is said: Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process,—that he never appeared in the action,—the presumption of jurisdiction over his person ceases." From this, and other like expressions in other cases, it is manifest that domicil or even residence in a state cuts no figure at all. The idea that domicil determines jurisdiction in divorce rests upon the assumption that status depends upon domicil, and is of interest there only. Judge Field could not have had this in mind in *Pennoyer* v. *Neff*, and, therefore, when he speaks of "absent defendants," he cannot mean those not domiciled within the state, but must have meant simply those physically absent, and upon whom, therefore, personal service of process could not be made. But it is claimed that the doctrine of *Pennoyer* v. *Neff* was explained in *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287, 34 L. ed. 670, in accordance with the views of respondent. I cannot find anything in that case upon the subject. The judgment there under consideration was a judgment by confession entered by a prothonotary in a court of Pennsylvania, in pursuance, as it was claimed, of a bond and warrant of attorney executed by John Benge, who was then a resident and citizen of Maryland. The warrant of attorney authorized any attorney of any court of record to confess judgment against him. The statute of Pennsylvania authorized the prothonotary of any

court of record in the state to enter judgment upon such an instrument. An attempt was made to execute this judgment in Maryland. It was claimed that the judgment was void, not being entered in pursuance of the power, and that defendant not having been served with process, and not having appeared, the judgment was without jurisdiction and void. The numerous cases cited by the chief justice were used to show that such a judgment would be held invalid without the state where rendered, and not to show that it should be held valid within the state; and I think the question whether such a judgment would be valid within the state where rendered was not before the court in any of the cited cases. But, in discussing the question as to whether the judgment would be valid in another state, it was assumed that it might be valid within the state where rendered. That was the very question in *Pennoyer* v. *Neff*. A personal judgment upon constructive service had been rendered against a nonresident, and property in Oregon sold under execution to satisfy it. The question was as to the validity of the judgment within the state where rendered.

It is contended also by the respondent that the decree is valid as to children and alimony, although the service was constructive, and the court could not render a personal judgment because these are incidents to the divorce. Conceding that they are incidents to the cause of action for a divorce, the result would not follow. In proceedings *in rem*, where there is no jurisdiction of the person, no such result has ever been recognized. In *Cooper* v. *Reynolds*, *supra*, it was said that costs cannot be recovered from any other property of defendant. There is, in reality, no defendant save the *res*. So here it cannot properly be said there was a defendant. In the proceeding the court had before it only the status of the plaintiff. The summons was not really a writ to bring the defendant into court, but merely a notice prescribed by the statute in the interest of fairness, and to rebut the idea that the proceeding was secret. 2 Bishop, Mar. & Div. § 159. It brought the *res* into court, and not the defendant. The adjudication must be confined to that status. It is said that the relation of the parents to the children, and their relation to each other in regard to the children, is a status If so, it would not help the respondent, for no such status was before the court. But the very meaning of the word "status," both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. "Status" implies relations, undoubtedly, but it is not a mere relation. But the authorities are all one way on the subject. If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of them. It is a mode of appointing a guardian, which is always a matter of local control, regardless of the legal domicil of the children, if domicil and residence do not coincide. It seems to have been held that, when the defendant appears and makes issue upon the point, the court may determine that one spouse is a suitable person to have the custody and control of the children, and that the other is not. *People*, *Allen*, v. *Allen*, 40 Hun, 611. An appeal was taken from the order made in that case, which was a proceeding in habeas corpus, to the court of appeals. There the appeal was discharged because it appeared that the lower court, "in view of all the existing facts relating to the welfare and interests of the infants, exercised its discretion in awarding to the mother the custody of the children, and, in so doing, it gave to the Illinois decree, not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it." This seems to hold that, without the state, such a finding would have no binding force. But, where, as in this case, no personal judgment could be entered, there can be no question. Van Vleet, Collateral Attack, §§ 389, 391, and authorities cited. And Judge Cooley, in his Constitutional Limitations, 6th ed. p. 499, says: "The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicil in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there. But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. . . . The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the state." See also Freem. Judgm. §§ 584, 585; Brown, Jur. §§ 6, 8, 78, 79. The doctrine is very clearly stated in *Woodworth* v. *Spring*, 4 Allen, 321: "Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government."

Respondent contends that there is no judgment for alimony. If so, it is not apparent how plaintiff would be injured by striking from the decree the clause complained of. I think the decree, if valid, settles the right of plaintiff to alimony for her support during life, and, as the court had no jurisdiction to provide for alimony, that part of the decree should be stricken out.

Respondent contends that a motion to vacate the judgment in this case could only be maintained under § 473 of the Code of Civil Pro-

cedure. The point of the contention, as I understand it, is that defendant should come in and submit himself to the jurisdiction of the court, show a meritorious defense, and ask leave to have his defense considered. It is obvious, of course, that defendant cannot do this; for he cannot show that the judgment was taken against him by his inadvertence, mistake, or excusable neglect. The argument, therefore, is that no such motion will lie. No authority for such a proposition is cited, unless *Jacks* v. *Baldez*, 97 Cal. 91, may be claimed to have that effect. In that case, however, the motion was to vacate a judgment rendered because a demurrer was sustained to a complaint, and the plaintiff failed to amend within the time allowed. The motion was made eleven months after the entry of judgment. Plaintiff was not notified, as the Code requires, of the order sustaining the demurrer. If this case is not put upon the ground that the failure to give the notice was not jurisdictional, I think it was overruled by *Norton* v. *Atchison, T. & S. F. R. Co.* 97 Cal. 388, and 394. It was, however, but a default, and the parties were in court. A plaintiff who for six months should fail to know what had become of a demurrer which had been submitted for decision would be guilty of great negligence. The remedy offered by § 473 was ample. The case of *Norton* v. *Atchison, T. & S. F. R. Co.* seems in point here.

It is also claimed that no appeal lies to this court from an order refusing to set aside the judgment, because the judgment was appealable. To this proposition many decisions of this court are cited. I do not care to review these cases. No doubt it has been held—and, I think correctly—that, when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable,—not because the last order is not within the terms of § 963 of the Code, allowing appeals, for it may be, but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing, contrary to the intent of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment roll would not present all the facts upon which the motion is based, even if one may have a bill of exceptions when he has not been in court and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not have been asked in any other mode. The defendant was not in court, and had no opportunity to be heard.

The order is reversed, and the cause remanded, with directions to the court to grant appellant's motion.

We concur: **Harrison**, J.; **Garoutte**, J.; **Henshaw**, J.

McFarland, J.:

I dissent. This is an action of divorce, and the present appeal is by defendant from an order of the superior court denying his motion to strike from the judgment rendered in favor of plaintiff all the provisions thereof relating to the custody of the minor children of the parties, and to support by way of alimony. The facts of the case are these: The respondent and appellant were both born in, and are citizens of, the state of California. They were married and their children were born, in this state, and they have been continuously domiciled, and resident here. The parties have two children,—a girl named Lorraine, about five years old at the commencement of this action, and a boy named James Francis, about two years old at that time. This action was commenced December 20, 1893. About three weeks before that time, appellant, by force and fraud, took the child James Francis away from respondent, and, on the following day, took and carried away both of said children, and kept them secreted from respondent, and has never since let her see them; and, a short time before the commencement of this action, he clandestinely left the state of California, and took said children with him; and about November 27, 1893, he clandestinely left the United States, taking said children with him, and since then has temporarily sojourned in the city of Paris, in France. In January, 1894, he made application to the proper authorities of France for permission to be domiciled there; and it is admitted by respondent that he obtained such permission in July, 1894. But it appears by the preponderance of evidence that he claimed his legal residence and domicil to be in the city of San Francisco, Cal.; that "his purpose in applying for permission to fix his domicil in France was to prevent his wife from serving summons on him in an action for divorce which she had commenced, and also to keep her from getting possession of the children;" that his sojourning in France was only temporary, for the purposes above mentioned; and that his intention was and is to return to California, where all his interests are, as soon as these purposes shall be subserved. Service of summons was duly made upon him by publication, and sending him a copy of complaint and summons to Paris, France, in accordance with the provisions of the statute of California on that subject; and, default having been regularly entered against him, judgment, after the introduction of evidence, was duly entered in favor of respondent. By said judgment (1) a divorce was granted respondent upon the grounds of adultery and extreme cruelty of appellant; (2) the custody of the said two children was given to respondent; and (3) it was further ordered that respondent "shall have the right, at such time in the future as she shall be advised, to apply to the court for suitable allowance and sum to be paid to her by said defendant for her support during life," etc., as she may be entitled to under her complaint. The motion made by appellant, from the refusal of which this appeal is taken, was to strike out the said second and third parts of said judgment, upon the ground that the said service of summons did not give the court jurisdiction over the matters embraced in those parts of the judgment.

Waiving the objection of respondent that said motion was not a proper remedy under our system of practice, it is apparent that the motion could be granted only upon the theory that the judgment, so far as it embraces the parts sought to be stricken out, is void; absolutely void; void in the state where it was rendered. And a court should certainly not judicially declare such utter inefficiency of a sovereign state to deal with the property and personal rights of its own citizens, unless it be driven to such declaration by the force of inevitable judicial authority. I do not think that there is such authority. The case chiefly relied on is *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565, which is declared by counsel for appellant, and by others, to have established what is called the "modern" doctrine in regard to the jurisdiction of state courts over persons not personally served with process within the state. A close examination of that case shows, however, that the main proposition decided by it—which may, perhaps, be styled "modern"—is that a judgment *in personam* rendered in a state court against a nonresident upon substituted service cannot be enforced even in the state where it was rendered, or satisfied even out of property situated within the state where it was rendered, while, before that, the weight of authority was that, although the courts of another state would not recognize such a judgment, it was valid in the state where it was rendered, and could be satisfied out of property of the defendant situated within that state. This is evidently the view of that case taken by Mr. Freeman, for in his work on Judgments (§ 567) he says: "Until a comparatively recent date, the opinion extensively prevailed that judgments *in personam* entered after constructive service of process upon a nonresident, while they were not enforceable beyond the limits of the state where entered, were nevertheless so far valid in that state, as to support a sale of the debtor's property situate therein. This opinion has been overthrown by the Supreme Court of the United States in the case of *Pennoyer* v. *Neff*, *supra*. Many of the authorities which show that such was the former doctrine may be found in the cases cited in the briefs, and in the opinion of the court in *Weaver* v. *Boggs*, 38 Md. 255. In that case the court states the rule in this language: "It is well settled that a judgment obtained in a court of one state cannot be enforced in the courts and against a citizen of another unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit, and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there, even against the property, effects, and credits of a nonresident defendant there situated, but it cannot be enforced or made the foundation of an action in another state. A law which substitutes constructive for actual notice *is binding upon persons domiciled within the state where such law prevails, and as respects the property of others there situated*, but can bind neither person nor property beyond its limits." (The italics are ours.) And in *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287, 34 L. ed. 670, the Supreme Court of the United States, speaking of the states of Pennsylvania and Maryland, says: "And the distinction between the validity of a judgment rendered in one state, under its local laws upon the subject, and its validity in another state, is recognized by the highest tribunals of each of these states."

But whether or not the state of the law on the question determined by *Pennoyer* v. *Neff* was the same before as after that decision it is apparent that *Pennoyer* v. *Neff* did not determine the question involved in the case at bar. There Neff was a bona fide, actual nonresident. The facts of that case were that one Mitchell recovered in a state court of Oregon a personal judgment for professional services against Neff, who was a nonresident of that state, and resided in the state of California; that the service of summons upon Neff was by publication; that on a common execution issued upon that judgment, certain land of Neff, situated in Oregon, was sold to Pennoyer; and that Neff brought an action against Pennoyer to recover said land, and recovered upon the ground that the judgment was not valid, even in Oregon, and could not be satisfied out of land in Oregon, because substituted service would not support a judgment against a nonresident. There was no claim that the defendant had either residence or domicil in Oregon. In that case the fact was that Neff was, in every sense, a nonresident of Oregon, having his domicil and citizenship elsewhere; and the scope of judicial decision is limited by the facts upon which it is based. In the second place, however difficult it may be to accurately define "residence," in its legal signification, and to distinguish it from "domicil," it is apparent that in the opinion in *Pennoyer* v. *Neff* the word "nonresident" is used as expressing the fact of an actual, bona fide residence outside of the state where the judgment is rendered,—such a residence as usually accompanies domicil, and not a mere temporary flight from one's home, *in fraudem legis*. Indeed, throughout the opinion the words "residence" and "domicil" are used indiscriminately, and as synonymous. There was no necessity in that case to notice any distinction, if there be any, between the words; for Neff was a nonresident, in every sense, either of residence or domicil, and the opinion is to be taken as written in view of that fact. For instance, it is said in the opinion that "the plaintiff here was a nonresident of the state;" again, it is said that there cannot be an encroachment upon the independence of the state "in which the persons are domiciled;" again, it is said that "the state, through its tribunals, may compel persons domiciled within its limits to execute," etc.; again, it is said that property within a state, owned by "nonresidents," may be subjected to certain processes, and that this "in no respect infringes upon the sovereignty of the state where the owners are domiciled;" again, "process from tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them;" and finally the court, in the last sentence of its opinion, says: "The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service

of process upon him, or his appearance therein." And as, in the case at bar, the appellant was neither a nonresident of the state where the judgment was rendered nor domiciled elsewhere, as was the plaintiff in *Pennoyer* v. *Neff*, the latter case cannot be relied on as imperative authority for holding that the power of the state of California to control and preserve, through her tribunals, the personal and property rights of her own citizens, can be evaded by flight perpetrated for that express purpose. As to the reasons sometimes given for an opposite rule, how can the dangers of judgments upon substituted service against persons who might not have seen the publication be marshaled in aid of a party who, knowing of the coming suit, flees to avoid it? In *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931, no question was raised as to the validity of the asserted nonresidence of Reynolds.

That the laws of a sovereign are binding upon all its citizens domiciled within its borders, whether temporarily absent or not, seems to be the clear result of the authorities. "The laws of a sovereign rightfully extend over persons who are domiciled within his terrritory." Story, Confl. L. § 539. Freeman—although he also includes the extraterritorial effect of a judgment, which does not concern us here—sums up the result of the authorities as follows [§ 570]: "The position, however, which seems to be best sustained, both by reason and by precedents, is, that each state has the authority to provide the means by which its own citizens may be brought before its courts; that the courts of other states have no authority to disregard the means thus provided; and finally, that every judgment or decree obtained in a state against some of its citizens, by virtue of a lawful, though constructive, service of process, should be as obligatory upon such citizen in every other state as it is in the state whence it is taken. Nor is it destructive of the extraterritorial effect of a judgment based on constructive service, that the defendant, being a citizen of the state, was temporarily absent therefrom. It is sufficient that he was, at the time, subject to the laws of the state and to the territorial authority of the court." There are numerous judicial decisions to the same point, one or two of which we will notice: In *Henderson* v. *Staniford*, 105 Mass. 504, 7 Am. Rep. 551, the court says: "The defendant was not in California when the action was commenced against him there; nor at any time during its pendency. No service of process or notice was ever made upon him personally. He did not appear by counsel, or otherwise, nor assent to the judgment, which was rendered upon his default of appearance. But he had been for a long time before that, a citizen of California; the contract was made there; and that continued to be his legal domicil when the judgment was rendered. He was therefore, upon principles of international right, subject to the laws and to the jurisdiction of the courts of that state." In *Welch* v. *Sykes*, 8 Ill. 201, 44 Am. Dec. 689, the supreme court of Illinois declared that "it is competent for each state to prescribe the mode of bringing parties before its courts," and that, "although its regulations in this respect can have no extraterritorial operation, they are nevertheless binding on its own citizens." In *Beard* v. *Beard*, 21 Ind. 321, the question is quite exhaustively considered, and many authorities examined, and the general conclusion is that "notwithstanding a state may authorize its courts to render personal judgment, upon constructive notice, against its citizens, it cannot, as we think, authorize such a judgment, upon such notice, against a citizen of another state, resident in such other state." But the statute there did not provide for service by publication, and the court says: "In such a case (that is, of temporary absence of a resident of the state), notice must be given by leaving a copy of process at his last place of residence. In *Burnam* v. *Com.* 1 Duv. 211, the court of appeals of Kentucky, considering a statute which provided for substituted service, said: "We cannot adjudge any provision in the act to be unconstitutional. As in other cases, when actual notice cannot be given to absent defendants, there must either be no remedy, or constructive notice must be substituted as sufficient; and what constructive notice shall be given is a question of legislative discretion rather than a power." In that case the defendants were presumably citizens and residents of the state, although temporarily absent. In *Huntley* v. *Baker*, 33 Hun, 578, the action was upon a money judgment rendered against the defendant in the state of Wisconsin, upon substituted service, when the defendant, who had lived for a long time in Wisconsin, was absent from that state, and in fact he never returned to it. The court, after referring to the doctrine that there is generally no extraterritorial jurisdiction, says: "But it has been repeatedly held in England that this doctrine is not applicable when the person so sought to be charged by judgment is a subject or citizen of the country where and at the time the proceedings are taken, and when they are in conformity to the statute there, although the person be then absent from the country, and that is put upon the ground that the person domiciled there owes allegiance to the country, and submission to its laws." It is then stated that there are not many reported cases on the point in this country, but reference is made to cases in the United States Supreme Court, and in the court of appeals of New York where the English cases are cited with approval. The court then says: "Without stating the principle more at length, it may be assumed that by reason of the relation between the state and its citizen, which affords protection to him and his property, and imposes upon him duties as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the state, prescribing a method of service which is not personal, and which in fact may not become actual notice to him. And this may be accomplished in his lawful absence from the state." The court then states that it is not necessary to consider the distinction between domicil and residence, but that such question was "one of fact dependent upon all the circumstances appearing by and inferable from the testimony, to which it is unnecessary here to refer in detail," which justified the referee to conclude that the domicil or residence of the defendant had not

been changed. And the evidence in that case was vastly stronger in favor of a permanent change of residence and domicil than in the case at bar. There are many other authorities to the same point, but we will only refer, in addition to those above cited, to Black on Judgments, § 907, and the numerous cases cited and quoted from in the notes to *Flint River S. B. Co.* v. *Foster*, to be found in 48 Am. Dec. commencing at page 274.

In nearly all the cases on the subject the words "resident," "domicil," "citizen," and "inhabitant" are used indiscriminately to signify an actual, permanent residence, which has not been actually and in good faith changed; and "nonresident" is applied to one who is not such a citizen, inhabitant, or resident of, and has not such domicil within, the state in which the judgment is rendered. We are not concerned here with the question how far full faith and credit should be given to the judgment in another state, but only with the question, is it void in this state? As the appellant was not a nonresident, the case does not fall within the decision in *Pennoyer* v. *Neff*, and under the general authorities the judgment is valid in the state in which it was rendered. All that is necessary to be determined in this case is that a citizen and resident of California cannot escape the performance of his duties, and baffle our courts in their attempts to enforce the rights of others against him, by sudden flight and temporary absence, expressly intended for that purpose. Every rule of law, and every sentiment of justice, is an obstruction to the success of such strategy. Nor will the affirmance of the order appealed from be violative of either the general international law, or the American interstate law. A sovereign state might be justified in refusing to enforce within its own territory, and against one of its own citizens, a judgment rendered in another state upon substituted service; but neither its interest nor its dignity would be touched by the enforcement of such a judgment by another state within its territory, and against its own citizens.

We cannot see merit in the point made by appellant that the substituted service was not sufficiently in compliance with the statute of this state which provides for it. The main contention is that the statement in the affidavit for publication, that the defendant "has departed from the state of California, and is now absent therefrom," is of a mere conclusion, and not of a fact; but it would be difficult to suggest any other language that would express the facts of departure and absence with more clearness and certainty. The fact that a few of those words are used in the statute does not prevent their use in an affidavit, if they are apt words to express the meaning of the affiant.

Respondent contends, also, that the order appealed from should be affirmed upon the further grounds that those parts of the judgment which relate to the custody of the children and alimony are mere incidents to the divorce, and that the jurisdiction to grant the divorce, which is admitted on all hands, carries with it the jurisdiction of the incidents, and, furthermore, that the relation of children to parents is a status like that of marriage, and that, therefore, an action to determine the custody of children, like a suit for divorce, is in the nature of a proceeding *in rem*. But it is unnecessary to discuss these points at length, because the views heretofore expressed would be determinative of the case in favor of respondent upon another ground. We may say, however, that, so far as the custody of the children is concerned, this second contention of respondent seems to be correct. The judgment merely determines generally the custody of the children, and whether it could be enforced in another state or country is not here involved. It is settled law that a decree of divorce operates upon the relation, the status, and that, therefore, such a decree founded upon constructive service by publication is valid, even as against one resident and domiciled beyond the state. See cases cited on pages 273, 274, 48 Am. Dec. A judgment for divorce is quasi, at least, *in rem*. Judgments *in rem*, it is well known, are not, as the name implies, confined to adjudications against things. They are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages. Freem. Judgm. § 606. In *Pennoyer* v. *Neff*, 95 U. S. 734, 735, 24 L. ed. 572, 573, it is said: "The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory." Now, is not the relation between parent and child a "civil status?" It is so assumed to be in Cooley, Const. Lim. 6th ed. p. 499. In Bishop, Mar. Div. & Sep. § 1189, it is said that "the relation of parent and child is a status, . . . like marriage." And in *Re Newman's Estate*, 75 Cal. 213, the court said: "So far as the action of *Maldonado* v. *Maldonado* affected the status of the parties and the custody of the child, it was a proceeding *in rem*, and service by publication in such case is good." See also *Wakefield* v. *Ives*, 35 Iowa, 238, and *People, Allen*, v. *Allen*, 40 Hun, 611. In *Brenot* v. *Brenot*, 102 Cal. 294, it was held that in an action for divorce the custody of the children was an incident in the main relief sought,—the divorce. See also *Younger* v. *Younger*, 106 Cal. 377.

Upon these authorities, and upon principle, we think that, in an action brought for both divorce and the custody of the children, the latter is an incident of the former, and that the court has jurisdiction over the status founded on the relation of parent and child, as well as of the status founded on the relation of husband and wife, even as against a bona fide nonresident domiciled elsewhere. And in such a case the actual physical presence of the children is no more necessary for jurisdiction over the status in the one instance than is the presence of the husband necessary in the other. It is not necessary to determine whether or not jurisdiction to decree alimony would follow as an incident to the divorce. It is doubtful if the judgment in this case really awards any alimony, but, if it does, its validity in that respect has sufficient basis in the proposition first discussed in this opinion.

With respect to the statement of facts hereinbefore made, it is proper to observe that where, as in this case, the appeal is from a

mere order of the court below granting or denying a motion, and where findings are not necessary, this court will assume the existence of such facts necessary to support the ruling of the lower court as fairly appear from the evidence. Here the preponderance of the evidence is largely in support of the facts above stated. Indeed, the fact that appellant fled the state, and clandestinely carried away the children, to avoid the action, is too apparent to be even debatable. The order appealed from should be affirmed.

We concur: **Beatty**, Ch. J., and **Van Fleet**, J.

MICHIGAN SUPREME COURT.

John M. FUCHS *et al.*, *Appts.*,
v.
Herman MEISEL *et al.*

(102 Mich. 357.)

1. **The presiding elder of the district** entitled to the use of the church for holding quarterly conferences, the regular appointed pastor, entitled to the use of the parsonage and to hold religious services in the church, and the members of the congregation, entitled to use the church as a place of worship, may lawfully join in a suit to prevent the unlawful withholding of the church from them.
2. **A bill is not multifarious** which seeks to recover the use of a church building, because in it are united the claims of a presiding elder, entitled to use the church for holding quarterly conferences, of the pastor, entitled to hold religious services therein, and of members of the congregation, entitled to worship therein.
3. **Actual absence of incorporation is not cured** by a statute which provides that whenever a religious society shall have exercised the franchises and privileges of a corporation for ten successive years it shall be presumed to have been legally organized according to law.
4. **That no trust or title in or to property ever vested in the general denomination** is not a sufficient answer to a bill by individuals to establish a right to the use of the property under the discipline and usages of the church to which it was conveyed.
5. **Courts are not deprived of jurisdiction** to enforce rights in the property of a voluntary religious association which have been established by a conclusive ecclesiastical decree, where there is no other remedy, by a statute providing that no order of any ecclesiastical body or any custom or usage of any religious order shall hereafter be recognized or enforced in this state so far as it shall relate to the acquisition, tenure, control, or disposition of any real estate or interest therein.
6. **The trustees and a majority of the**

NOTE.—*Power of local church society to withdraw from the general body of a church.*

Of course, in this country there is nothing to prevent individuals or congregations from withdrawing from denominational ties at pleasure. The only question that can arise is as to their right to take the church property with them.

There are few decisions involving this question simply as it is stated above. There are some cases in which the rights of independent churches have been considered, and more in which the rights of majority and minority members have been involved, but in few cases has the entire body of the local church attempted a separation from the denomination.

Independent congregations.

In cases of independent congregations, in the absence of anything to control the action in the title deed of the church property, it seems that they may make and break connections with other churches and with denominations at will.

A Congregational church has power by a majority vote to change religious views or form of church government at pleasure. Wiswell v. First Cong. Church, 14 Ohio St. 31.

An incorporated Protestant church which is in itself independent of a higher authority may by means of a majority vote change its creed or form of government without any power of the minority to interfere. Keyser v. Stansifer, 6 Ohio, 363.

In Trinitarian Cong. Soc. v. Union Cong. Soc. 61 N. H. 384, the court, in speaking of a Congregational church, says as there is no law requiring a church to be connected with a religious society it may exist without such connection. Its relations are such as it chooses.

If the congregation is an independent one and connects itself with a synod so as to form a confederation of self-governing churches its withdrawal therefrom cannot be considered as a withdrawal from the church body so as to constitute a perversion of the trust. Fadness v. Braunborg, 73 Wis. 257.

If the church is independent in its relations it may change its affiliations, although it has been in the habit of sending delegates to a particular synod. Landis's Appeal, 102 Pa. 467.

But in case of a schism and withdrawal of part of the members of a congregation the remainder will have a right to the church property. Craigdallie v. Aikman, 2 Bligh, 529.

And it has been held that the majority of the members of a Baptist church, although it is independent in government, have no power to divert the church property to the propogation of doctrines contrary to Baptist articles of faith and church covenants; and on attempting to do so, they may be enjoined from interfering with the proper use and control of the property by the minority. Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 13 L. R. A. 198.

Rights of majority and minority.

Many cases of attempted withdrawals have been decided upon the general rule governing the rights of majority and minority members of a divided congregation. Authorities upon that question are collected in a *note* to Mt. Zion Baptist Church v. Whitmore (Iowa) 13 L. R. A. 198. In this note only those are gathered in which an attempt was made to withdraw from denominational ties.

An organized church cannot be devested of its property by the majority of the members who enter a new organization and adopt the name of the old church, if the original organization still exists. Venable v. Coffman, 2 W. Va. 310.

The majority cannot change the relations of the church. Reeves v. Walker, 8 Baxt. 277.

32 L. R. A.

See also 32 L. R. A. 838; 34 L. R. A. 169.

members of a religious association which voluntarily connected itself with a particular denomination and acquired property in such connection, cannot withdraw such property from its connection with the denomination against the protest of the minority nor prevent its use by persons remaining in the denomination and representing its regular organization.

(November 7, 1894.)

APPEAL by plaintiffs from a decree of the Circuit Court for Bay County in favor of defendants in an action brought to enforce rights in certain church property. *Reversed.*

Statement by **Grant, J.**:

The bill in this case contains, in substance, the following averments:

The Evangelical Association of North America is a religious denomination organized about 1800, under the "connectional" or "associated" form of church government, founded upon that of the Methodist Episcopal Church, and having a system of graded, executive, legislative, and judicial ecclesiastical bodies and officers, and a code of rules known as the "Discipline." The territory covered by said denomination is divided into "Annual Conference Districts," in each of which is held a yearly meeting of the preachers of the denomination located within such district. Every preacher who holds a pastorate within the district must attend every session of his conference. For certain purposes of local administration, each annual conference exercises jurisdiction over all its own members, and over the congregations within its limits. By the general conference held every four years, bishops are elected for a term of four years. It is the special duty of a bishop to preside over the annual conferences, and, with the aid of the presiding elders thereof, to appoint at the conference session the preachers to their respective pastoral charges for the ensuing year, "the same being the only recognized method of appointing ministers in use in said denomination since its origin. Neither the lay members of the several congregations, nor the trustees thereof, according to the discipline of said denomination, have any voice or vote in the selection of their pastors, nor any power to reject a pastor who has been appointed in the manner aforesaid." The Michigan annual conference of this denomination has been in existence over sixteen years, and has always embraced within its limits all the preachers, members, and congregations of the denomination in Bay county, Mich. Each annual conference elects presiding elders, for service within its own bounds, and for terms of office not exceeding four years. Each year the conference assigns to each presiding elder a certain district within its territory for supervision. Under the discipline, a presiding elder is required to superintend the spiritual and temporal affairs of the denomination within his district, to enforce all disciplinary provisions, to hold services, and otherwise to officiate in the various houses of worship in his district, and once in every three months to call and preside over a quarterly conference, held in the house of worship of each pastoral charge. In

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A minority cannot against the will of the majority change the relations of the church to its denomination. Deaderick v. Lampson, 11 Heisk. 523.

In case of a division in the congregation the title to the property is in that portion which adheres to the denomination and conforms to its rules. Rosbi's Appeal, 69 Pa. 466, 8 Am. Rep. 275.

In church organizations those who adhere to and submit to the regular order of the church, local and general, although a minority, are the true congregation and corporation, if incorporated, and they are the ones who are entitled to the use and control of the church property. Winebrenner v. Colder, 43 Pa. 244; Trexeler v. Menning, 2 W. N. C. 677, 33 Phila. Leg. Int. 321.

The majority cannot control in violation of the general laws of the organization. Sutter v. First Reformed Dutch Church, 42 Pa. 503.

It is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation and the form of worship in practice, as also in favor of the government of the church in operation with which it was connected at the time the trust was declared. App v. United Lutheran & G. Reformed Cong. 6 Pa. 201.

Seceders from the Methodist Episcopal Church who have organized a separate conference and rejected the office of bishop are not entitled to any portion of the property of the society from which they seceded. Methodist Episcopal Church v. Wood, 5 Ohio, 283.

Seceders have no right in the church property. Rottmann v. Bartling, 22 Neb. 375; Ehrenfeldt's Appeal, 101 Pa. 186.

Seceding members of a church have at common law no interest in its property. Curd v. Wallace, 7 Dana, 190, 32 Am. Dec. 85.

By seceding from the organization even a majority of the members of a congregation will forfeit their rights to the church property. Lewis v. Watson, 4 Bush, 228; Brown v. Monroe, 80 Ky. 443.

In Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ, 60 Fed. Rep. 937, the doctrine is referred to with apparent approval that the courts will adjudge the property to the members, however few in numbers they may be, who adhere to the form of church government or acknowledge the church connection for which the property was acquired.

In Bouldin v. Alexander, 82 U. S. 15 Wall. 131, 21 L. ed. 69, it is said that it may be conceded for the purposes of that case that withdrawal from a church and uniting with another church or denomination are a relinquishment of all right in the church abandoned.

Where the consistory of a Dutch Reformed church being displeased with the action of the classis on a particular question dissolved its connection therewith and attempted to withdraw and form a connection with the True Dutch Reformed Church, whereupon the classis dissolved their connection with the church and ordered the election of a new consistory, it was held that their connection with the old church ceased and that the property belonged to the new consistory elected by order of the classis to fill their places. Den, Dey, v. Bolton, 12 N. J. L. 236.

Members of a church which separate themselves wholly from the church organization to which they belong, deny its authority, denounce its doctrine, and refuse to abide by its judgments as well as join themselves to a totally different organization, have no right to the property of the church or to the use of it. Watson v. Jones, 80 U. S. 13 Wall. 679, 20 L. ed. 666.

Trustees of a church in connection with the

this denomination a pastor's appointment over any particular charge lasts for one year only, though he may be reappointed at annual conference, but not more than three times in succession. A presiding elder's appointment over any particular district in like manner is good for only one year, though he may be reappointed over the same district four times in succession. Under the discipline and usages of the denomination, each pastor and presiding elder is entitled, by virtue of his office, to certain emoluments derived from collections taken up among the members of their charges. Every pastor who is a married man is entitled to occupy the parsonage belonging to his congregation. "Stewards" are appointed in each charge, to collect funds to pay the pastor's salary, and to procure a dwelling-place for him, if a married man. Under the discipline, each quarterly conference has to provide for the support of the pastor and presiding elder, and every member must contribute to their support according to his means, under penalty of trial under the church rules. The discipline also provides that each annual conference shall provide for the yearly salary of its preachers. In 1886 the Michigan conference enacted that each presiding elder should be entitled to a yearly salary of at least $500, and each pastor of the rank of elder should receive the same amount. The discipline provides "that, when any trustee of a church of this denomination withdraws from the denomination, he shall cease to be trustee," and also that, "when any land is conveyed for the use of any congregation of said denomination, said land shall be kept in trust to be kept, used, and maintained as a place of divine worship by the ministers and membership of the Evangelical Association of North America, with power to dispose of and convey the same, subject to the discipline, usages, and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference thereof, or by the particular annual conference within whose bounds the said premises are located." In like manner with regard to parsonages, the discipline provides "that, if any land is conveyed to said denomination or any of its congregations for the erection of a dwelling-house for the use of preachers, the said land must be held in trust to be kept, used, and maintained as a place of residence for the preachers of the denomination who may from time to time be duly stationed in said place, with power to dispose of and to convey the same, subject to the discipline and usages of said denomination." In the year 1878 there was organized, "as a voluntary association," by and among members of the denomination in and about Bay City, under the supervision of a preacher of said denomination, a congregation thereof under the name of "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." Until the acts of the defendants herein complained of, said congregation, without dissent, always acted as, and claimed to be, a part of said denomination, and subject to its rules and usages, and to the jurisdiction of the general conference of the denomination and of the Michigan annual con-

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Dutch Reformed Church of the United States cannot against the will of dissenting members dissolve their connection with that church and with the classis to which they were united, and transfer the property and their connection to the German Lutheran Church. Gable v. Miller, 10 Paige, 627.

In Miller v. Gable, 2 Denio, 492, the court reversed the opinion of the chancellor, but the judges who wrote opinions did not agree as to the ground of reversal. Gardiner, president, thought that the terms of the trust had not been violated, but intimated the opinion that the trustees of a church are not independent of all control in reference to doctrines and modes of worship. While Barlow, senator, thought that if property is given to a corporation without any explicit declaration in the deed limiting the use to a particular channel, a majority of the members or trustees are at liberty to deviate from the doctrine which prevailed at the time of donation, and that such deviation would not produce a forfeiture or entitle the minority adhering to the faith professed at the time the donation was made to the enjoyment of the property to the exclusion of the majority who have acquiesced in the change.

Rule under particular statutes.

Under some state statutes it is held that a majority of the members of incorporated churches may control the property and the uses to which it shall be applied.

Under a former New York statute for the incorporation of religious societies no trust can be attached to property which will compel its retention in a particular denomination. The whole income of the church is under the control of a majority of the members, and their action will determine the disposition of the trust. If the society wishes to devote its property to an unchangeable form of worship and tie down its members to a procrustean bed of creeds and confessions of faith, it must remain a voluntary association, and not commit the management of its affairs to a corporation. Robertson v. Bullions, 11 N. Y. 243, Reversing on this point 9 Barb. 64.

The majority of the members of a corporation under the New York law may change their form of worship and their denominational affiliations at any time they choose to do so. Petty v. Tooker, 21 N. Y. 267, Affirming 29 Barb. 256.

Under the New York statute a majority of the corporators without respect to their religious tenets have entire control over the revenues of the church. Gram v. Prussia Emigrated Evangelical Lutheran German Soc. 36 N. Y. 161; Watkins v. Wilcox, 66 N. Y. 654.

If a religious society thinks proper to separate from the church with which it has previously been connected and to form a connection with another denomination, the trustees have the power to employ a minister as they think fit and to exclude from the pulpit a minister appointed by the ecclesiastical judicatory with which the society was previously connected, and a court of equity has no power to control their action. Burrel v. Associate Reformed Church, 44 Barb. 282.

The majority of a Dutch Reformed church incorporated under the New York law may withdraw from connection with that church and organize a Congregational church, taking their property with them. Watkins v. Wilcox, 4 Hun, 220.

But under the New York act of 1875, which forbids the trustees of a religious denomination to divert the property to the uses of other than its own denomination, trustees who form a new society in connection with another denomination for the purpose of applying the property of the former society to the uses of the new one thereby cease to be trus-

ference; and, in particular, said congregation always accepted as their pastor and presiding elder only such persons as had been appointed thereto according to the discipline and usages of said denomination. "With a single exception, the said Zion's society, in each and every year after its organization, in 1878, up to the spring of 1891, solicited and received from the said Michigan annual conference an appropriation or contribution of money, for the purpose of maintaining the said society, and paying its current expenses as a society belonging to said denomination. At times such yearly appropriations amounted to $500." In 1878, with money contributed for the purpose by members of the denomination within the bounds of the Michigan conference, and by the members of said conference, there was purchased, and in part paid for, a lot of ground in Bay City (describing the same); and, with funds derived from the same sources, said society thereupon erected upon said lot a building, which was used for a house of worship according to the rules and discipline of said Evangelical Association. In November, 1882, the owner of said lot conveyed the same in fee to "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." The deed contains the following clause: "This deed being made pursuant to a contract for the sale of said premises made by Jennie F. Paine to August Meisel, Frederic Koch, and August Kosky, bearing date the said 8th day of June, 1878, which contract has been assigned by said Meisel, Koch, and Kosky to the trustees of said party of the second part hereto, and said premises having been conveyed subject to said contract by said Jennie F. Paine to James T. Lawson, by said Lawson conveyed to Hiram A. Jones, and by said Jones conveyed to John W. Forsyth, above named."

Afterwards, in 1889, with funds contributed by members of the denomination both in said Zion's society and elsewhere within the bounds of the Michigan conference, and collected by preachers of said conference from persons not members, upon the representation that such contributions were to be used to erect a church of said denomination, there was erected by said society on lot 7 a new house of worship for use according to the usages and discipline of said denomination, and not otherwise. In laying the corner stone of said new edifice, the pastor in charge (being a person appointed thereto from the Michigan conference), in the presence of said congregation, and with its consent, used the forms perscribed in said discipline. These forms require the officiating clergyman to declare that "we lay this corner stone as the foundation of a house to be dedicated to the service of the Most High, according to the order and rules and for the use of the Evangelical Association." Afterwards, when completed, said edifice was dedicated under the discipline by a bishop of said denomination. The disciplinary form required the bishop to declare that "we now declare, designate, and consecrate this house as the [name of the church] of the Evangelical Association of [name of place]," for divine worship and the observance of "devotional services,

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tees of the former and will be enjoined from interference with the property. First Reformed Presby. Church v. Bowden, 10 Abb. N. C. 1.

Under the act of 1875 the congregation as well as the trustees are deprived of the power to divert the church property from the promotion of the religious tenets of the persons obtaining and requiring it and the maintenance of a different system of religious belief. Isham v. First Presby. Church, 63 How. Pr. 465.

Under the Illinois statute the trustees of a corporation do not, in the absence of any expressly declared or clearly implied trust, hold the property for the benefit of any particular doctrines or tenets of faith, but simply for the society or congregation whose officers they are. Calkins v. Cheney, 92 Ill. 463.

If persons are incorporated under a statute which permits any five persons to form themselves into a religious society under articles of incorporation which do not designate the denomination to which they shall belong except that the name adopted indicates an intention to belong to a particular denomination, property acquired by a general deed without any trust limitation is not devoted to the use of the denomination whose name they adopted, but a majority of the members of the church may permit the property to be used in connection with a different denomination. Wilson v. Livingstone, 99 Mich. 594.

Under the Virginia laws the general church can have no claim to or control over the property of a local church, but that must be governed by the terms of the deed and the action of the local congregation. Boxwell v. Affleck, 79 Va. 407.

Property acquired under express trust or for particular purpose.

The deed by which the property is given may limit the use to a particular denomination. Means v. Presbyterian Church, 3 Watts & S. 303.

When property has by express dedication been devoted to the support of some specific form of religious doctrine it cannot be diverted to other and different doctrinal uses. Watson v. Jones, 80 U. S. 13 Wall. 679, 20 L. ed. 666.

Land conveyed in trust for the sole and exclusive use and benefit of religious corporations of regular orthodox Methodist Protestants, which may assemble to worship at the church building thereon, and for no other use or purpose whatever, cannot be claimed by persons who did not pretend to belong to the Methodist Protestant church but to another church entirely, although a majority of the Methodist Protestant congregation have joined the latter church and attempted to take their property with them. Finley v. Brent, 87 Va. 103, 11 L. R. A. 214.

Where a conveyance is made to a religious society by its denominational name it may be a sufficient guide as to the nature of the trust created, and those having control of the property will not be permitted to apply it to the promotion of doctrines adverse to the fundamental doctrines of the denomination for whose benefit the trust is created. Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

When property is acquired while the church is in subordination to a particular denomination a majority of the members cannot break off this connection and carry the property into another denomination. Jones v. Wadsworth, 11 Phila. 227.

When a church has been organized and endowed, whether by donation or subscription, as belonging to any particular sect or in subordination to any particular form of church government, it cannot break off from that connection and government. Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415.

If a fund is raised by a particular religious society for the education of children of the denomination.

rules, and customs adopted and practiced in public worship by the Evangelical Association." In November, 1884, with funds subscribed by members of the Evangelical Association, and solicited by the pastor in charge (appointed from the Michigan conference), there was purchased by the said Zion's society another lot (number 6) in Bay City. Such lot was conveyed by the owner to "the Zion Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." In the early spring of 1889, said Zion's congregation solicited and received from said Michigan annual conference $500, to be used in part payment for a parsonage to be erected on said lot 6. With the money so donated, and with other funds contributed by the members of the denomination there was erected on said lot a parsonage "for the use, as a dwelling-house, of the preacher who should be duly appointed at the Michigan annual conference as the pastor of said congregation under the discipline." Until 1893 no person had ever been admitted to membership in said congregation except such as were members of the denomination; and no one had acted as trustee or officer of the congregation except persons who had been admitted to the denomination and into said congregation according to the rules of the denomination. At a regular session of said Michigan conference, in April, 1890, the complainant Rev George A. Hettler was elected presiding elder for the ensuing four years; and at a session of said conference in April, 1893, the district which includes said Bay City charge was assigned to said Hettler for the ensuing year. Said Hettler is a duly-ordained elder of the denomination, and a member of said conference, and was such prior to 1890. The complainant Rev. John M. Fuchs is a duly ordained elder of the denomination, and a member of said Michigan conference. At the session of said conference held in April, 1893, he was appointed by the presiding bishop, with the aid of the presiding elders, of said conference, pastor of said Zion's Church. Said complainant is a married man. Since their appointment, as aforesaid, said Hettler and Fuchs have endeavored to enter said church, and officiate therein, as presiding elder and pastor, respectively; and said Fuchs has demanded from defendants the possession and the right to occupy the said parsonage. But the defendants and their adherents in said congregation have excluded both of said complainants from the church and said Fuchs from the parsonage, and have denied their official authority, and threaten to continue so to do, and to exclude them "from the enjoyment of any perquisites or emoluments belonging to the office of presiding elder and pastor, respectively, of said charge;" but they recognize the defendant Schneider as their lawful pastor, and they admit him into said church as pastor and permit him to receive the collections taken up for the pastor's salary, and have admitted him into the occupancy of the parsonage; and they threaten to continue thus to support said Schneider in the possession of said office, and the use of said church and parsonage. "In March, 1893, the defendants (save and except Schneider) and their adherents in the said con-

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it cannot be divided when a portion of the members dissolve their connection with that denomination for the purpose of appropriating it to the education of children of persons belonging to other denominations. Hendrickson v. Shotwell, 1 N. J. Eq. 577.

If property is contributed in trust to organize a church for the use of persons of all denominations, to be under the control of trustees of the Presbyterian church, the donors may prevent its being conveyed to the Methodist church to be held for the exclusive benefit of members of that denomination. Ludlam v. Higbee, 11 N. J. Eq. 342.

The property must be administered substantially in accordance with the intention of the original founders, and a minority can insist upon carrying out the purposes for which the church or society was organized, and a majority will not be permitted to divert the common property to their uses or to use it for the support and maintenance of doctrines essentially at variance with the original constitution of the society. Schradi v. Dornfeld, 52 Minn. 465.

Those having control of church property under a particular church organization have no power to transfer this property to a different sect or denomination or divert it from the purposes for which it was dedicated when in violation of the fundamental law upon which the organization is based. Kinkead v. McKee, 9 Bush, 535.

It is not in the power of a majority of a religious society to carry property which has been dedicated to the church to the support of a new and different doctrine. Smith v. Pedigo (Ind.) 19 L. R. A. 433.

The trustees of a church have no right to pervert the use of the property to any other purpose than that for which it was acquired. First Cong. Church v. Stewart, 43 Ill. 81.

If any persons taking the benefit of a trust for a church incline to the adoption of a different system from that which was intended by the founders and there are others who think proper to adhere to the original system, the latter will be entitled to the property. Atty. Gen., Mander, v. Pearson, 3 Meriv. 353.

Property acquired for a congregation adopting the doctrine and discipline of the Reformed church in the United States cannot be, by a majority of the members of the congregation, diverted to the use of the Lutherans. Baker v. Ducker, 79 Cal. 365.

A majority of a congregation have not the power, upon retiring from the denomination and forming a new and different religious organization, to control the property of the old association and divert it from the particular purposes to which it was dedicated. First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 567.

A majority of the members of a Free Will Baptist church cannot, against the will of the minority transfer property obtained for the use and benefit of that denomination to the Baptist denomination, notwithstanding a clause in its manual provides that a church in good standing may have letters of dismissal and recommendation to another evangelical denomination. Park v. Champlin (Iowa) 3 L. R. A. 141.

Seceders from a religious society are not entitled to share in the benefits of a fund held in trust for the society. Atty. Gen., Abbott, v. Dublin, 38 N. H. 459.

When a church is endowed with property for the support of a particular faith it is not competent for a majority of the church to appropriate the property for the maintenance of a different faith. Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439.

Synodical relations.

In some of the cases a mere change of synodical relations has been attempted. In most cases such

gregation formally resolved and declared that they would no longer submit to the authority or the rules of the officers of the constituted tribunals of the said Evangelical Association, but that they would separate from and be independent of the said Michigan annual conference in all respects, and they notified said conference of this resolution." The complainants Hebinger and Fenske are now, and for some years past have been, members of the denomination and of the said Zion's Church, and have attended worship at the latter, and have contributed to the support of said congregation. Said Hebinger has not attended services since the defendant Schneider has been acting as pastor, because he believed said Schneider not to be the lawful pastor. Besides the complainants, "there are a large number of the members of said congregation who dissent from such unlawful acts and proceedings and who still adhere to the said Evangelical Association and its rules, and still recognize and submit to the authority of the complainants Hettler and Fuchs, respectively, as their presiding elder and duly appointed pastor, and who desire the said church edifice and parsonage to be used by said Hettler and Fuchs as by the discipline required and permitted, as aforesaid." The defendant Schneider now holds, and refuses to surrender, the books and papers pertaining to the affairs of the congregation, which, under the discipline and usages of the denomination, rightfully belong to the custody of the lawful pastor,—such as the registers of marriages, births, deaths, etc., the membership lists, and the financial accounts of the congregation. Since April, 1893, the stewards of the congregation have collected funds applicable, under the usages of the denomination, to the payment of the pastor's salary. Part of said funds have been paid over to defendant Schneider. Defendants and their adherents threaten to continue to take up such collections, and pay them to said Schneider, to the extent of at least $600 per annum; and they pretend that they have hired the services of said Schneider, for a year or more, as pastor. In excuse of these unlawful acts, defendants and their adherents pretend that the said Michigan conference of 1893 was not a lawful conference of the Evangelical Association, and that therefore complainant Hettler's appointment over the presiding elder's district, and the complainant Fuchs' appointment as pastor, were not valid. In this regard complainants say that said Michigan conference of 1893 was composed of the preachers within the district theretofore duly fixed by general conference, and duly qualified under the discipline to be members of said body, and that the time and place at which it was convened had been duly fixed the preceding year by the presiding bishop, and a majority vote of said conference duly convened. The bishop presiding when complainant Fuchs was appointed pastor had been elected as bishop by a general conference of the denomination held in October, 1891, at Indianapolis.

The bill then sets forth facts to show the regularity and validity of said Indianapolis body as a general conference of this church. Prior to assuming the office of pastor of Zion's

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a change is immaterial. The property still remaining subject to the same laws as before, no rights are infringed.

In Smith v. Nelson, 18 Vt. 511, which was a case of secession from the decrees of a synod, the court seemed to recognize the right of a majority of a congregation to seize and control the church property, from the very nature of religious societies in this country.

The mere change of synodical relations will not forfeit the rights of the majority to the property. Lutheran Congregation v. St. Michael's Evangelical Church, 48 Pa. 20.

There is no forfeiture by refusal to accept the authority of a synod. Presbyterian Congregation v. Johnston, 1 Watts & S. 9.

A Lutheran church may sever its connection with the synod with which it had united itself. Heckman v. Mees, 16 Ohio, 583.

The mere withdrawal of a majority from the synod without any change of doctrine will not result in a forfeiture of the rights of the seceders in the church property. Ferraria v. Vasconcellos, 31 Ill. 25.

If property is acquired while a church is independent of any synod the mere fact that it subsequently connects itself to a synod will not prevent a majority from subsequently severing the connection. Lawson v. Kolbenson, 61 Ill. 405. The court said: "This church organization is unlike those of other denominations, where they cannot exist at all except in subordination to a higher and controlling organization."

In Dressen v. Brameier, 56 Iowa, 756, the question was as to dissolving the connection of the congregation with a particular synod within the church, and it appeared that the majority of the members had voted to remain with that synod while a minority desired to dissolve the connection and join another one. The court held that the majority ruled and was entitled to the use of the church property.

But if the property is procured not only for a particular congregation, but it is also stated that it is subject to certain particular and general synods, the majority of the congregation withdrawing from or refusing to recognize the authority of the synod cannot retain control of the property. McBride v. Porter, 17 Iowa, 203.

So, if a particular congregation is by the terms of its charter in full connection with a synodical body, and not independent of it, should a portion of the congregation secede from the synod it will forfeit its rights to the church property. Harmon v. Dreher, 1 Speers, Eq. 87.

So, if at the time the property is acquired by a church it is in connection with a particular synod a majority cannot afterwards, against the objection of the minority, dissolve the connection with the synod and become an independent church. Wilson v. Presbyterian Church, 2 Rich. Eq. 192.

Rule where governing body of denomination changes its laws.

Whether a local church can sever its connection with the denomination to which it is attached because the denomination has departed from the original doctrine to which they subscribed was not decided in Gable v. Miller, 10 Paige, 627.

In Associate Reformed Church v. Theological Seminary, 4 N. J. Eq. 77, where the synod had illegally attempted to merge the Reformed church into the Presbyterian church, it was held that as against dissenting local churches they would cease to have any title to the property, and that the dissenters could recover the property for the use of the denomination for whose use it was acquired.

The majority of the church following the act of the synod in making a lawful change in the church

Church, defendant Schneider had withdrawn from the Michigan conference and from the Evangelical Association. Complainants file their bill on behalf of the members of the denomination and of the Michigan conference, "and especially on behalf of the members of said Zion's Church congregation at Bay City who still adhere to the said Evangelical Association." The defendants (except Schneider) are the trustees of said Zion's Church, "and, as such, have the actual possession of the said church edifice and parsonage, and are exercising control thereover." The relief prayed is as follows: That defendants be restrained from interfering in any way with the complainant Hettler in the discharge of his duties as presiding elder of said congregation, and in taking up collections from said congregation for his salary; from withholding from said Hettler funds heretofore collected from said congregation as and for the salary of the presiding elder; from preventing Hettler from entering the church, and officiating therein as presiding elder, and from holding his quarterly conferences therein; from interfering with complainant Fuchs in the discharge of his duties as pastor; from preventing his entrance into the church, and from interfering with his collection of contributions for his salary; from withholding from said Fuchs funds already collected as and for the pastor's salary; from excluding Fuchs from the parsonage; from withholding from said Fuchs the said records, registers, etc., pertaining to the congregation, and lawfully belonging to the custody of the pastor. That defendant Schneider be restrained from acting as pastor of said congregation; from officiating in and about said church edifice as pastor; and from taking up collections from said congregation for pastor's salary. That the defendants account for moneys heretofore collected by them (as and for pastor's and presiding elder's salary) from said congregation, and be decreed to pay over the amount, when ascertained, to the complainants. That the rights of the respective parties be ascertained and decreed.

A demurrer was interposed, stating the following reasons: (1) That the bill covered "distinct matters and causes, in several whereof the complainants are not in any manner in common or jointly interested or concerned." (2) That the bill is multifarious. (3) That the bill states no cause for relief of any kind. The demurrer was sustained.

Messrs. **T. A. E. Weadock** and **J. C. Weadock,** with *Messrs.* **Judd, Ritchie & Esher,** for appellants:

There is no plaintiff who is not either directly or indirectly (but substantially), interested in the relief prayed. There is do defendant that is not immediately interested in resisting each and every part of the relief prayed. *Scofield* v. *Lansing*, 17 Mich. 437; *Ingersoll* v. *Kirby*, Walk. Ch. (Mich.) 65; *Cornwell Mfg. Co.* v. *Swift*, 89 Mich. 519; *Graves* v. *Corbin*, 132 U. S. 586, 33 L. ed. 467; Story, Eq. Pl. §§ 279*a*, 284, 285.

The individual defendants are in actual pos-

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polity may control the church property as against the objection of a dissenting minority. McGinnis v. Watson, 41 Pa. 9; Ramsey's Appeal, 88 Pa. 60.

Immaterial change.

In case of a mere change of form of church government if the majority retain the church organization a minority cannot wrest the property from them because of the change. Organ Meeting House v. Seaford, 1 Dev. Eq. 453.

If the church is not described in the original donation or subscription as in connection with or under the ecclesiastical jurisdiction of any particular body of believers it may change its relation, provided there be in such change no radical departure from the original faith or doctrine. The guaranty of religious freedom does not guarantee the freedom to steal churches. It secures to individuals the right of withdrawal, forming a new society with such creed and government as they please, raising from their own means a fund, and building a house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be slumbering in their graves. Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415.

Withdrawal under laws of church.

If the general body of the church divides and concedes to a majority of a local church the right to determine which branch it will adhere to, the majority, when it has made its choice, will have a right to the property as against the dissenting minority. Gibson v. Armstrong, 7 B. Mon. 481; Humphrey v. Burnside, 4 Bush, 215.

If the majority of the church votes to go with the Methodist Episcopal Church South in accordance with the plan adopted by the general conference to settle the question, those adhering to that decision, and not the dissenters, have a right to control the church property. Brooke v. Shacklett, 13 Gratt. 301; Hoskinson v. Pusey, 32 Gratt. 428.

Division of property.

Members who dissolve their connection with the society to which they belong and the entire ecclesiastical body of which it is a part, and unite with a distinct organization, cannot be regarded as a party within the meaning of a statute requiring the division of church property between the parties in case a congregation is disrupted by a schism or a division of the society. McKinney v. Griggs, 5 Bush, 401, 96 Am. Dec. 360.

Effect of statutory permission.

An act providing that in the contingency of a division of any religious society the majority may determine to which branch such congregation shall thereafter belong, which determination shall conclude questions as to the property held in trust for such congregation, is void as a violation of a contract, so far as it attempts to give the benefit of trust property to others than those to whom it was exclusively limited by the one creating the trust. Finley v. Brent, 87 Va. 103, 11 L. R. A. 214.

Effect of unanimous action.

In Harper v. Straws, 14 B. Mon. 48, it appears to be decided that the unanimous action of a church congregation, people, and officers, in severing their connection with one and connecting themselves with a different organization, subjects the church property to the constitution and laws of such latter organization, provided there is nothing in the deed to prevent it, and that case is cited in support of that doctrine in First Presby. Church v. Wilson, 14 Bush, 252.

Rights of third persons.

Tenants of trust property cannot take advantage of the fact that the lessor has changed its ecclesiastical relations. Swedish Evangelical Lutheran Church v. Shivers, 16 N. J. Eq. 453. H. P. F.

session of this church property, and are collecting funds for the purpose of pastor's salary, etc. The plaintiffs, Fuchs and Hettler, are excluded from the premises and from any participation in these funds. The plaintiffs, who are lay members, have the right, not merely to enter the church, but to have the services conducted therein by a pastor appointed according to the church rules.

First Congregational Church v. *Stewart*, 43 Ill. 81; *Hardin* v. *Second Baptist Church*, 51 Mich 137, 47 Am. Rep. 555; *Whitecar* v. *Michenor*, 37 N. J. Eq. 6; Cooley, Torts, 2d ed. 343, note; Cooley, Const. Lim. 6th ed. 573, note; *Schweiker* v. *Husser*, 146 Ill. 399; *O'Hara* v. *Stack*, 90 Pa. 477; *People, Griffin,* v. *Steele*, 2 Barb. 397.

The objects of this trust are easily and with certainty ascertained at any moment, as the discipline discloses, every member has his name inscribed on a membership list, which is in the custody of the pastor, and the records of each conference will disclose at any moment the name of the person who has the legal right to serve as pastor and presiding elder of any congregation.

Hoskinson v. *Pusey*, 32 Gratt. 428; *Brooke* v. *Shacklett*, 13 Gratt. 301; *Gibson* v. *Armstrong*, 7 B. Mon. 491; *Bear* v. *Heasley*, 98 Mich. 279, 24 L. R. A. 615.

The fact that this congregation is not incorporated does not relieve these defendants of their obligation to observe good faith towards the plaintiff.

Watson v. *Jones*, 80 U. S. 13 Wall. 720, 20 L. ed. 673; *Chiniquy* v. *Catholic Bishop*, 41 Ill. 157; *Lynd* v. *Menzies*, 33 N. J. L. 164.

Defendants are in no position to dispute this trust, because they hold under the same source of title as plaintiffs.

Whitecar v. *Michenor*, 37 N. J. Eq. 6; *Lynd* v. *Menzies*, *supra; Beatty* v. *Kurtz*, 27 U. S. 2 Pet. 566, 7 L. ed. 521; *Dwenger* v. *Geary*, 113 Ind. 106; 1 High, Inj. § 316; *Thatcher* v. *St. Andrew's Church*, 37 Mich. 273; *Methodist Episcopal Church* v. *Clark*, 41 Mich. 737, *Butterfield* v. *Beardsley*, 28 Mich. 412; *Turner* v. *Ontonagon River Imp. Co.* 77 Mich. 603; *Chicago Dock Co.* v. *Kinzie*, 49 Ill. 293; *Kelly* v. *Kendall*, 118 Ill. 650; *Fadness* v. *Braunborg*, 73 Wis. 279; *Voorhees* v. *Presbyterian Church*, 8 Barb. 143.

A parol trust if executed will not be disturbed.

Ripley v. *Seligman*, 88 Mich. 183; *Patton* v. *Chamberlain*, 44 Mich. 5; *Barber* v. *Milner*, 43 Mich. 248.

Even though these defendants are unlawfully in possession as against the rightful owner, they are bound to recognize plaintiffs' rights against themselves.

Kinsman v. *Parkhurst*, 59 U.S. 18 How. 293, 15 L. ed. 387; *McBlair* v. *Gibbes*, 58 U. S. 17 How. 236, 15 L. ed. 134; *Sharp* v. *Taylor*, 2 Phill. Ch. 801; *Brooks* v. *Martin*, 69 U. S. 2 Wall. 79, 17 L. ed. 734.

The question who shall be permitted to serve as pastor and presiding elder in this church does not depend on which faction has the majority.

Bear v. *Heasley*, 98 Mich. 279, 24 L. R. A. 615; *Watson* v. *Jones*, 80 U. S. 13 Wall. 723–727, 29 L. ed. 674–676; *Schnorr's Appeal*, 67 Pa. 146, 5 Am. Rep. 415; *McGinnis* v. *Watson*, 41 Pa. 9; *Sutter* v. *First Reformed Dutch Church*, 42 Pa. 503; *Roshi's Appeal*, 69 Pa. 468, 8 Am. Rep. 275; *Curd* v *Wallace*, 7 Dana, 195, 32 Am. Dec. 85; *Gibson* v. *Armstrong*, 7 B. Mon. 491; *Den, American Primitive Soc.* v. *Pilling*, 24 N. J. L. 656; *Ferraria* v. *Vasconcelles*, 23 Ill. 456; *Methodist Episcopal Church* v. *Wood*, 5 Ohio, 283; *People, Griffin,* v. *Steele*, 2 Barb. 397.

Messrs. **Pratt, Van Kleeck & Gilbert** for appellees.

Grant, J., delivered the opinion of the court:

1. We see no force in the contention that the bill sets forth no grievance common to all the complainants, and seeks no common relief. The complainants are interested in the same subject matter, and all claim one common right to use the church, although in different ways. Fuchs, as pastor, and Hettler, as presiding elder, are entitled to the use of it for the purpose of conducting divine worship. Fuchs is entitled to the use of the parsonage in connection with the church, and the other complainants are entitled to the use of the church for the purpose of worship according to its discipline and usages. We therefore think the bill is not multifarious.

2 While the bill alleges that Zion's Church at Bay City is not a corporation, but a voluntary association, it is nevertheless insisted that it is a corporation, because the bill shows that it has exercised the franchises and privileges of a corporation for a term of more than ten successive years; that it has bought and held real estate in its corporate name, has erected a church and parsonage, and that all its temporal affairs are controlled by a board of trustees. It is therefore argued that its rights must be controlled by the same rules that apply to religious societies duly incorporated. In support of this, § 4649 of Howell's Statutes is cited. This section provides that, "whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of ten successive years, the same shall be presumed to have been legally organized in pursuance of the laws of this state." This statute creates only a presumption. It does not of itself change a voluntary organization by lapse of time into a corporation. It was held in *Smith* v. *Bonhoof*, 2 Mich. 129, that, under this statute, "no church can become incorporated, provided the powers conferred by the statute upon the corporators are by the constitution, laws, or usages of the church, lodged in another body." See also *Allen* v. *Duffie*, 43 Mich. 3, 38 Am. Rep. 159; *Methodist Episcopal Church* v. *Clark*, 41 Mich. 730. The allegation, therefore, that the church is a voluntary association, must be assumed as true.

3. It is next argued that no trust is created by the conveyance in favor of the Evangelical Association of North America; that, therefore, the legal title is in the local church; and that the Evangelical Association of North America obtained no right to the church property or its use, under the statute abolishing uses and trusts. The complete answer to this argument is that the general association is not

a complainant in this case, nor is it seeking to enforce any title to or claim over the property. The complainants claim the right to its use under the discipline and usages. A conveyance or bequest to a religious association, or to trustees for that association, necessarily implies a trust. The deed in this case shows that the contract was made to certain persons as trustees for the church, and that the deed was made pursuant to that contract. We would naturally look to the written declarations in the constitution, by-laws, and written documents of the organization, to ascertain the trust and the purpose for which the property was conveyed. If the deed refers expressly or by implication to such writings, courts will look there for the declaration of the trust. It is by no means clear that these defendants, who are now the trustees, are in position to set up the statute of frauds. Neither the grantor nor any other person claiming under him is setting up this claim. Both parties claim under the same conveyance. In *Lynd* v. *Menzies*, 33 N. J. L. 164, it is said: "The imperfection relied on was the absence of an incorporation. But the want of this quality does not at all affect the rights and duties of pastor and people towards each other. The effect of becoming incorporated is to facilitate the acquisition and transfer of property, and to enable the congregation to be represented in the convention of the diocese. But by the canonical law of this denomination of Christians, it is not necessary, in order to constitute a church, that the congregation should take the form of an incorporated body. Indeed, the very law of this state which provides for the incorporation of this class of churches presupposes and requires that there shall be antecedent to the inception of proceedings, 'a congregation of the Protestant Episcopal Church in this state, duly organized according to the constitution and usages of said church.' . . . In the case now before us, it plainly appears that this church was constituted in conformity to the ecclesiastical law and usages applicable to it, and the consequence is that the plaintiff, by his official connection with it, acquired all the customary powers and privileges pertaining to the rectorship." In any view of the case, the allegations of the bill are sufficient to require an answer and proofs.

4. The principal and important question in the case is whether the trustees and the members of this local church at Bay City can, by a majority vote, withdraw its connection with the general body, take the church property with them, set aside the itinerant plan, and deprive their regularly appointed ministers of its use. In this determination the allegations of the bill alone can be considered. *Ex parte* affidavits, which were used upon the hearing for a preliminary injunction, cannot be considered in the nature of an answer, and must be entirely excluded from this discussion. It is insisted that under How. Stat. § 4639, the violation of church discipline and church law is to be corrected by ecclesiastical tribunals, and that the state courts have no jurisdiction. Courts, of course, will not set aside the decrees and orders of ecclesiastical courts involving the construction of their own articles of faith or discipline. But this statute has never been so construed as to deprive those entitled to property rights under the conclusive ecclesiastical order and decree, of a remedy which they otherwise have not. *Buettner* v. *Frazer*, 100 Mich. 179, does not aid the defendants, for it was there said that "both parties must first exhaust the remedies afforded by the ecclesiastical body before the courts will consider the questions involved." See also *Smith* v. *Bonhoof*, 2 Mich. 116, where is found an able discussion of this provision of the statute. Nor is this case ruled by that of *Wilson* v. *Livingstone*, 99 Mich. 594. In that case the church was a corporation organized under the statutes of this state, and the difference between such a corporation and the case of a voluntary society was expressly recognized. It was there stated that the "obligations and rights of the members of a voluntary society are to be measured by their articles of association or constitution." In the present case the bill recognizes the defendant trustees as the lawful trustees, in charge and in possession of the church property. No attempt is made to deprive them of its control or possession when used in a legitimate manner. The only purpose is to compel them to permit the use of the church and parsonage according to the discipline, rules, usages, and polity of the church. It is immaterial in whom the legal title stands. One party may hold the title and another be entitled to the use and possession of the property; or, as in this case, both may be entitled to its joint use and possession. It may be admitted for the purposes of this hearing that the title is in the local society or its board of trustees. The question is not, as in many of the cases cited in the briefs of counsel, in whom is the title to the property? but, in whom is the right to its use for religious worship both as pastor and layman? The bill sets forth fully the history, the discipline, and polity of the church, the title of complainants Hettler and Fuchs to the offices which they hold, and the right to the use of the church property to which said officers are entitled. The question presented relates exclusively to property rights, over which the proper courts have almost universally exercised jurisdiction. If the defendants' position be the true one, it follows that they are in no manner bound to the faith and tenets of this church, and that they may withdraw, and take the property to any other denomination of Christians. The plan of the Evangelical Association is identical with that of the Methodist Episcopal Church. The itineracy of its clergy is one of its chief distinctive and fundamental principles. The church at Bay City entered into the voluntary association with full knowledge of its discipline, rules, and usages, and agreed to be bound thereby. Its property was not purchased with funds raised entirely by its own members, but in part by members of the Michigan conference and others, for the purpose of erecting a church of said denomination. The building was consecrated in accordance with its discipline, and for many years, and until after the schism in the church, the local body at Bay City accepted the pastor and elder appointed by the proper authorities. The churches of this body,

when they entered it, voluntarily surrendered the right to choose their own pastor, and agreed to accept the pastor appointed by the bishop with the aid of the presiding elders. Many authorities might be cited sustaining the rights of complainants, but we shall refer to but few. They may be found in the briefs of counsel. This religious body is nearly identical in its discipline with that of the Methodist Episcopal Church. In each the itineracy of the clergy is one of the articles of its discipline. The right of the trustees of a local church of that denomination to close its doors against a pastor appointed by the bishop was passed upon in *Whitcar* v. *Michenor*, 37 N. J. Eq 6, a case identical in its facts with the present one. The trustees in that case closed the building against the duly appointed pastor, on the ground that it was not for the interest of the church that he should be its pastor, and that he was appointed against the wishes of the majority of its members. The court says: "It is not claimed that there is any warrant in the discipline of the church for the action of the trustees, nor that the discipline provides that the wishes of the majority of the members shall determine whether the preacher appointed to the charge shall act as such or not. If the church belongs to the Methodist Episcopal connection, as it is admitted it does, there is no warrant of law, discipline, or usage for the acts of the defendants. What is known as the itineracy of the preachers and the absolute power of the bishops over the appointments of the preachers to the churches is part of the discipline." An injunction was issued in that case to prevent the trustees from closing the church building against the regularly appointed pastor. In a footnote to that case are collated many authorities bearing upon the question, as well as upon the jurisdiction of a court of equity to grant an injunction. Counsel for defendants, in their brief, admits that the local church at Bay City adheres to the faith of the Evangelical Association, and they say that the church services and Sunday school are conducted in the same manner and in the same faith as before, and that it withdrew in order to keep away from the factions of the association. The reasons for such action are stated in the brief. In the freedom of conscience and the right to worship allowed in this country, the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who chose to remain in the church, and who represent the regular church organization. If complainants maintain the allegations of their bill, that they represent the regularly organized body of the church, and are its regular appointees, they are entitled to the relief prayed.

The decree of the court below is reversed, and the case remanded for further proceedings, with costs of both courts.

Montgomery, J., did not sit. **McGrath**, Ch. J., **Long** and **Hooker**, JJ., concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Jennie A. JORDAN
v.
NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(165 Mass. 346.)

1. **Opening a station for the sale of tickets** upon a train which is about to pass is an invitation to persons to come there if they wish to take the train.
2. **The maintenance of a toilet room** opening out of a waiting room in a railroad depot for a long period of time and leaving the door of it open when persons enter the depot for the purchase of tickets, although there is no light in either room except what comes from the ticket office, is an invitation to a passenger to enter the toilet room in case of a wish to use it.
3. **A railroad company owes to a passenger** the highest degree of care consistent with the proper management of the business.
4. **A dangerous hole in the floor** of a toilet room in a railroad depot is evidence of negligence on the part of the carrier.
5. **Due care on the part of a lady** who is injured by falling through a dangerous hole in the floor of an unlighted toilet room in a railroad depot, the door to which was open from the waiting room, may be found by the jury where she fell while feeling with her hand for the seat.
6. **The fact that a personal injury was sustained on the Lord's Day** on account of negligence of a railroad company is not a defense to recovery under Stat. 1884, chap. 37.

(February 28, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Overruled.*

The facts are stated in the opinion.

Messrs. **Benton & Choate**, for defendant:

The plaintiff was not in the exercise of due care. If it be assumed that the defendant was responsible for the existence of the hole, the injury complained of did not result from any act of the defendant but from its omission. The defendant was not bound to establish the toilet room. The plaintiff would have had no ground of complaint had the defendant failed altogether to furnish a toilet. Nor when provided could she hold the defendant to the ex-

NOTE.—As to the duty of a railroad carrier in respect to lights at a station, see also authorities collected in *notes* to Kelly v. Manhattan R. Co. (N. Y.) 3 L. R. A. 74; Louisville, N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 193.

ercise of the same degree of care which she might have expected while a passenger on board one of its trains.

Moreland v. *Boston & P. R. Corp.* 141 Mass. 31.

The mere existence of a hole without evidence of how it was caused or how long it had been there is not evidence of negligence on the part of the defendant. Though in a building controlled by the defendant it was not so exclusively controlled by it as to prevent interference by third parties. It was not a thing which in its nature and ordinary use would be used solely by the defendant.

White v. *Boston & A. R. Co.* 144 Mass. 404; *Kendall* v. *Boston*, 118 Mass. 234.

Mr. **John F. Kilton,** for plaintiff:

The defendant was bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers were expressly or impliedly invited to go, and was bound, by its servants and agents, to exercise due care towards passengers using its stations and platforms by its invitation.

Keefe v. *Boston & A. R. Co.* 142 Mass. 251; Cooley, Torts, p. 605; Whart. Neg. §§ 652, 821.

The case was properly submitted to the jury under instructions in accordance with the very numerous decisions of this honorable court in analogous cases regarding due care of the plaintiff and negligence of the defendant.

Gaynor v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Chaffee* v. *Boston & L. R. Corp.* 104 Mass. 108; *Warren* v. *Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Murphy* v. *Brooks*, 109 Mass. 202; *Davis* v. *Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Dewire* v. *Bailey*, 131 Mass. 169, 41 Am. Rep. 219; *Learoyd* v. *Godfrey*, 138 Mass. 315; *Sonier* v. *Boston & A. R. Co.* 141 Mass. 10; *Smith* v. *Wildes*, 143 Mass. 556; *Gordon* v. *Cummings*, 152 Mass. 513, 9 L. R. A. 640; *Hendricken* v. *Meadows*, 154 Mass. 599; *Sweat* v. *Boston & A. R. Co.* 156 Mass. 284; *Merritt* v. *New York, N. H. & H. R. Co.* 162 Mass. 326; *Bradford* v. *Boston & M. R. Co.* 160 Mass. 392.

Knowlton, J., delivered the opinion of the court:

The only exception in this case is to the refusal of the judge to rule that upon all the evidence the plaintiff cannot recover. The plaintiff went to the defendant's passenger station in Holbrook to take a train for South Braintree. She bought a ticket, and passed from the ladies' waiting room into the ladies' toilet room, which opened out of the waiting room. There was no light in any part of the station, except the ticket office. The door of the toilet room was open. The plaintiff had often been there before, and was familiar with the place. She had occasion to use the toilet room, and when she felt with her hand for the seat she failed to find it, and fell through an opening in the floor and was injured. The opening of the station for the sale of tickets upon a train which was about to pass over the railroad, and the condition of the station at the time, were an invitation to persons to come there if they wished to take a train; and the maintenance of a toilet room for a long time previously, the door of which was then open, was an invitation to lady passengers to enter if they wished to use it. The plaintiff was a passenger, and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged. *Dodge* v. *Boston & B. S. S. Co.* 148 Mass. 207, 2 L. R. A. 83.

The existence of a dangerous hole in the floor of the toilet room, under the circumstances, was evidence of negligence on the part of the defendant. There was also evidence that the plaintiff was in the exercise of due care. She had been familiar with the toilet room for many years, and she had no reason to suppose that it was dangerous to enter it. That it was not then lighted was not very significant in view of the fact that the ladies' and gentlemen's waiting rooms were also without lights, except from the ticket office. The jury might find that after she entered it she did what ordinarily prudent persons might be expected to do under like circumstances.

It is contended that the plaintiff should not be permitted to recover because the accident happened on the evening of the Lord's Day. This argument, if it would otherwise be valid, is answered by the Statute of 1884, chap. 37, which is as follows: And "the provisions of chapter 98 of the Public Statutes, relating to the observance of the Lord's Day, shall not constitute a defense to an action for a tort or injury suffered by a person on that day."

Exceptions overruled.

MICHIGAN SUPREME COURT.

Allen MACOMBER *et al.*,
v.
DETROIT, LANSING, & NORTHERN RAILROAD COMPANY, *Plff. in Err.*

(.....Mich.....)

Failure to remove logs after they are cut, within the time named in the contract for the sale and removal of timber within a definite time, does not forfeit the title.

(March 3, 1896.)

ERROR to the Circuit Court for Montcalm County to review a judgment in favor of plaintiffs in an action to recover the value of certain timber alleged to have been converted by defendant's assignor. *Affirmed.*

NOTE.—In connection with the above case as to forfeiture of timber for failure to take it away within the time agreed, see similar decisions in Magnetic Ore Co. v. Marbury Lumber Co. (Ala.) 27 L. R. A. 435.

As to written sales of timber, see also Mee v. Benedict (Mich.) 22 L. R. A. 641; Fish v. Capwell (R. I.) 25 L. R. A. 159; Yockey v. Norn (Mich.) 26 L. R. A. 145.

As to oral sales of standing timber, see Hirth v. Graham (Ohio) 19 L. R. A. 721.

The facts sufficiently appear in the opinion.

Messrs. **McGarry & Nichols,** for plaintiff in error:

The language of this contract is plain and unambiguous. It positively states that the said J. S. Wiedman is to remove the timber in two years from the date of the contract, and sooner, in case the land is sold before that time, on being notified. A condition is placed in the contract by the vendor and accepted by the vendee, and like clauses have been so construed by this court time and again to be a condition.

Green v. *Bennett*, 23 Mich. 464; *Richards* v. *Tozer*, 27 Mich. 451; *Johnson* v *Moore*, 28 Mich. 4; *Haskell* v. *Ayres*, 32 Mich. 93, 35 Mich. 89; *Utley* v. *Wilcox Lumber Co.* 59 Mich. 263; *Williams* v. *Flood*, 63 Mich. 487; *Wasey* v. *Mahoney*, 55 Mich. 194; *Gamble* v. *Gates*, 92 Mich. 510, 97 Mich. 465; *Prentiss* v. *Ross's Estate*, 96 Mich. 83.

The fact of the timber being severed from the land and not being removed would make no difference in regard to the timber reverting.

Johnson v. *Moore*, *supra*; *Monroe* v. *Bowen*, 26 Mich. 523; *Reed* v. *Merrifield*, 10 Met. 155; *Saltonstall* v. *Little*, 90 Pa. 422, 35 Am. Rep. 683; *Judevine* v. *Goodrich*, 35 Vt. 19; *Lyons* v. *Webb*, 41 N. J. L. 203, 32 Am. Rep. 193.

I have endeavored to show that the exception is unconditional; and if this be so, by its own efficacy, it kept the title of the timber in the plaintiff; but, if to the contrary, the property in the timber was not to remain in the plaintiff, unless the trees were removed within such a period, then very clearly the mere felling of the trees would not satisfy the requirements of such condition.

Pease v. *Gibson*, 6 Me. 84; *Howard* v. *Lincoln*, 13 Me. 123; *Gilmore* v. *Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Boisaubin* v. *Reed*, 1 Abb. App. Dec 161, 2 Keyes, 323. See also *McIntyre* v. *Barnard*, 1 Sandf. Ch. 52; *Warren* v. *Leland*, 2 Barb. 622.

Mr. **Vernon H. Smith,** with *Messrs.* **Whittlesey & Kennedy,** for defendants in error:

In this case the language is unequivocal that the timber was sold to Wiedman. It was not executory.

Williams v. *Flood*, 63 Mich. 490; *Haskell* v. *Ayres*, 35 Mich. 90.

If the limitation as to time of removal is construed to be a covenant on the part of the purchaser, then without question he could remove the timber after the expiration of the time, and only be liable for damages for so doing.

Williams v. *Flood*, *supra*; *Green* v. *Bennett*, 23 Mich. 470; *Johnson* v. *Moore*. 28 Mich. 3.

Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates.

Blanchard v. *Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142, and cases cited in note 1.

They must be expressed in terms clear and unambiguous.

Rawson v. *School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Strong* v. *Doty*, 32 Wis. 381; *Clemens* v. *Conrad*, 19 Mich. 176.

If it be held that the parties intended that this timber should revert to the seller if not removed from the land in two years, even though severed from the soil and cut into logs within that time, then it must logically follow that no matter how its condition and character may be changed, still if upon the land the next day after the two years expired then it would revert to and be the property of the seller. This was not the intention of the parties. The rule would work great injustice and hence cannot be the law.

Pierrepont v. *Barnard*, 6 N. Y. 290, cited in 52 Mich. 369.

The contract was an absolute sale of the timber. The words as to removal constitute a covenant, and are not a condition subsequent, and the trial court was right and the judgment must be affirmed.

Green v. *Bennett*, 23 Mich. 470; *Hicks* v. *Smith*, 77 Wis. 146; *Golden* v. *Glock*, 57 Wis. 118, 46 Am. Rep. 32.

A tree is real property as long as it stands on its native soil, but when cut down it becomes subject to the laws of personal property.

Wescott v. *Delano*, 20 Wis. 515; *Drake* v. *Wells*, 11 Allen, 141; *Owens* v. *Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Kingsley* v. *Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *White* v. *King*, 87 Mich. 111; *Spalding* v. *Archibald*, 52 Mich. 368, 50 Am. Rep. 253.

To whom is this timber to revert if the language be deemed a condition? Not to the Cutler & Savage Lumber Company, for it has conveyed all of its interests; and not to Bissell, the grantee of the lumber company, as the right is not assignable.

Rice v. *Boston & W. R. Corp.* 12 Allen, 141; *Guild* v. *Richards*, 16 Gray, 309; *Hooper* v. *Cummings*, 45 Me. 359; *Van Rensselaer* v. *Ball*, 19 N. Y. 100; *Nicoll* v. *New York & E. R. Co.* 12 N. Y. 121.

Neither Bissell nor defendant company has any rights as bona fide purchasers without notice, as it is distinctly found that Bissell purchased and took possession of the land, knowing of the existence of the contract. The plaintiffs have the same rights as against this defendant or Bissell as they had against the lumber company.

Johnson v. *Moore*, 28 Mich. 7; *Russell* v. *Myers*, 32 Mich. 523; *Williams* v. *Flood*, 63 Mich. 493.

If but a license it extended until July 22, 1894. The timber was cut before the expiration of the time, and if it be held to be a license it was more than a revocable license.

Ibid.

Such a license could not be revoked before the end of the two years.

Spalding v. *Archibald*, 52 Mich. 368, 50 Am. Rep. 353.

There is not only no decision which prevents the affirmance of this judgment, but the principle we contend for has already been announced.

Clemens v. *Conrad*, 19 Mich. 170; *Green* v. *Bennett*, 23 Mich. 464; *Greeley* v. *Stilson*, 27 Mich. 153; *Johnson* v. *Moore*, 28 Mich. 3; *Russell* v. *Myers*, 32 Mich. 524; *Haskell* v. *Ayres*, Id. 93, 35 Mich. 89; *Utley* v. *Wilcox Lumber Co.* 59 Mich. 263; *Williams* v. *Flood*, 63 Mich. 489; *Wasey* v. *Mahoney*, 55 Mich. 194; *Prentiss* v. *Ross's Estate*, 96 Mich. 83; *Gamble* v. *Gates*, 92 Mich. 510.

Montgomery, J., delivered the opinion of the court:

On the 22d day of July, 1892, the Cutler & Savage Lumber Company executed a writing to one John S. Wiedman, containing the following provisions: "The Cutler & Savage Lumber Company has this day sold to J. S. Wiedman, of Lake View, Michigan, all of the timber on the entire section 29, town 13 north, range 7 west. The said J. S. Wiedman is to remove the timber in two years from this date; and, in case the Cutler & Savage Lumber Company sell any of said land, the said J. S. Wiedman is to remove the timber from the land sold at once on being notified of said sale." On the 4th of November, 1892, Wiedman sold the same timber to plaintiff, and the lumber company afterwards sold the land to one Fred Bissell. No notice of this sale or request for immediate removal was made. Plaintiffs within the two years cut the pine in question into logs, but had not removed the logs from the premises within the two years. Bissell removed them, and defendant represents his title. The question is whether failure to remove the logs after they were cut, and within the two years named in the contract, forfeited the title. Contracts containing similar provisions have been construed in the courts in a number of the states, and the weight of authority supports the defendant's contention that, as to timber remaining uncut at the expiration of the time limited under a contract such as this, the title reverts to the owner of the realty. See *Pease* v. *Gibson*, 6 Me. 84; *Howard* v. *Lincoln*, 13 Me. 123; *Saltonstall* v. *Little*, 90 Pa. 422, 35 Am. Rep. 683; *Utley* v. *Wilcox Lumber Co.* 59 Mich. 263; *Haskell* v. *Ayres*, 32 Mich. 93, 35 Mich. 89; *Gamble* v. *Gates*. 92 Mich. 510.

None of the Michigan cases directly determine the status of timber cut and manufactured into logs during the time limited by such a contract as that in question, but not removed until later. In *Gamble* v *Gates*, the contract covered all the timber standing, lying, or being on the land. It was provided expressly that whatever of said timber shall remain on said lands after the limit afforded shall revert back, and become the property of the first party. The case was determined by the terms of the contract. In *Golden* v. *Glock*, 57 Wis. 118, 46 Am. Rep. 32, a contract similar to that in question was held to convey title to only such timber as was removed within the time limited, but considered all such timber as was manufactured into hoop poles as removed. In *Hicks* v. *Smith*, 77 Wis. 146, the same doctrine was reaffirmed by the same court. A contract not distinguishable from the one herein involved was considered, and it was held that, as to trees cut into logs, the severance from the realty had become complete. The property had become personalty, and its character so essentially changed by such manufacture that it was, in effect, removed from the premises, within the meaning of the deed. In *Williams* v. *Flood*, 63 Mich. 493, Mr. Chief Justice Campbell, speaking of such a contract as the present, said: "It is not very important to discuss the exact nature of plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to plaintiff unless lost by that forfeiture for nonremoval." The same can be said of the present case, and, if we apply the rule that forfeitures are not favored (*Miller* v. *Havens*, 51 Mich. 485), the rule of the Wisconsin court seems consistent with reason and justice. It is no stretch to treat the severance of the timber from the soil, and its manufacture into logs, as a removal, within the terms of the provision for forfeiture. The case of *Boisaubin* v. *Reed*, 1 Abb. App. Dec. 161, is opposed to the Wisconsin cases cited; but we think the doctrine of the Wisconsin cases more just, and are disposed to adopt it.

Judgment affirmed.

The other Justices concur.

Morgan E. DOWLING

v.

William LIVINGSTONE, Jr. *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. **Criticism of a book which is placed before the public is not libelous** provided it does not include any misstatements of any material facts contained in the book or attack the character of the author.
2. **To say that a writer quotes** from another, without giving him credit when he encloses in quotation marks the passage quoted, does not charge him with plagiarism.
3. **To call a remedy proposed by a book for poverty a "quack remedy"** is not libelous.
4. **Criticism, although severe and caustic,** so long as it is directed to literary composition and theories, and not to the personal character of the author, is not libelous.

(February 18, 1896.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the publication of an alleged libelous review of a book written by plaintiff. *Reversed.*

Statement by **Grant, J.**:

Plaintiff published a book entitled "The Wage Worker's Remedy," which was offered for sale to the public generally. The defendants are the publishers and owners of the Detroit Journal, a newspaper printed and published in the city of Detroit. Plaintiff took this book to the editorial room of the Journal and requested that it be reviewed. The book was handed by the managing editor to an employee

NOTE.—For criticism by expression of opinion as defamation, see *note* to St. James Military Academy v. Gaiser (Mo.) 28 L. R. A. 667.

for that purpose. A review was written and published May 15, 1894, and is as follows:

"Mr. Dowling's Book,—The Wage Worker's Remedy.

"Morgan E. Dowling's little book, The Wage Worker's Remedy, is a well-meant, but rather hysterical, attempt to solve the labor question. Although utterly lacking scientific value, it is interesting to most Journal readers, because the author is a Detroit man, and because it reveals how the average mind is groping and floundering in the midst of a forest of contradictions and in swamps of bad logic to the discovery of the truth. We do not claim to know beyond question the right path, but feel sure that Mr. Dowling has hopelessly lost his way. In the first place, Mr. Dowling's view is entirely confined to this country. His wage worker is the American wage worker. This is mainly why his effort has no value as a contribution to economic science. What would be thought of a writer who tried to explain the law of the correlation of forces wholly from the American or French standpoint? The truths of political economy are, of course, world-wide, like all truth. Rent and interest and wages must rise and fall in the United States in obedience to the same eternal laws that govern them elsewhere. To think otherwise is to doubt the harmony and simplicity of God's rule. Bearing this in mind, one of the author's nine remedies for low wages and lack of employment is seen to be inadequate. For instance, he would suspend immigration to this country; yet Italy, Germany, and Poland, all having emmigration instead of immigration, and enjoying to a small degree some of his other remedies, are suffering from low wages. Ireland still seems to be too crowded, although, from famine and immigration, her population has been reduced one half in less than a century. Surely, France's low wages have not been caused in any way by immigration, and war and starvation and a low birth rate have kept her population within reasonable limits, almost to a standstill. Another of Mr. Dowling's remedies for low wages is government ownership of railways, street railways, telegraph lines, and telephones. This is funny. He doesn't stop to think, but disposes of the whole subject almost with one flourish. If he had stopped for even a moment, it might have occurred to him that wages were low before the telegraph and locomotive were known. In his hasty opinion, governmental operation of street cars would realize Mayor Pingree's dream of a three-cent fare, and that would lead to more travel, and hence to the employment of more men. There you are. The whole question of labor is solved! But electricity has displaced horses (outside Detroit); travel on street cars has doubled, and yet wages have fallen. We, of course, are using the word 'wages' in its strict economical sense, whereas Mr. Dowling for the moment has in mind only the wages of one set of men. The reduction of street-car fares, he says, would be equivalent to raising the wages of those wage workers who used the cars. Has he never thought of the influence of street-car improvements on rent? May it not be possible that the landowner, not the wage earner, would absorb the benefits of such improvements? We are not arguing against the restriction of immigration and governmental ownership and management of these natural monopolies. They may be desirable in themselves, but as a solution of the labor problem they are ridiculous. Mr. Dowling disclaims being a paternalist; yet he advocates the most astounding piece of socialistic policy. He inveighs against class legislation, and then proposes some legislation of that kind. He would have the government forbid a higher rate of interest than 4 per cent and a lower rate of wages than $2 a day. Such childish suggestions were bad enough in the Middle Ages, when the laws of political economy were unknown. An old king commanded the tide to recede, and an English parliament undertook to fix a maximum wage. Both were excusable, for they were ignorant. We know better to-day. Like the tide, wages follow certain unchangeable laws. The old king might have erected a stone wall against the tide, but the tide would have gone on working just the same, until it overflowed the obstruction or undermined it or pushed it over. So the law of wages does not cease to operate when artificial obstructions are placed in the way of its sweep. Something may fall and smash, but it will not be the fault of the economic law. The law itself is all right, being the will of the Creator, and any patchwork by the finite mind cannot but lead to bad results. Mr. Dowling simply does not understand what 'wages' are, in the meaning given to the word by political economy. He has constantly in mind the meaning of the word as applied to 'wage-earners.' In political economy, however, the meaning of the word 'wages' is broader. It is the return for any service or for any productive labor. Thus, many are their own employers, and receive as wages what they themselves produce. How could the legislature compel an express-wagon driver or a small market gardener or a small shopkeeper to pay himself at least $2 a day? The merchant is both a capitalist and a wage earner, as political economy regards him. His profits are made up of interest on his capital, and of wages of superintendence. He may have, let us say, fifty clerks employed, at an average rate of $1.50 a day. The law suddenly compels him, according to Mr. Dowling's scheme, to pay them not less than $2 a day, increasing his expenses $25 a day. He is himself a laborer, a wage worker, as truly as are his clerks, and nine times out of ten a harder and more anxious worker, for upon him rests responsibility, and the shame should failure come. His own wages may already be cut down fearfully by high rent and competition; yet Mr. Dowling would arbitrarily make him pay higher wages to his clerks than the labor market required. Of course, like all quack remedies, it would intensify the trouble if it had any effect at all. Besides trickery and lying, it would cause business failures and the employment relatively of less clerks. The tide might be dammed up for a moment, but its strength would be felt. About one third of Mr. Dowling's book is devoted to praising Henry George, and to refuting his ideas. In the opening chapter he quotes from George without giving him credit, and outdoes him in raising alarm over present social conditions,

even saying that revolution is at hand unless something is quickly done to appease the wrathful and wronged masses. In the last chapter he has apparently cooled off, forgotten his alarm, and believes that material progress tends to benefit all. One wonders what he made such a fuss for first, especially when it is found that he believes that some poverty is bound to exist anyway. He says Henry George's scheme is socialistic, and then he proposes an extension of governmental powers which would make Sam Goldwater happy. He denounces the single-tax scheme as robbery, and then advocates it, at least so far as it is applied in New Zealand. He would exempt improvements largely, and tax land values so high as to prevent speculation in land, which is all any single taxer dares to hope will be accomplished in a generation or two to come. After giving his program of nine remedies, Mr. Dowling thinks of many more. He would prohibit the acquirement of more land by any man than is actually needed by him for business or homestead purposes. This is pretty strong for one who has just been defending the institution of private property in land as all right, and it hasn't the merit of originality, for Horace Greeley advocated the same thing fifty years ago. It is altogether an amusing book, as full of contradictions and absurdities as a schoolboy of tricks. Mr. Dowling gravely assures the reader that the remedy for poverty is 'steady work, shorter hours, and fair wages.' He might have added that food is an excellent remedy for hunger. 'The Wage Worker's Remedy' is on sale at Hunt & Eaton's, 189 Woodward Ave."

The defendants, with their plea, gave notice that they would insist in their defense that they had the right, and that it was their duty, to justly and fairly criticise such book, and that the criticism complained of is a just and fair one, and was published without malice or intention to injure said plaintiff. Two questions are presented: (1) Is the article libelous? (2) If so, what is the measure of damages?

Messrs. **Cutcheon, Stellwagen, & Fleming,** for plaintiffs in error:

The article is not libelous. It in no way attacks plaintiff personally. It does not attack his business. It is nothing but a discussion of a book which was offered for review. It contains nothing but the opinion of one writer about a book written by another.

Townshend, Slander & Libel, 4th ed. pp. 450, 451, 463, 464.

That publication is not to be considered a libel which has for its object, not to injure the reputation of anyone, but to correct misrepresentations of fact, to refute sophistical reasoning to expose a vicious taste in literature, or to censure what is hostile to morality.

Tabart v. *Tipper*, 1 Campb. 352; *Hibbs* v. *Wilkinson*, 1 Fost. & F. 608; *Paris* v. *Levy*, 2 Fost. & F. 71.

One writer in exposing the follies and errors of another may make use of ridicule, however poignant, and if loss occurs it is *damnum absque injuria*.

Carr v. *Hood*, 1 Campb. 354; *Strauss* v. *Francis*, 4 Fost. & F. 1114.

Any man has a right to express his opinion on literary productions.

Soane v. *Knight*, Moody & M. 74; *Thompson* v. *Shackell*, Id. 187.

If the occasion be such as repels the presumption of malice, the communication is privileged, and plaintiff must fail unless he can prove actual malice.

Henwood v. *Harrison*, L. R. 7 C. P. 606; *Wason* v. *Walter*, L. R. 4 Q. B. 73; *Taylor* v. *Hawkins*, 16 Q. B. 321; *Briggs* v. *Garrett*, 111 Pa. 404, 56 Am. Rep. 274; *Press Co.* v. *Stewart*, 119 Pa. 603.

It is not libelous to impute opinions to any man.

Cerveny v. *Chicago Daily News Co.* 35 Ill. App. 560; *Heriot* v. *Stuart*, 1 Esp. 437; *Walker* v. *Tribune Co.* 29 Fed. Rep. 827; *Belknap* v. *Ball*, 83 Mich. 583, 11 L. R. A. 72; *Campbell* v. *Spottiswoode*, 3 Fost. & F. 421 *Merivale* v. *Carson*, L. R. 20 Q. B. Div. 275; *O'Connor* v. *Sill*, 60 Mich. 175.

In a criticism upon the work of an author, no action can lie unless the criticism is grossly false and works a special damage to the proprietor of the book at which strictures are leveled.

Cooper v. *Stone*, 24 Wend. 434; *Kennedy* v. *Press Pub. Co.* 41 Hun, 422.

No action can be maintained but on the ground of its being a disparagement of plaintiff's book; and to maintain the action on that ground there must be an allegation and proof of special damages.

Swan v. *Tappan*, 5 Cush. 105; *Gott* v. *Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; Cooley, Torts, 260.

When words are not actionable in themselves special damages must be alleged and proved.

Walker v. *Tribune Co. supra; Pollard* v. *Lyon*, 91 U. S. 225, 23 L. ed. 308; *Dooling* v. *Budget Pub. Co.* 144 Mass 258, 59 Am. Rep. 83.

Mr. **Morgan E. Dowling** defendant in error, *in propria persona:*

If the words used appreciably injure the plaintiff's reputation, he suffers an injury which is actionable without proof of any damage.

13 Am. & Eng. Enc. Law, p. 298, and cases cited in note 1.

The words are sufficient if they render plaintiff comtemptible or ridiculous.

Foster v. *Scripps*, 39 Mich. 379, 33 Am. Rep. 403; 13 Am. & Eng. Enc. Law, p. 300, and cases cited in notes 1 and 2.

A newspaper article which tends to injure a man in his calling, diminish his reputation, or expose him to public hatred, contempt, or ridicule, if untrue, is libelous *per se*.

13 Am. & Eng. Enc. Law, p. 294, and authorities cited in note 1; *Hatt* v. *Evening News Asso.* 94 Mich. 114; *Tyron* v. *Evening News Asso.* 39 Mich. 636; *Weiss* v. *Whittemore*, 28 Mich. 366.

A book may be libeled by false suggestions regarding its purpose or tendency, its originality or truthfulness, or by garbled extracts or perversions of language in criticising it.

Cooley, Torts, 419, 420; *Reade* v. *Sweetzer*, 6 Abb. Pr. N. S. 9, and note; *Archbold* v. *Sweet*, 5 Car. & P. 219; *Macleod* v. *Wakely*, 3 Car. & P. 311.

An article that attacks a man's property, and

indirectly attacks the owner individually, is libelous, and the owner may recover damages for the personal attack.

13 Am. & Eng. Enc. Law, p. 316, and cases cited in note 1.

"Malice," in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.

Cooley, Torts, 245, and note; *Bacon* v. *Michigan C. R. Co.* 66 Mich. 173.

The law always presumes that in a publication of an article which is libelous upon its face, it was published voluntarily and from malicious motives.

13 Am. & Eng. Enc. Law, p. 426; *Scripps* v. *Reilly*, 38 Mich. 24; *Maclean* v. *Scripps*, 52 Mich. 214.

It is the province of the jury to determine the question of malice.

Bacon v. *Michigan C. R. Co. supra*, and cases cited; 13 Am. & Eng. Enc. Law, p. 427, and cases cited.

The amount of damages sustained by plaintiff must be determined by the jury as judges of the facts.

Scripps v. *Reilly, supra; Tyron* v. *Evening News Asso.* 39 Mich. 639; Odgers, Slander & Libel, 291; *Tripp* v. *Thomas*, 3 Barn. & C. 427; 13 Am & Eng. Enc. Law, p. 298, and cases cited in note 1, p. 432, and cases cited in note 4.

When the act done is one which from its very nature must be expected to result in mischief, or indicates a reckless disregard for the rights of others, damages for injury to the feelings of plaintiff are recoverable.

Scripps v. *Reilly, supra; Farrand* v. *Aldrich*, 85 Mich. 604.

Grant, J., delivered the opinion of the court:

The propositions advocated by the plaintiff are thus stated in the second chapter of his book: "(1) The suspension of all immigration to this country. (2) The making of eight hours a legal day's work. (3) The prohibition of marriage under the age of twenty-one years. (4) The prohibition of the employment of children under fifteen years of age in workshops, factories, and mines. (5) The fixing of the minimum rate of wages at $2 per day for all laborers, except domestic and farm laborers. (6) The reduction of the legal rate of interest to 4 per cent per annum. (7) The purchase of all street railways, and the placing of them under the control and management of the municipal authorities. (8) The purchase of all telegraph, telephone, and railroad lines in the United States, and the placing of them under the control and management of the national government. (9) The prohibition of the purchase of lands in this country by nonresident aliens, and the compelling of all nonresident aliens who now own lands to sell them within a specified time, or forfeit their titles." The book is mainly devoted to a discussion and elucidation of these propositions. No malice was shown on the part of the defendants, unless it is fairly deducible from the article itself. On the contrary, it appears to be conclusively established that the defendants did not entertain any malice towards him, and that the book was placed by them in the hands of their critic, who wrote the article, without any comment or instruction.

When an author places his book before the public, he invites criticism; and, however hostile that criticism may be, and however much damage it may cause him by preventing its sale, the critic is not liable in an action for libel, provided he makes no misstatement of any material facts contained in the writing, and does not attack the character of the author. The book and the criticism are both before the public. The language we used in *Belknap* v. *Ball*, 83 Mich. 589, 11 L. R. A. 72, applies to this case: "When language is truthfully stated the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison. Readers can then determine whether the writer has by the publication libeled himself or the candidate. When the language is falsely and maliciously stated privilege ceases to constitute a defense." We think that case and the authorities there cited establish the principle governing this. Townshend states the rule as follows: "As criticism is opinion, it can never be primarily material to inquire into its justness. The right to criticise implies the right to judge for one's self of the justness of the criticism. It would seem to be but a delusion to say one has the right to criticise, provided the criticism be just. The justness or unjustness can never be more than matter of opinion. The test always is, Was the criticism bona fide? It is like the case of one writing concerning the sanity of another; the test of the justification is not, Was the statement such as a man of sound sense would have made? but, Was it the honest conviction of the publisher?" (p. 464). The case of *Bacon* v. *Michigan C. R. Co.* 66 Mich. 166, has no application to this case. No question of criticism of an author's writing was there involved. The defendant had reported the plaintiff as having been discharged from its employ for stealing. The report was a direct attack upon his personal character. There is in both reason and authority a wide distinction between language uttered concerning a person and criticism of his writings. Townshend, Slander & Libel, § 255. It was said in *Campbell* v. *Spottiswoode*, 3 Fost. & F. 428: "The article, no doubt, is pungent, bitter, and caustic; at the same time public men, and, above all, public writers, must not complain if they are sometimes rather roughly treated. Public writers, who expose themselves to criticism, must not complain that such criticism is sometimes hostile. . . . It was perfectly lawful for a public writer to say that it was an idle scheme, and that it was a delusion to suppose that by forcing these papers [meaning the plaintiff's newspapers] into circulation by free distribution the great cause of missions would be promoted, and, in short, to denounce the whole scheme as pernicious and delusive." In a note to the above case will be found cited several English cases sustaining the rule. See also Townshend, Slander & Libel, § 254. It is not libelous to ridicule literary composition. *Carr* v. *Hood*, 1 Campb. 355, note. Lord Ellenborough in that case said: "One writer in exposing the follies and errors of another may make use of ridicule, however poignant. Ridi-

cule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? . . . Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right."

It is unnecessary to cite or quote further from the authorities. The rule of law in such cases is clear. In applying it to the present case, we find that the personal character and reputation of the author are not attacked. His theories are. In no material matter is there any misstatement of fact or of the propositions set forth in the book. The critic was at liberty to attack or denounce them with sarcasm and ridicule.

The learned circuit judge instructed the jury that "the defendants had the right to ridicule this book if, in the candid judgment of any fair man, the book or any part of it deserved ridicule." This is not the law. As already shown, when the critic correctly states the author, he (the critic) is the sole judge of the language of his criticism. Many fair men might disagree with him, and very likely would in this case. This is for the public, and not for a jury, to determine. If the plaintiff's contention be the correct rule of law, then the protectionist might maintain an action for libel against the free trader who attacks his protection theories and arguments with sarcasm, ridicule, and contempt.

Plaintiff insists that the defendants charged him with plagiarism, because he did not give Henry George credit for a quotation from his works. The quotation was inclosed in quotation marks, but not credited to Mr. George, and the court very properly charged the jury that this did not charge him with plagiarism.

The court also correctly instructed the jury that it was not libelous to call his remedy a "quack remedy."

It was not libelous to say that "Horace Greeley advocated the prohibition of the acquirement of more land by a man than is actually needed by him for his business or homestead purposes," even though it should appear that Mr. Greeley had not advocated such a doctrine.

Complaint is also made of the statement that "he [plaintiff] denounces the single-tax scheme as robbery." In that part of the book to which this statement has reference, plaintiff is discussing the single-tax theory of Mr. George, and is denouncing his proposition to take the land from the present owners without compensation, which he denounces as "a gigantic piece of robbery." As stated in the book, this was a part of the single-tax theory of Mr. George. The article complained of, however, correctly states the position of the plaintiff upon this subject.

The declaration contains no innuendoes, and, although the criticism is undoubtedly severe and caustic, it does not exceed the bounds of legitimate criticism. The court should have directed a verdict for the defendant.

Judgment reversed, and a new trial ordered.

The other Justices concur.

KENTUCKY COURT OF APPEALS.

Joseph ATKINS *et al.*, *Appts.*,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

1. **Affidavits for a change of the place of trial because a fair trial cannot be had** in the county cannot, by denying that such a trial can be had in certain other counties, prevent the judge from exercising his right under the statute to act on his own personal knowledge in sending the case to an adjacent county or some other county most convenient, in which the court is of opinion that a fair and impartial trial may be had.

2. **A statute permitting the denial of a continuance in a criminal case for absent witnesses** for the defendant, provided the prosecuting attorney will admit that the witnesses if present would testify as alleged in the affidavits, is not in violation of the constitutional right of the defendant to compulsory process for obtaining witnesses or the right to meet witnesses face to face (which means witnesses against him), where he has had reasonable time and opportunity to obtain his witnesses by compulsory process of the law, but such reasonable time and opportunity must be given him.

3. **Filing indictments against witnesses** to prove an alibi based solely on evidence of witnesses for the prosecution, in the presence of persons summoned to serve as jurors in the trial of the case, is improper as not calculated to give the accused a fair and impartial trial.

4. **The discretion of the circuit court to order into actual custody** a defendant in a criminal trial which has commenced cannot be restricted by a previous allowance of bail by a county judge.

(January 16, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Knox County sentencing them to imprisonment for murder of which they had been found guilty. *Reversed.*

The facts are stated in the opinion.

Messrs. **Breckinridge & Shelby,** for appellants:

The Knox county court was without jurisdiction in this case, and the order of the Perry circuit court transferring the case was void.

Ky. Stat. § 1110; *Higgins* v. *Com.* 94 Ky. 57.

NOTE.—For denial of continuance upon admissions by the prosecution, as affected by right of accused to meet witnesses, see *note* to Hoyt v. People (Ill.) 16 L. R. A. 239.

A refusal to continue a criminal case when the defendant was entitled thereto might be of itself a sufficient cause for reversal.

Morgan v. *Com.* 14 Bush, 106; *Salisbury* v. *Com.* 79 Ky. 425; *White* v. *Com.* 80 Ky. 489; *Petty* v. *Com.* 12 Ky. L. Rep. 920; *Bowlin* v. *Com.* 94 Ky. 394; *Vogt* v. *Com.* 92 Ky. 71; *Murphy* v. *Com.* 92 Ky. 488; *Hardesty* v. *Com.* 88 Ky. 541.

The fair construction of § 189 of the Criminal Code is, that was the trial term.

Pace v. *Com.* 89 Ky. 206.

The amendment to the Code of 1886 is not constitutional.

Pace v. *Com.* 89 Ky. 207.

The judgment of the judge of the county court of Knox county deciding that the prisoners were entitled to bail was as final as if made by the circuit judge, and his order admitting them to bail had the same legal effect.

Smith v. *Com.* 91 Ky. 588; *White* v. *Com.* 80 Ky. 480.

Messrs. **B. B. Golden, C. Bowers, C. B. Lyttle, J. C. Forrester,** and **John L. Scott & Son** also for appellants.

Mr. **William J. Hendrick** for appellee.

Grace, J., delivered the opinion of the court:

This is an appeal by Joseph Atkins and Jesse Fields from a judgment of the Knox circuit court sentencing each of them to confinement in the state penitentiary for life, for the murder of Josiah Combs. The killing occurred in Hazard, the county seat of Perry county, on the 23d day of September, 1894; same being Sunday and about 7 o'clock in the morning. Indictment against these defendants was duly found by the grand jury of Perry county on the 13th day of December, 1894. And on the same day, and on motion of the commonwealth, for the removal of the cause to another county, was made, accompanied by the written statement of the commonwealth's attorney, in due form, that the state of lawlessness was such in Perry county that a fair trial of the accused on said charge could not be had in that county. This motion was not opposed by the accused, but pending same they filed a joint affidavit saying that they had been participants in what was known as the "French Eversole feud," that had been going on in Perry county and (naming) ten other counties, including the county of Knox, and that the state of public opinion against them, among the masses of the people, relations, and friends of the Eversole faction and J. M. Combs, in the counties named, was such that they did not believe they could have a fair trial in either of said counties. This affidavit was supported by the joint affidavit of three other persons, who simply say that they are acquainted with the facts stated in the foregoing affidavit, and that they believe them to be true. Upon this state of the record, the court made an order removing the cause to the county of Knox for trial, and to this order defendants excepted. And when the case was called in Knox county for trial, and before entering their plea of not guilty in said court, they objected to the jurisdiction of the circuit court of Knox county, and moved that "said cause be remanded to the circuit court of Perry county, to be again assigned." This motion was overruled by the court.

It will be noticed that by the statute, passed in pursuance of the constitutional authority, for the removal of causes by the commonwealth, when the commonwealth's attorney has filed his statement showing the necessity of the removal, "the court may then act on its own personal knowledge in the removal of the cause, either to some adjacent county, or yet to some other county most convenient, and in which the court is of opinion that a fair and impartial trial may be had." In the order removing this case, the court recites that, so acting on its own personal knowledge, it removed the case to the county of Knox, "as being the most convenient county for the trial of same in which this state of lawlessness did not exist." In this removal the court was authorized so to act, and was not bound by the affidavit of the accused, though supported by the other affidavit, in objecting to the county of Knox. The objection of the accused to the jurisdiction of the circuit court of Knox county was properly overruled.

The Knox circuit court began on the 2d Monday in April, 1895. This cause seems to have been set for the 4th day of the term. The commonwealth announced "Ready." The defendants were not ready, and, being required, they filed an affidavit setting out the absence of some twenty-five witnesses by whom they could prove important and material facts chiefly relating to an alibi in behalf of both parties; showing that in March, before, they had procured a subpœna for the witnesses, and placed same in the hands of the sheriff of Breathitt county, where said witnesses resided; counsel for defendants saying to the court that they did not desire a continuance of the cause for the term, provided they could obtain the attendance of these witnesses at a later day of the court. Thereupon the court set said cause for hearing on the 10th day of the term. And upon the representation of the accused that they were poor, and that their witnesses were poor, and had not the means to pay passage from Breathitt county, where they lived to Knox county, the court made an order directing that these witnesses should be summoned and arrested on behalf of the commonwealth, and brought to court. This warrant of arrest, however, was never issued, and never in fact sent to the sheriff of Breathitt county. But, as is shown by an affidavit in the cause, the judge of the court—not in open court, but at night, and at the instance of the attorneys for the prosecution, and without the knowledge or consent of the accused or their counsel—appointed one Burton, a witness for the commonwealth, and one Mann, a resident of Breathitt county, as special bailiffs to execute this process. It appears from the affidavit of Burton that on going to Jackson, the county seat of Breathitt, he found Mann, and had him duly sworn, and that then, having an arrangement with Marcum to furnish tickets by railroad to such witnesses as they might obtain, they summoned for the defendants thirteen witnesses; that, of these, three were sick, and the family of another was sick, but that they did in this way have present, at the time and place agreed on with Marcum, nine of the witnesses of the de-

fense, but that Marcum failed to appear and furnish the transportation as he had agreed to do. And the special bailiff says, that, having no money himself to pay the fare of the witnesses, and the day of trial approaching, he did not place the witnesses under arrest, but abandoned them, and returned to court to make his report; that only a single witness was secured by this arrangement.

On the calling of the cause on the 10th day of the term, the attorney for the commonwealth again announced "Ready," and the defendants, "Not ready;" and being required by the court again to show cause, they filed another affidavit, reciting the absence of some twenty-seven witnesses, the materiality of whose evidence in their defense was duly set forth together with the facts developed in their efforts to procure their attendance since the former calling of the cause, as recited herein. And defendants again asked a continuance. Upon an examination of this last affidavit, the commonwealth's attorney agreed that the same might be read upon the trial of the cause as the testimony of the absent witnesses; the counsel for accused insisting, if compelled to try on this affidavit, that the state should admit absolutely as true, the facts stated in this affidavit. This the court overruled. Exceptions were duly taken, and the court overruled the motion for a continuance. Exceptions were duly taken. Thereupon an examination of jurors, touching their competency, commenced, and five being obtained who were qualified, but not finally passed upon or accepted, an adjournment was had until the next morning. Whereupon, on the assembling of the court next day, defendants offered to file an additional and amended affidavit reaffirming the one filed the day before, and setting forth in their amended paper quite a number of (some sixteen) witnesses not before presented to the court and whose testimony they said they had discoverd since the filing of their former affidavit. Most of the witnesses named in this amended affidavit lived in and near Hazard, the place of the killing. "And by the testimony of six, at least, of them, defendants say they can prove such facts as will clearly show that five of the six or seven witnesses for the commonwealth who will undertake to identify Joseph Atkins as the man who did the shooting, and some of whom identify Fields as the man who was present at the time, were not in fact present at the time of this shooting, and that they did not and could not possibly have seen, at the time and place they claim to have seen, the person who did this shooting." So clearly and distinctly is this evidence embraced in this amended affidavit opposed to the testimony of the witnesses who testify for the commonwealth to the killing, that their materiality cannot for a moment be questioned. If the testimony as contained in this amended paper offered is true, then it greatly impairs the most important and direct testimony of the witnesses for the commonwealth who testify to the killing, and who undertake to identify Atkins and Fields as the parties who participated in same. Quite a number of the witnesses named in the last paper, it is said, will contradict testimony of commonwealth's witnesses tending to connect these defendants with the killing, and same are clearly contradictory of the evidence of the commonwealth, as afterwards appears in the trial. No inconsiderable part of the testimony of the commonwealth tending to identify Atkins and Fields consisted of evidence of certain parties who went in pursuit of the parties who did the shooting, and who claimed that, in a fight with said parties on that day, two of them shot and wounded Fields, and at the same time claimed to recognize Atkins as being with Fields in the fight; and yet by an examination made only two days later, by the friends of Combs, who was killed, of the person of Fields, it was clearly shown that he had not been wounded at all. In this amended paper it was stated that the reason that neither of the defendants had been to Hazard since this killing to hunt up evidence in their behalf, and to prepare their cause, was that the state of feeling against them in that town and county was such that their lives would have been endangered, and that this occasion was the first opportunity they had to obtain this information. This affidavit was full in other respects as required by law. The court refused to permit the defendants to file this affidavit, or to give the accused, in any way, any benefit of the evidence contained in same,—again refusing to continue the cause. During the day, further progress was made in obtaining a jury, but it was not completed, accepted, or sworn, and the court again adjourned over until the next day.

On the morning of the next day, defendants offered to file a fourth affidavit, in which they, still relying upon their former affidavits, say that "it is manifest that the testimony to be heard in the case will be extremely conflicting and contradictory, and that the personal presence of their witnesses is highly important, and that since the calling of this case on the tenth day of the term, the witnesses for the prosecution, conspiring together to intimidate and prevent the attendance of the witnesses for defendants, have procured by false testimony before the grand jury, the indictment of some of these witnesses for false swearing or perjury, by reason of the testimony formerly given by them before the county judge of Knox county on a motion for bail, and that one of same (Patton), the only one who was obtained by the special bailiff out of the whole twenty-five whom he was ordered to arrest, has been so indicted, and, in open court, and in the presence of the jury then approved, arrested on said charge; that they are refused access to or knowledge of these indictments against their witnesses. Cannot tell against whom nor how many are indicted, but they say that, in all this, a fair and impartial trial is obstructed and denied these defendants." On tendering this paper, the defendants again moved a continuance. The court refused to permit same to be filed, and again overruled the motion to continue the cause. It is proper to add that, of the witnesses for the defense from Breathitt county who were relied upon by them to prove an alibi, ten finally appeared, and testified to a state of facts which, if true, showed it was impossible that either of the accused (Atkins or Fields) could have been in Hazard, Perry county, Sunday morning, September 23, 1894, when the shooting and killing

of Combs occurred; this testimony showing the accused to have then been in Breathitt county, thirty miles away from Hazard, at the hour of the shooting of Combs. And finally it appears under the affidavit which the accused did file, and the statements of which the commonwealth consented, to prevent a continuance, might be read as evidence, that the statements of thirteen other witnesses were read on this same matter of an alibi; that these statements were given with great detail and circumstance of time and place, and showing conclusively, if true, that the accused could not have been in Hazard, Perry county, at the time of the killing of Josiah Combs.

Counsel for the defendants contend earnestly that in all this proceeding their clients have, by this combination of circumstances,—one of the affidavits filed showing the absence of their chief attorney, who was acquainted with all the facts of the case,—and by the rulings of the court, been deprived of a fair and impartial trial; that they have not been allowed a reasonable opportunity to prepare their defense in a case of such grave magnitude to them. And particularly do counsel complain that their clients have not been awarded that compulsory process of the law to compel the attendance of their witnesses, as guaranteed under the Bill of Rights (a part of the Constitution of the state) to every person accused of crime; that their clients have not been accorded any reasonable opportunity for the operation and execution of such compulsory process, as provided by the supreme law of the land; that instead of this process, which, under the law, should have gone to the sheriff of Breathitt county, same was not so awarded, but that in disregard of this law, and as a substitute therefor, a special bailiff was appointed by the judge of the court, at the instance of the attorneys employed to assist the commonwealth in their prosecution (and which was so ordered without their knowledge or consent). And while counsel do not question the good faith of the court in making this special order, yet they say the utter failure of which process to the special bailiff was due to the failure of one of the attorneys for the commonwealth to furnish the transportation as he agreed to do (all this is shown by the affidavit of the special bailiff in the record, and remains unexplained); and that, finally, they were forced into trial without the personal attendance of many of their material witnesses, and, as to some of them, compelled to try without any benefit whatever of their testimony, and, as to others, only on the admission by the commonwealth that the affidavits should be read as the testimony of the absent witnesses, and not upon the condition that the statements should be taken as true.

Counsel question the constitutionality of the act of 1886 in reference to the trial of criminal cases, whereby this proceeding is made possible under the Code. Counsel say that this question has often been presented to this court, but not decided; and they insist in this case that it is due to their clients, as well as to the trial courts of the state, and to the profession, that it should be determined.

The provision upon which counsel rely is found in the 11th section of the Bill of Rights, adopted as a part of the present Constitution of Kentucky, and is as follows: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." These are substantially the same provisions on this subject as contained in the old Constitution of Kentucky. Under our Criminal Code, adopted soon after that Constitution went into operation, it was provided (§ 188): "That when an indictment is called for trial, or at any time previous thereto, the court upon sufficient cause shown by either party may direct the trial to be postponed to any time in the same term, or to another term." And by § 189: "That the provisions of the Code of Practice in civil actions in regard to the postponement of the trial of actions, shall apply to the postponement of [criminal] prosecutions on application of defendant, except that, when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the commonwealth admits upon the trial that the facts are true. These provisions found in the Code of 1854 became the rule of practice in the trial courts, and, from time to time, it was, either by implication or directly, approved by the court. And in the case of *Pace* v. *Com.* 89 Ky. 206–209, this court expressly affirmed the constitutionality of that act. And such continued to be the law and rule of practice in criminal cases up to May, 1886. During all these years it became manifest that the rule requiring the state to admit as absolutely true whatever the accused might, by his *ex parte* affidavit, say he could prove by an absent witness, materially impaired the execution of the criminal law; that by its operation it was placed in the power of an unscrupulous criminal, aided by expert and ingenious counsel, to long and indefinitely delay the trial of his cause, or else to compel the state to admit facts, for the purpose of a trial, which often, in effect, were equivalent to a verdict of acquittal. In this way, and by the operation of this provision, the criminal law was brought into disrepute, and by many held in contempt, and the court and officers of the law censured for the long delay, and final failure, of justice. To remedy this crying evil, the legislature, in 1886, amended the provisions of the Code of 1854 in reference to the terms on which the state might procure a trial of criminal causes, and provided that the state might demand a trial, at any term of the court after the one at which the indictment was found, by admitting, not that the facts claimed by the accused that he could prove by any absent witness were true, but by admitting that, if such witness was present and testifying, he would state the facts as claimed by the accused in his affidavit; this latter amendment, however, still containing a provision that the court might, in its discretion, where the ends of justice seemed to require it, compel the attorney for the commonwealth to admit the truth of the statements contained in the affidavit of the accused. This amendment of 1886 also contained further

clauses authorizing the state to contradict the statements of the affidavit by other testimony, and to impeach the absent witnesses by whom it was claimed such testimony would be given. This law has been the rule of practice in the circuit courts of the state since its enactment. It is conceded that its provisions are widely different, and make a material modification of the Code of 1854 on this subject. It may be also observed of this new provision that, in practice, it has been found a great improvement upon the old law, in that it enables the state, in a reasonable time, to force a trial of its indictments, notwithstanding the continued and persistent efforts of the accused to delay and continue. We call to mind no provision of the Criminal Code that has been found so valuable, and of such material aid to accomplish a speedy trial, as that contained in this amendment. In our experience, drawn from the many records of criminal trials brought before us, as well as in our own personal observation, men do not commit crimes that they may be punished, or for the sake of the punishment affixed by law, but from motives of malice, in obedience to, or to gratify, some unlawful passion, or for purposes of gain by force or fraud.

Yet the question remains whether this amendment of 1886 is constitutional. Of the provisions of the Bill of Rights, § 11, before quoted, as applicable to this case, we have two clauses,—one affirming the right of a person accused of crime to meet the witnesses face to face (of course, this means the witnesses that may be called by the state against him). The other provision is that the accused shall have the right to "the compulsory process of the state for obtaining witnesses in his favor." The one provision is equally as authoritative, as clear, and its meaning as obvious, as the other. No effort has ever been made by the legislature to impair in any degree the efficiency of the first clause quoted,—"That accused shall have the right to meet the witnesses [called against him] face to face." We apprehend that no such effort would be tolerated by the courts. And yet this § 11 of the Bill of Rights by no means contains the whole law applicable to the Criminal Code of the state. It is easily, fairly, and clearly deducible from the Constitution that it is the first and highest duty of a state to its citizens to preserve the public peace, and by its laws, and through its courts and law officers, to afford full, complete, and ample protection to all its citizens in life and limb, reputation and property. This is the very foundation stone of its authority and right to exist as a government at all. This end can only be accomplished, First, by the enactment by the legislative power of appropriate laws for the protection of its citizens, to which should be annexed appropriate penalties for violation of the same; and, second, by the courts, in faithfully and diligently enforcing these laws and punishments. It is well argued by text writers and courts that it is the certainty of punishment that deters bad men from the commission of crime. So that we find that the provisions of § 11 of the Constitution, under consideration, is but a part of the whole. It is but a provision in behalf of one accused of crime to have the process of the state to compel the attendance of his witnesses. And yet the question is presented whether this provision shall override and dominate every other duty of the state to the citizen. Whether, after the compliance with this provision of the Constitution, in awarding to the accused the compulsory process of the state, wherein and whereby is given reasonable time and opportunity for the execution of the same, and yet, after all this has been done, and the actual attendance of every possible witness failed to be obtained, what shall then be done? Shall the accused be discharged without trial, and, of course, without punishment, or shall the legislature make some other and further provision applicable to that state of case? It did undertake to make such further provision, by the Code of 1854, in allowing the state a trial upon admitting as true the facts stated by accused that he could prove by absent witnesses. This provision, having, on a fair trial, been found highly detrimental, if not subversive of the whole Criminal Code, was by the amendment of 1886, under consideration, abandoned, and a different mode adopted by the legislative will. This consists, as we have seen, in only requiring the state to admit that the absent witnesses, if present, would testify as claimed in the affidavit. On the face of the acts in question, neither of them, either in letter or spirit, violates the provisions of the Constitution. They are but an expression of the legislative will as to what shall be the rule of procedure by the courts on a state of case where the accused, having had awarded him this compulsory process of the state to obtain the attendance of his witnesses, and having been allowed a reasonable time and opportunity to enforce this writ, yet, on the calling of his cause for trial, finds himself without the actual presence of all the witnesses whom he desires. In this state of case the amendment of 1886, under consideration, provides that the state may have a trial if the prosecuting attorney will admit to be read, as the evidence of the absent witnesses, the affidavit filed by the accused. Either act, viewed and interpreted and administered so as to substitute the provisions of either for the constitutional guaranty to the accused of the compulsory process of the state, with reasonable time and opportunity for the execution of the same, would be bad. But neither provision, either of the Code of 1854, or of the amendment in question of 1886, is bad, construed and enforced in the light of the interpretation herein indicated. And this we think is the true meaning and interpretation of the clause in the Constitution before quoted, and of the amendment of 1886 to the Code. In adopting this construction, the prisoner is deprived of no right guaranteed to him by the Constitution. And the state is also, by this amendment of 1886, enabled to obtain a trial within a reasonable time, and thus give to all her citizens the benefit of the laws enacted for their security and protection.

Reviewing this case in the light of this interpretation, and upon the facts disclosed by the record, we feel constrained to say that the accused have not, in the trial of this case, had awarded them the compulsory process of the law, with reasonable time and opportunity to obtain the benefit of same. And for this rea-

son the judgment of conviction, as to both appellants, Atkins and Fields, is reversed, and the cause remanded to the Knox circuit court for further proceedings therein not inconsistent with the principles of this opinion.

We might add that we do not view with approval the filing of indictments by the grand jury of Knox county, based solely on the evidence of the witnesses for the prosecution in the criminal case under trial, against the witnesses of the defendants who had theretofore testified to facts showing, in behalf of the accused, an alibi. The filing of same in the presence of those summoned to serve as jurors in the trial of the murder case was not calculated to give to the accused that fair and impartial trial contemplated by law.

Many other objections are made by counsel for appellants on this appeal, but, outside of the matters indicated, we find the record substantially correct, and free from error. The case needed no other evidence to authorize the submission of the conspiracy between these parties and others to do the deed than the evidence tending to identify them as the persons actually present and participating and tending to identify them as the parties found in the woods a few miles away, and with whom the posse claims to have had an encounter. That there was yet a third man stationed on the hill opposite the town, who participated in the firing on Combs, or at least at the time of his killing, seems to be conceded. This third man might well correspond to one of the three men found in the woods by the posse.

The court seems to have kept steadily in view the principle heretofore announced by this court, that evidence tending to connect the accused with the faction adverse to the Combs people must be of a general nature only, and that it was not proper for either party to go into the particulars of any transaction. And, further, the court warned the jury that the evidence admitted on this line could only be considered by them as supplying a possible motive for the commission of the offense with which they now stand charged.

Neither was it necessary for the court, all through the trial (where the defendants were being tried together), to be constantly warning the jury that this or that particular evidence was either to be considered only against or in favor of one or the other of the accused. The jury may be fairly supposed to possess sufficient intelligence to distinguish and apply the evidence properly.

Another matter complained of is that the court, on entering upon the trial, disregarded the order of the county judge of Knox county, previously made, allowing bail; held the bond taken bad on its face, as not being taken by the proper officer; and then ordered the defendants into actual custody. There was no error in all this. It would be a strange perversion of the law if a county judge could dictate to a circuit judge what course he should pursue in the trial of one charged with felony in his court. It was within the discretion of the court to order defendants into actual custody when the trial commenced. Neither should the order of the county judge heretofore made have any effect, or be regarded of any validity, if the prisoners desire to again give bail. New proceedings for this purpose will be necessary, before the proper officer.

We mention these things only because questions of a similar nature may again arise in any future trial of the defendants. And, as this cause must go back for a retrial, we have carefully refrained from expressing any opinion as to the merits of the case on the evidence. This is purely and exclusively a question for the jury to determine. The motion by the commonwealth to strike the bill of exceptions from the record is overruled.

Judgment reversed.

ILLINOIS SUPREME COURT.

Elizabeth BOYER, *Appt.*,
v.
Peyton R. CHANDLER *et al.*

(160 Ill. 394.)

1. A mortgage securing a principal sum and interest coupons may be foreclosed to raise the amount due on coupons as they fall due, without affecting its security for the principal and other coupons.

2. Holders of the principal note and interest coupons not due are not necessary parties to a suit to foreclose the mortgage to raise the amount due on matured interest coupons, if the lien of the mortgage in favor of the other notes is to be left unimpaired.

3. Possession by the holder of an unrecorded contract for a block of flats, of one of the flats in the building, is sufficient notice to preserve his rights as to a person subsequently taking a mortgage from the vendor.

(January 20, 1896.)

APPEAL by defendant Elizabeth Boyer from a decree of the Circuit Court for Cook County subordinating her to the rights of Emily Elliott an intervener in a proceeding by plaintiffs to foreclose a mortgage given by George R. Allen. *Affirmed.*

Statement by the COURT:

On April 1, 1892, one George R. Allen executed his deed of trust to Frank R. Chandler on lot 23 in a certain subdivision of a tract of land in Chicago, to secure his promissory note, of even date therewith, for $3,500, payable to Allen's own order, maturing five years after date, and bearing interest at 6 per cent payable

NOTE.—The present case seems to be a novel one in respect to the right of the holders of coupon interest notes to foreclose a mortgage securing them; but the general subject of the rights of bondholders to enforce a mortgage securing their bonds is the subject of a *note* to Seibert v. Minneapolis & St. L. R. Co. (Minn.) 20 L. R. A. 535.

semi-annually on the 1st days of April and October in each year until paid, evidenced by ten coupon notes of $105 each. The deed of trust provided that it was given for the security of the payment of all said notes, without priority or preference, and that, in case of default in payment for ten days, the whole of the principal sum should at once, at the option of the holder of any one of said notes, become due. The notes were indorsed by Allen, the maker and payee thereof. Peyton Chandler and Frank R. Chandler, partners, became the owners of the first, second, and third of said coupons, and, default being made in the payment, they thereupon on October 28, 1893, filed this bill in the circuit court of Cook county, against Allen and others, defendants, to foreclose the mortgage. Elizabeth Boyer, the holder of the second mortgage given by Allen on the same lot, for the sum of $1,500, payable to her two years after date, was made a party defendant. This last note was secured by a deed of trust given by Allen to Henry F. Vallette, trustee. On April 11, 1892, Emily Elliott, one of the defendants, made a written agreement with said Allen for the purchase of the lot in question, subject to the Chandler deed of trust of $3,500, and he was to convey the same to Mrs. Elliott within twenty days. Allen, also, by said agreement, was to erect a three-story flat building on the lot by July 1, 1892. He was to retain the premises, and use of the first and second floors for thirty weeks from July 1, 1892, without rent. Mrs. Elliott failed to record this agreement. Allen completed the building, but not in the time fixed. Mrs. Elliott, in October, 1892, took possession of the third flat, and held the same until September, 1893; and Allen rented the other two flats to certain persons, who occupied the same. During the occupancy of Mrs. Elliott, Allen procured the loan of $4,500, subject to the Chandler loan of $3,500, from Mrs. Boyer, who claims to have made the loan in ignorance of Mrs. Elliott's equities and her contract of purchase, and, therefore, that she is entitled to priority over Mrs. Elliott. Mrs. Elliott on March 6, 1894, filed her cross bill, in which the contract with Allen was set out, with the attendant facts. Upon the final hearing the court decreed that the Vallette trust deed, and the rights of appellant, Boyer, were subject to the rights of Mrs. Elliott under her contract with Allen, and her possession of the premises. From this decree Mrs. Boyer brings the case to this court.

Messrs. **Vallette & Hall,** for appellant:

Appellant did not have notice of the interest of Emily Elliott at the time of the execution and delivery of the trust deed from Allen to Vallette.

All deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers without due notice, until the same shall be filed for record.

Ill. Rev. Stat. chap. 30, § 30; 4 Kent, Com. *171; *Clark* v. *Morris*, 22 Ill. 434; 3 Washb. Real Prop. 5th ed. *591; Burton, Real Prop. 6th ed. p. 603; Willard, Real Estate & Conv. 2d ed. p. 121; 2 Sugden, Vendors, p. 541; *Wyatt* v. *Barwell*, 19 Ves. Jr. 439; *Truesdale* v. *Ford*, 37 Ill. 210; *Smith* v. *Jackson*, 76 Ill. 254; *Hassett* v. *Johnson*, 48 Ill. 72; *Jackson* v. *Berner*, Id. 208; *Patten* v. *Moore*, 32 N. H. 384; *Ely* v *Wilcox*, 20 Wis. 531, 91 Am. Dec. 436; *McMechan* v. *Griffing*, 3 Pick. 154, 15 Am. Dec. 198.

Whatever may be the character of the occupancy or the improvement, it must still be exclusive.

Truesdale v. *Ford* and *Patten* v. *Moore*, *supra*.

Courts of justice view secret agreements with a jealous and scrutinizing eye

Scott v. *Gallagher*, 14 Serg. & R. 334, 16 Am. Dec. 508; *Smith* v. *Yule*, 31 Cal. 184, 89 Am. Dec. 167; 2 Greenl. Ev. *460.

There should not be a foreclosure and sale of said premises subject to the continuing lien of said trust deed for the payment of said principal note and remaining interest notes not yet due.

Hards v. *Burton*, 79 Ill. 510; *Gardner* v. *Diederichs*, 41 Ill. 170.

The holders of said principal note and remaining interest notes were necessary parties to the foreclosure proceedings.

Dan. Ch. Pr. 4th ed. pp. 190–193; Story, Eq. Pl. §§ 72–77; Jones, Mortg. § 1368.

On petition for rehearing.

Those who fail to place their deed upon record, and who also permit their grantor to remain in possession, are not innocent grantees as to those whom he has induced to give him credit upon the faith of his claimed ownership of the property.

Blackman v. *Preston*, 123 Ill. 385.

And a concurrent possession of a grantor who holds the record title and his grantee under an unrecorded deed is no notice of such grantee's interest.

Norcross v. *Widgery*, 2 Mass. 508; Wade, Law of Notice, 2d ed. § 293; *Bank of United States* v. *Housman*, 6 Paige, 537, 538; *Hildreth* v. *Sands*, 2 Johns. Ch. 48; *Brown* v. *Volkening*, 64 N. Y. 76; *Stone* v. *Cook*, 79 Ill. 424.

Allowing grantor to remain in possession is a fraud upon subsequent creditors.

Hungerford v. *Earle*, 2 Vern. 261; *Shepard* v. *Shepard*, 36 Miss. 173; Wade, Law of Notice, 2d ed. § 290; 1 Jones, Mortg. § 592; *Jones* v. *Smith*, 1 Hare, 55; *Hewitt* v. *Loosemore*, 9 Hare, 458.

The protection furnished by registry laws should not be taken away except upon clear proof of a want of good faith in the party claiming their protection, and a clear right in him who seeks to establish notice by means of possession.

Hewitt v. *Loosemore*, *supra*; *McMechan* v. *Griffing*, 3 Pick. 154, 15 Am. Dec. 198; *Hewes* v. *Wiswell*, 8 Me. 99; *Yeck* v. *Crum*, 122 Ill. 268.

Concealing a mortgage (or contract) is a constructive fraud upon subsequent purchasers.

1 Jones, Mortg. § 602; *Bell* v. *Twilight*, 22 N. H. 508.

Messrs. **Stillman & Martyn,** for appellee Chandler:

Partial foreclosure may be had by any note holder subject to the continuing lien of the encumbrance foreclosed for the security of indebtedness thereafter to accrue.

Burnett v. *Hoffman*, 40 Neb. 569; *Vansant*

v. *Allmon*, 23 Ill. 30; *Weiner* v. *Heintz*, 17 Ill. 259; *Mines* v. *Moore*, 41 Ill. 273; *Sargent* v. *Howe*, 21 Ill. 148; *Kimmell* v. *Willard*, 1 Dougl. (Mich.) 217.

Interest coupons are in effect promissory notes.

Harper v. *Ely*, 70 Ill. 581.

Note holders on default are under no obligation to declare the entire debt due, but may proceed to foreclose separately.

Bressler v. *Martin*, 34 Ill. App. 122, 133 Ill. 278.

Mr. **F. W. Coombs,** for Emily Elliott, appellee:

The fact that some one or more were in possession of the premises in whom the record showed no title nor contract with Allen was notice to Vallette and to Boyer that they had or might have some interest in the premises.

Coari v. *Olsen*, 91 Ill 273; *Lancey* v *Brock*, 110 Ill. 609; *Brainard* v. *Hudson*, 103 Ill. 218; *Walsh* v. *Wright*, 101 Ill. 178; *Lumbard* v. *Abbey*, 73 Ill. 177.

Per Curiam:

The complainants below, the Chandlers, by their bill, sought to foreclose the deed of trust given by George R Allen to them, as to the three first coupon or interest notes. It is not sought to affect or lessen the security as to the principal note and the two remaining coupon notes. The holder of a note due is not required to wait until the other notes secured by the same mortgage are due before he takes steps to enforce his security. In *Morgenstern* v. *Klees*, 30 Ill. 422, the bill proceeded for a foreclosure of unpaid interest on the mortgage debt. The court said: "The practice is too well settled, to require discussion, or reference to authority, that where a mortgage is given to secure sums of money falling due at different periods, the creditor may foreclose by bill, as they severally fall due. . . . The mortgage must have been given to secure the interest as well as the principal, and the law will not withhold a remedy until a period elapses for the maturity of the whole debt,"—citing *Brinckerhoff* v. *Thallhimer*, 2 Johns. Ch. 486; 2 Hilliard, Mortg. 108. The creditor, by the terms of the contract, is entitled to the aid of the court, and to a decree for the sum due him. To refuse a foreclosure of a mortgage for his debt, as it matures, would be to deprive him of his rights without his fault. *Bressler* v. *Martin*, 133 Ill. 278.

The decree in this case found there was due to the complainants the sum of $426 47, and directed that any sale of the premises be made subject to the continuing lien of the trust deed thereon for the security of said principal note, and any and all other coupons and other disbursements made under the provisions of said trust deed, and in addition to the amounts due the complainants as aforesaid. Such decree is clearly recognized by the courts in cases like the present. *Vansant* v. *Allmon*, 23 Ill. 30–34; *Weiner* v. *Heintz*, 17 Ill. 259; *Mines* v. *Moore*, 41 Ill. 273; *Sargent* v. *Howe*, 21 Ill. 148; *Kimmell* v. *Willard*, 1 Dougl. (Mich.) 217. Interest coupons are in effect promissory notes. *Harper* v. *Ely*, 70 Ill. 581; *Morgenstern* v. *Klees*, 30 Ill. 422.

It is said that the holders of the notes which had not matured were necessary parties to the bill. The rule is well established that all persons having an interest in the subject-matter which may be affected by the decree of foreclosure of the mortgage should be made parties defendant, if not joined as complainants. *Bonham* v. *Galloway*, 13 Ill 68. In this case the holders of the principal note of $3,500, and the seven coupon notes, neither of which was due at the time, were not made parties to the bill. The complainants sought to foreclose as to the first three coupon notes. They sought no relief at all that might injuriously affect the holders of the notes not due. On the contrary, the course adopted by complainants was beneficial, as to the holders of the notes not matured. The effect of the foreclosure was to withdraw from the lien of the mortgage the notes of the complainants, and to make the mortgage a security only for the remaining eight outstanding notes. The complainants had a clear right to take a decree to sell the mortgaged premises, subject to the balance due or to become due on the mortgage, and were not bound to exercise the option to declare the whole debt due.

The rights of Emily Elliott under her cross bill remain to be considered. By failing to record her agreement with Allen for the purchase of the lot until after he had procured a loan on the same for $1,500, she, in the absence of all notice of her rights, would take the title of the lots subject to the Boyer deed of trust; but at the time Mrs. Boyer loaned Allen $1,500, taking as security a mortgage on the property, and for some time before, Mrs. Elliott was in the actual occupancy and possession of the third flat of the building, and such possession was notice of her rights in relation to the entire building, and the ground on which it stood. The possession of a party need not be of every part thereof, in fact, in order to constitute notice of his rights, both legal and equitable. Possession of a part of a tract of land or a lot, under a deed for the whole, may be regarded as possession of the whole. Moreover, when the agent saw the property was occupied, it was his duty to make inquiry of those in possession, in regard to the title under which they occupied the property. Had he done this, he might have ascertained that Allen had no title. But the agent made no inquiries of any person occupying the property, but relied solely on the statement of Allen. The agent of Mrs. Boyer had notice of facts sufficient to put him on inquiry, and, as such inquiry would have disclosed the existence of Mrs. Elliott's title, he is chargeable with notice of such title.

Finding no error in the decree of the court, it must be *affirmed.*

Rehearing denied March 19, 1896.

MICHIGAN SUPREME COURT.

City of GRAND RAPIDS, *Plff in Certiorari*,
v.
Max BRAUDY

(.....Mich.....)

(July 2, 1895.)

1. The refusal of a court to proceed to trial of the prosecution on appeal from a conviction is not an acquittal.

2. The quashing of the proceedings on appeal from a conviction may be reviewed by certiorari as well as by mandamus.

3. It is common knowledge that thieves resort to pawnbrokers, junk dealers, and dealers in second-hand goods to dispose of stolen goods, and that unscrupulous and oftentimes criminal persons are engaged in the business.

4. A very clear abuse of the police power must be shown in order to justify the court in declaring ordinances regulating pawnbrokers, junk dealers, and dealers in second-hand goods, to be unreasonable and void.

5. It is not unreasonable to require a license fee of $25 per annum from junk dealers and second-hand dealers, or $50 from pawnbrokers.

6. Requiring a bond of $2,000 from a junk dealer or second-hand dealer, and one of $5,000 from a pawnbroker, conditioned for the observance of the city charter and ordinances, is not unreasonable.

7. Requiring an indorsement by twelve freeholders on an application for a license by a pawnbroker or junk dealer is not unreasonable.

8. Prohibiting purchases from boys, intoxicated persons, or habitual drunkards by licensed pawnbrokers or junk dealers, is not unreasonable.

9. Power to revoke the license arbitrarily, reserved in an ordinance regulating licenses for pawnbrokers and junk dealers, is not so unreasonable that the courts can declare it void.

CERTIORARI to the Superior Court of Grand Rapids to review a judgment quashing proceedings against defendant for violating an ordinance regulating pawnbrokers, junk dealers, and dealers in second-hand goods. *Reversed.*

Statement by **Grant, J.**:

The defendant was convicted of engaging in the business of junk dealer in the city of Grand Rapids without having procured a license therefor from the common council, contrary to the provisions of "an ordinance relative to licensing and regulating pawnbrokers, junk dealers, and dealers in second-hand goods." The trial and conviction were had in the police court of the city. He thereupon appealed the case to the superior court of the city. The superior court, upon motion of the defendant, quashed the complaint and warrant upon the ground that the provisions of the ordinance, particularly those of §§ 7, 8, and 11, were unreasonable, and in restraint of trade. The entire ordinance is as follows:

"Sec. 1. No person shall engage in the business of pawnbroker, junk dealer, or dealer in second-hand goods and merchandise, except furniture, in the city of Grand Rapids, without a license therefor from the common council of said city.

"Sec. 2. Every person, and all persons, desiring to engage in the business of pawnbrokerage, junk dealing, in said city of or in the business of dealing in second-hand goods and merchandise, except furniture, in said city, shall make application in writing to said common council, specifying (as near as may be) the street and building in which he, she, or they, intend to carry on said busi-

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NOTE.—*Police power as exercised by municipalities over the business of pawnbrokers, junk dealers, and dealers in second-hand clothes.*

I. *Power to regulate trade.*
II. *Pawnbrokers.*
III. *Junk dealers.*
IV. *Dealers in second-hand clothes.*

The limit of the amount of license fees is treated of in the *note* to State, Toi, v. French (Mont.) 30 L. R. A. 415, and State v. Wheelock (Iowa) 30 L. R. A. 429.

I. *Power to regulate trade.*

The authorities below must not be taken as exhaustive on the question of the power of municipal authorities to regulate trade, as they are confined to cases affecting the regulation of the business of pawnbrokers, junk, and second-hand clothes dealers, in which the general rules have been declared.

An ordinance passed under the general authority conferred by statute upon a municipal corporation must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state; it must not be oppressive, and must be impartial, fair, and general, and must be for the purposes of regulating, and not of restraining, trade. *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642.

Municipal authorities cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130.

And this is so for the reason that municipal authorities having power to abate nuisances cannot absolutely prohibit a lawful business, not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. *Ibid.*

The legislature has undoubted power to authorize, and the authority conferred is ample to pass, ordinances for the prevention of the introduction of infectious or contagious diseases and the preservation of the public health. *Ibid.*

Such ordinances are considered as a part of the system of police regulations in aid of the preservation of the public health, and the courts will not interfere with, or set them aside unless the power has been manifestly transcended. *Ibid.*

The control which municipal corporations may exercise over business or trade is such only as belongs to the necessities and demands of local government, such as have relation to the general pursuit of the citizen, the public health, order, and morals of the community, and such a corporation cannot, outside of this consideration, enter into the arena of business competition to advance a favored class and retard others. State, Muhlenbrinck, v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518, 522.

See also 37 L. R. A. 673; 42 L. R. A. 403.

ness, signed by at least twelve freeholders, citizens of said city, of good reputation, certifying to the good reputation, fair fame, and moral character of the applicant or applicants.

"Sec. 3. After such application shall be granted, and before a license shall be issued thereon, pawnbrokers shall execute a bond to the city of Grand Rapids in the penal sum of $5,000; and junk dealers and other persons included in this ordinance shall execute a bond to said city in the penal sum of $2,000, with one or more sufficient securities, to be approved by the mayor, conditioned that he, she, or they will in all respects comply with and faithfully observe all the requirements of the charter and ordinances of the city of Grand Rapids relative to pawnbrokers, junk dealers, and dealers in second-hand goods and merchandise, except furniture. And the said pawnbrokers shall also pay into the treasury of said city the sum of $50 per annum, and the junk dealers and second-hand dealers shall pay into the treasury of said city the sum of $25 per annum as a license fee, before such license shall be issued.

"Sec. 4. Whenever said common council shall have determined to grant a license to such applicant or applicants and upon the presental to the clerk of said city of the bond herein before provided for, and the receipt of the treasurer of said city for the license fee, the said clerk shall issue to the said person or persons a license under the seal of the city, in which it shall be stated that the same is revocable at any time by the common council of said city for such time as the said common council shall have prescribed therefor; but before receiving such license such applicant or applicants shall pay to said clerk as a fee for issuing and recording the same, the sum of $1, and before the said clerk shall issue any such license he shall record the same in a book to be provided for such purpose.

"Sec. 5. No person or persons, licensed as a pawnbroker, a junk dealer, or as a dealer in second-hand goods or merchandise, except furniture, shall by virtue of one license keep more than one house, shop, or place for such business of pawnbroker, junk dealer, or dealer in second-hand goods, except furniture; provided, however, that such person or persons may remove from one place of business to another in said city by giving immediate written notice of such removal to the chief of police of said city and of the building (as near as may be) and of the street to which removal is made.

"Sec. 6. Every person or firm licensed under this ordinance shall cause his or her name or the firm name (as the case may be) with the words 'licensed pawnbroker,' 'licensed junk dealer,' or 'licensed dealer in second-hand goods and merchandise,' (as the case may be) to be printed or painted, in large legible characters, and placed over the outside or door, or entrance of his, her, or their shop, office, or place of business.

"Sec. 7. Every person, or firm of persons, licensed to carry on either of said businesses in said city, shall keep a book, in which shall be written legibly in ink, at the time of the purchase, or taking of any goods, article, or thing, an accurate account and description in the English language, of the goods, article, or other thing purchased or pledged, the amount of money paid therefor, the time of purchasing or taking the same, the name and residence of the person selling or pledging such goods, article, or thing, and a description of the person or persons (as near as may be) from whom the same were purchased or taken. And, when any watch is purchased or taken, the person or firm of persons so licensed, shall also write in such book the name of the maker thereof

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All citizens in pursuit of legitimate, honest occupations stand equal before the law, and a police power intrusted to a corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights. *Ibid.*

A grant of power to control or suppress would carry with it the power to license. Shuman v. Fort Wayne, 127 Ind. 109, 11 L. R. A. 378.

In Marmet v. State, 45 Ohio St. 63, it was held that the general assembly had power, except as limited by section 18 of the schedule of the Constitution, to regulate occupations by license, and to compel, by imposition of a fine, payment of a reasonable fee, where a special benefit was conferred by the public upon those who follow an occupation, or where the occupation imposed special burdens on the public, or where it was injurious or dangerous to the public.

The power to license depends upon the concurrent power to prohibit. The business or occupation is declared unlawful except upon compliance with certain conditions, and therefore a license is a privilege granted to carry on some occupation, or exercise some right, which could not be exercised without the grant of such license; the pursuit of the prohibited occupation becomes a franchise in the power of the municipal authorities to grant, and the license fee is the price exacted for the right to exercise the franchise. Shuman v. Fort Wayne, *supra*.

The power to license must be granted in express terms, although it is merely a police power. It is one mode of regulation, but one that cannot be exercised under general police authority. *Ibid.*

To license one, means to confer upon him the right to do something which he would not have the right to do without such license, and the object of the license is to confer a right which does not exist. *Ibid.*

But the right to license must be plainly conferred or it will not be held to exist. *Ibid.*

All licenses are in their nature restrictive, and a municipal corporation cannot restrict a lawful business unless the power to do so is conferred by the state. *Ibid.*

A defendant, having full notice of the provisions of the ordinance before taking out his license, cannot afterwards be held to say that such ordinance is oppressive or tyrannical. Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625.

And such an ordinance does not depend upon the opinions of witnesses as to the possible and probable effect of it upon the party's business for the construction of its reasonableness or legality. *Ibid.*

II. *Pawnbrokers.*

A city ordinance imposing upon pawnbrokers the duty of making out and delivering, every day before a specified time, a legible and correct copy of a certain book kept by them, containing an ac-

and its number; and when jewelry, or gold or silver articles of any kind are purchased or taken, he, she, or they shall note, in said book, all letters or marks, described, engraved, or cut thereon.

"Sec. 8. That it shall be the duty of every person or firm of persons aforesaid, to make out and deliver to the chief of police of said city, every day before the hour of twelve o'clock noon, a legible and correct copy from the book required in § 7 hereof, giving an accurate account and description of each and all of the articles and things purchased or taken during the preceding day, the price paid therefor, the precise time of purchase or taking, the name and residence of the person or persons, from whom such purchases were made, and a description of the person or persons (as near as may be) from whom purchased or taken.

"Sec. 9. The book provided for in § 7 of this ordinance shall at all reasonable times be open to the inspection of the mayor of said city, or of the chief of police, or any member of the police force, thereunto authorized by the said chief of police.

"Sec. 10. It shall be the duty of every person or firm of persons, licensed as aforesaid, upon him, her, or them (as the case may be) receiving information or learning that any goods, article, or thing left with him, her, or his or her firm, has been lost or stolen, to notify in writing the chief of police of the fact, giving the name of the person from whom he, she, or they received the same, the time when it was received, and of any other facts connected therewith, that may tend to the discovery or conviction of the thief or thieves.

"Sec. 11. No person, or firm of persons, licensed as aforesaid, shall purchase or take any goods, articles, or thing offered him, her, or them, from any person under the age of sixteen years, or from any person who is at the time intoxicated, or from any person who is an habitual drunkard; nor knowingly take or purchase from any servant or apprentice any goods, article, or thing, without first ascertaining that such article or thing is the property of the person or persons offering to sell or pledge the same.

"Sec. 12. Any person or persons who shall violate any of the provisons or requirements of this ordinance, on conviction thereof shall be punished by a fine of not less than $5, nor more than $50 and costs of prosecution; or, by imprisonment at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse, house of correction, or almshouse of said city, in the discretion of the court or magistrate before whom the conviction may be had, for a period of not less than five days nor more than ninety days. And in case such court or magistrate shall only impose a fine and costs, the offender may be sentenced to be imprisoned at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse, house of correction, or almshouse of said city, until the payment of such fine and costs, for a period of not less than five days nor more than ninety days."

Messrs. **Henry J. Felker** and **Harvey Joslin**, for plaintiff in certiorari:

In determining a question as to the reasonableness of an ordinance, the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance.

What the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy.

1 Dill. Mun. Corp. 3d ed. §§ 327, 328.

Where the municipal legislature has the power to act, it must be governed, not by our

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count of the personal property and valuables taken by them in pawn during the preceding day, together with other particulars respecting such persons and goods, is not unjust, unreasonable, tyrannical, or oppressive, but is a reasonable means of keeping the pawnbroker's business free from great abuse by reason of thieves disposing of stolen goods in their shops, such an ordinance being made in the interest of the public and intended for the detection and prevention of crime. Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625.

In Launder v. Chicago, *supra*, the question was whether the legislature had conferred the power on the city council to pass an ordinance relating to pawnbrokers, the legislature having given the city council in cities, and the president and trustees in villages, power "to license, tax, regulate, suppress, and prohibit . . . pawnbrokers, . . . and to revoke such licenses at pleasure" (Rev. Stat. chap. 24, § 62, subs. 41), and the court held that such grant of power was purely a matter of discretion with the city authorities, whether they granted such licenses or wholly prohibited and suppressed such business within the city, and that in such a case, if the city granted a license, it might impose such conditions and burdens as it might see fit, the latitude of power growing out of the fact that it was discretionary to prohibit the business, or license it on such terms as the city might choose.

And in Heitzelman v. State (Tex.) 26 S. W. 729, upon a prosecution under the pawnbroker act, the defendant was convicted of receiving in pledge an article of property and selling the same without complying with the laws regulating pawnbrokers, for which he was fined $100 under article 386 of the Penal Code. It was held, upon appeal, that evidence of the fact that he was carrying on a pawnbroking business, and that he failed to file a copy of the advertisement, or report of the sale in question, as required by the law, was properly admitted to rebut any suggestion of mistake or inattention, and to show beyond controversy that the sale was made in violation of law.

So, in Van Baalen v. People, 40 Mich. 258, the defendant was fined for carrying on the business of a pawnbroker without a license contrary to the city ordinance, and an exception was taken, by way of certiorari, upon the ground that the ordinance, which imposed a fine of $200, was unreasonable in consequence of the magnitude of the charge, and was therefore invalid: but the court refused to interfere, holding that where the power to license was not evidently abused and made a pretext for doing what was a violation of a constitutional right, the courts would not interfere with municipal discretion.

In Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625, it was shown that the pawnbroker would not, without the license conferred upon him by the city authorities, have had a right to carry on the busi-

discretion, but by its own, and we shall not be hasty in convicting them of being unreasonable in the exercise of it.

Fisher v. *Harrisburg*, 2 Grant. Cas. 291, 1854; *St. Louis* v. *Weber*, 44 Mo. 547; *Com.* v. *Robertson*, 5 Cush. 438; *Vintners' Co.* v. *Passey*, 1 Burr. 239; *Workingham* v. *Johnson*, Cas. T. Hardw. 285; *Poulters' Co.* v. *Phillips*, 6 Bing. N. C. 314; *St. Paul* v. *Colter*, 12 Minn. 41; *Com.* v. *Patch*, 97 Mass. 221.

Mr. **Frank A. Rodgers,** for defendant in certiorari:

A prosecution under an ordinance is a criminal case.

People v. *Hanrahan*, 75 Mich. 611, 4 L. R. A. 751; *Northville* v. *Westfall*, 75 Mich. 603; *State* v. *Vail*, 57 Iowa, 103; *Plattsville* v. *McKernan* (Iowa) 11 N. W. 798.

The acquittal had on the 19th day of December, by the learned judge of the superior court, cannot be appealed from, and a writ of certiorari will not lie, and the order is final.

State v. *Grottkau*, 73 Wis. 594.

In *People* v. *Leavitt*, 41 Mich. 470, the court says: "If the state of the case is such that the contention cannot be otherwise than speculative, and no rights of the parties can be changed in point of law, it is not incumbent on the court to formulate opinions."

This court cannot under this proceeding set aside the judgment of the superior court, and the order made therein, discharging respondent. Said order is final. If this court should quash the proceedings of the superior court, it would not change the status of this case.

Whitbeck v. *Hudson*, 50 Mich. 86; *People* v. *Hobson*, 48 Mich. 27.

No right of the parties can be changed, and it is not incumbent on the court to formulate an opinion.

Knapp v. *Gamsby*, 47 Mich. 375; *Powell* v. *People*, Id. 108.

The council had no right to compel a man to pay $26 for a license, the duration of which is subject to the whim and caprice of as uncertain a body as the common council.

Re Frazee, 62 Mich. 396; *Chaddock* v. *Day* 75 Mich. 527, 4 L. R. A. 809; *Hughes* v. *Recorder's Court*, 75 Mich 574; *People* v. *Armstrong*, 73 Mich. 288, 2 L. R. A. 721.

The right to follow a perfectly lawful business cannot be left to an unregulated discretion.

People v. *Armstrong*, *supra*; 1 Dill. Mun. Corp. § 262.

Grant, J., delivered the opinion of the court:

1. It is first insisted that this is a criminal case, that the action of the court amounted to an acquittal, and that the city is therefore remediless. This position cannot be maintained. There was no trial upon the merits. The court simply refused to proceed to trial, and quashed the proceedings, because it held the ordinance invalid. This court has repeatedly issued the writ of mandamus to compel circuit and recorder's courts to proceed with the trial of criminal cases under similar circumstances. *People, Robison,* v. *Swift*, 59 Mich. 529; *Sadler* v. *Sheahan*, 92 Mich. 630. See also *Ware* v. *Loveridge*, 75 Mich. 488. While the writ of mandamus may be the more appropriate remedy, the same result is reached by the writ of certiorari, which has been held to be the proper remedy to review convictions for violation of city ordinances. *Swift* v. *Judges of Circuit Ct.* 64 Mich. 487; *People* v. *White*, 53 Mich. 537.

2. It is next insisted that the ordinance is so unreasonable that it should be declared void. The charter expressly confers upon the common council the power to license and regulate pawnbrokers, junk dealers, and dealers in second hand goods. Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unrea-

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ness in question, and therefore he took the privilege which was granted him by the city authorities subject to the restrictions and burdens imposed by the ordinance in question.

In Kuhn v. Chicago, 30 Ill. App. 203, it was contended that § 1711 of the ordinance of the city of Chicago, which provided: "No pawnbroker or loan-broker, or keeper of a loan office, shall, under any pretense whatever, purchase or buy second-hand furniture, metals, or clothes, or any other article or thing whatever to him or her offered as a pawn or pledge."—was unreasonable, because it imposed a penalty on pawnbrokers for doing that which was lawful for other persons to do; but the court held that the statute (Ill. Rev. Stat. art. 5, chap. 24, § 1) authorized cities, not only to regulate pawnbrokers, but to suppress and prohibit them, and therefore the imposition of a fine for a breach of such regulation applied equally to all pawnbrokers, and was therefore not unreasonable.

In Queen v. Inland Revenue Comrs., Ohlson's Case, Garland's Case [1891] 1 Q. B. 485, the question arose under the English pawnbroker's act of 1872, § 39, which provided that a pawnbroker's license was only to be granted to an applicant upon the production of a magistrate's certificate, "save that it shall not be necessary for any person being at the commencement of this act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such certificate." It was held that the exemption in favor of a pawnbroker licensed at the commencement of the act was not confined to the business which was then actually carried on by such pawnbroker, but was a general exemption in favor of all persons who were then licensed pawnbrokers, and that therefore after the commencement of the act such a licensed pawnbroker, his executors, administrators, assigns, or successors could open a new business upon payment of the license duty without the production of a magistrate's certificate.

But in Phillips v. Atlanta, 78 Ga. 773, it was held that unless there was a municipal ordinance authorizing it, the recorder could not impose a fine for engaging in the business of a pawnbroker without a license, but that a valid ordinance on the subject might be enforced in that way, under § 2137 of the Code of that state.

So, in Shuman v. Fort Wayne, 127 Ind. 109, 11 L. R. A. 378, it was held that an ordinance requiring pawnbrokers to take out licenses was not authorized by a statute empowering city councils to make by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation.

And in Schaul v. Charlotte (N. C.) 24 S. E. 526, it was held that the businesses of broker and pawnbroker constituted separate and distinct classes, and that it was competent for the city authorities under the private laws, to impose an entirely dif-

sonable, when the power to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts. *Fisher* v. *Harrisburg*, 2 Grant, Cas. 291; *Com.* v. *Robertson*, 5 Cush. 438; *St. Louis* v. *Weber*, 44 Mo. 547; 1 Dill. Mun. Corp. § 328. "Regard must be had to all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance." Id. § 327. It is common knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business. The business, therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations. A very clear abuse of this power must be shown in order to justify the court in declaring the regulations to be unreasonable and void. While this business is legitimate in the absence of any statute law controlling it, no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require. This brings us to the provisions complained of. Neither the license fee of $25 or $50 nor the bond is unreasonable. This was decided in *Kitson* v. *Ann Arbor*, 26 Mich. 325. The license fee in that case was $100 for keeping a saloon or restaurant, and the bond $2,000. The defense was that, if it assumed to license the sale of intoxicating liquors, the ordinance was void under the Constitution which prohibited its sale; and if it involved the license of a restaurant it was void, as unreasonable, and in restraint of trade. The ordinance did not provide for or authorize the sale of intoxicating liquors. It was insisted that a saloon was necessarily a place for the sale of such liquors. The court held otherwise, and in illustrating the argument said: "A pawnbroker might as well attempt to do business without a license, by confining his dealings to stolen goods, or an auctioneer, by making no legitimate sales, and holding none but Peter Funk auctions." There is nothing unreasonable in requiring such persons to keep a record of their purchases and sales, and to furnish a statement thereof to the police department. This provision is no more unreasonable, and certainly is as essential for the protection of society, as the law regulating druggists, which requires them to record in a book the names of all persons applying for intoxicating liquors, the date of sale, the amount and kind of liquor sold, and the purpose for which the same was to be applied. Pub. Acts 1887, act No. 313, § 3. The statutes of several states provide that, in order to obtain a license for the sale of intoxicating liquors, the application must be indorsed by a certain number of freeholders, certifying to the good character and reputation of the applicant. This is upon the theory that the state has the right to require that such business shall be carried on by reputable men, and not by the disreputable, vicious, and criminal classes. This provision has been universally sustained by the courts. The same principle applies to junk dealers and pawnbrokers, and we find nothing unreason-

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ferent license tax upon pawnbrokers and brokers, but that the private act of 1866, which related to the license to be paid by brokers, did not extend to pawnbrokers,—the court citing and approving of the principal case of ROSENBAUM v. NEWBERN (N. C.) *post*, 123.

In Fulton v. District of Columbia, 2 D. C. App. 431, it was held that § 3 of the act of Congress of January 26, 1887 (24 Stat. at L. p. 368), authorizing the commissioners of the District of Columbia to make police regulations for the government of the district, which prohibited pawnbrokers from permitting the redemption or removal of the article pawned from the place of business of such pawnbroker, junk dealer, or person engaged in the second-hand clothing business, for the space of twenty-four hours thereafter, was an unreasonable regulation, in so far as it prohibited the redemption and removal of all pawned property by the owner thereof, and was not within the powers given to such commissioners by the said statute nor by the general resolution of February, 1892; and a conviction under it was therefore quashed and the accused discharged.

III. *Junk dealers.*

A junk shop has been defined as a place where odds and ends are purchased or sold. Charleston v. Goldsmith, 12 Rich. L. 470.

Where a city ordinance prohibited the purchase or sale of old metal, old ropes, rags, and other odds and ends in a shop kept within the city, without a license, it was held that the defendant, whose business consisted in the buying and keeping in his store, and shipping from thence, for sale, the articles in question, was properly convicted, under the city ordinance, of keeping a junk shop without a license. *Ibid.*

In Com. v. Leonard, 140 Mass. 473, 54 Am. Rep. 485, the defendant was indicted as a junk dealer for receiving stolen goods, and not complying with the provisions of the Massachusetts statutes and the ordinance of the city of Cambridge, which required him to keep a book for the purpose of entering a record of the articles purchased by him, and it was held that if the defendant intentionally neglected to keep such book for the purpose of tracing all articles purchased by him as a junk dealer, such a fact was competent to be considered by the jury.

The provisions of §§ 1, 2, 22, 26, and 35, of the Ohio act of April 16, 1883 (80 Ohio Laws, 129), and § 29, as amended by the act of March 25, 1884 (81 Ohio Laws, 78), which required that in cities of the first grade of the first class a proprietor, or lessee, of a theater, and, *inter alia*, every dealer in second-hand articles and keepers of junk shops, should pay a license as therein provided, that no person should engage in any such business until a license therefor should have been obtained, and that any person who should violate any of the provisions of the act should be punished by fine,—have been held not to be in conflict with the Constitution. Marmet v. State, 45 Ohio St. 63.

In Pitts v. Vicksburg, 72 Miss. 181, the question raised was whether junk stores were embraced in the term "stores" in § 3390 of the Mississippi Code of 1892, by which a privilege tax was levied on each store where the stock never exceeded in value $2,000. The court held that such stores were within the provisions of the Code, as, until the legislature undertook the work of classification of stores generally, the generic term used in the Code would

able in the requirement that the application to enter upon the business shall be indorsed by twelve freeholders.

We cannot hold unreasonable that provision prohibiting the licensee from purchasing from boys, intoxicated persons, or habitual drunkards. The reason for this provision is apparent, for it is well known that there are many young thieves in the large cities, who steal property, and resort to these places, ready to sell them for mere nominal sums. It is also well known that habitual drunkards will use the same means to obtain money to satisfy their appetites for intoxicating liquors.

The only other provision we need to notice is that giving the power to revoke the license arbitrarily. It seems to be conceded by counsel for the city that the common council does not possess the right to revoke the license without cause shown. He says: "It must be presumed that this right would be exercised only in cases of violation of the conditions of the ordinance, and after an investigation of such a charge; otherwise an action of the common council in assuming to so revoke arbitrarily could be restrained from doing injustice to the licensee." No express power to revoke is conferred upon the council. In the investigation we have been able to make we find but few authorities bearing upon the subject, and counsel in their briefs have cited none. We find two authorities sustaining this power. *Com.* v. *Kinsley*, 133 Mass. 579; *Martin* v. *State*, 23 Neb. 371. But in both these cases the express power to revoke was conferred upon the city by its charter. If no reservation of the right to revoke was reserved in the license, there would be little difficulty in reaching a conclusion. Has the common council the right to insist, as a condition precedent to the issue of the license, that the applicant shall agree that his license may be revoked at the will of the council? is the question presented. The necessity of a rigid control over this business in our large cities is clear. Convictions are difficult though the public authorities may be well convinced that stolen goods are bought and sold at these places. The business is not necessary to the welfare of society or the public. The common council, with the knowledge of all the facts before them to a greater extent than courts can possibly have, have determined that it is well, in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the courts to declare it void. Counsel for defendant cite and rely upon *Chaddock* v. *Day*, 75 Mich. 527, 4 L. R. A. 809; *Hughes* v. *Recorder's Court*, 75 Mich. 574; *Re Frazee*, 63 Mich. 396; *People* v. *Armstrong*, 73 Mich. 288, 2 L. R. A. 721. An examination of these cases will show that in neither their facts nor principles are they like the case at bar. It is unnecessary for us to note the distinctions.

We hold the ordinance valid, and *the order of the court below is reversed*, and the court directed to proceed with the trial of the cause.

The other Justices concur.

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embrace any species of store not otherwise particularly named and taxed, there being no reference to any particular class or character of goods named, the word being broad enough to cover any store, even one in which the dealer dealt in old iron and other metals, old glass, old rope, and old paper stock.

Where a junk dealer took exception to a city ordinance imposing a tax or license of $250 upon every member of a company or firm, and every person not connected with a company or firm, keeping a junk store, upon the ground that the same was not constitutional, since it imposed different sums or licenses on the general dealer in merchandise and the dealer in specified articles, the court held that the constitutional requirement that taxation should be equal and uniform throughout the state (art. 118) did not inhibit the legislature from, nor deprive it of, the power of dividing the objects of taxation into classes, but that it did command the law-making department of the government to impose the same burden upon all who were in the same class; and further, that the legislature of the state having, by act of 1870 (Extra Sess. pp. 35-37), empowered the city council to levy taxes and impose a license tax upon all persons pursuing any trade, profession, or calling,—the tax imposed upon the defendant as a junk dealer was legal. New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328.

But in Pitts v. Vicksburg, *supra*, where it was sought to show that the municipal tax levied by the city ordinance upon junk stores was done in the exercise of the police power of the city, but the ordinance itself plainly declared that the taxes therein enumerated were levied in order to provide a revenue for the city, the court held that the authority to levy taxes by a city was not embraced in its police power, the power to raise revenue being one thing, and the power of police regulation another, and that therefore the city had no power to levy the tax.

See also the case of Duluth v. Bloom, 55 Minn. 97, 21 L. R. A. 689, *infra*, IV.

IV. *Dealers in second-hand clothes.*

Second-hand or cast-off garments, blankets, bedding, and bed-clothes become dangerous by reason of the nature of their previous use, condition, or exposure. Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130.

Dealers in second-hand articles, and keepers of junk shops, may properly be classed with pawnbrokers and keepers of loan offices who are required to obtain licenses because of imposing special burdens by reason of their requiring the supervising powers of the police. Marmet v. State, 45 Ohio St. 63.

Ordinances having for their object the protection of the health of the inhabitants are regarded as police regulations subject to which the individual holds his right of liberty or property, and presumptions will be indulged in, in favor of their necessity, propriety, and validity, and where not unreasonable, or partial, nor oppressive, nor inconsistent with the legislative policy of the state, they will be sustained. Greensboro v. Ehrenreich, *supra*.

In State v. Segel, 60 Minn. 507, it was held that an ordinance passed pursuant to the charter of the city of Minneapolis, which authorized the city council to make and enforce ordinances to license and regulate "dealers in second-hand goods," embraced dealers in second-hand furniture.

Second-hand or cast-off garments, blankets, bedding, and bed-clothes are not *per se* introductive of infectious or contagious disease, and a lawful busi-

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina
v.
Ernest TAFT, *Appt.*

(.....N. C.....)

An ordinance making it unlawful to import into a town any second-hand clothing, garment, cloth, or bed furniture for the purpose of selling or offering it for sale, is void as an attempt absolutely to prohibit a lawful business not in itself necessarily a nuisance, but which may be conducted without danger to the community when properly regulated.

(February 25, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Franklin County convicting him of a violation of a town ordinance against selling second-hand clothing. *Reversed.*

Defendant had, prior to the enactment of the ordinance, procured a quantity of second-hand clothing which he intended to sell in Louisburg, and at the time the ordinance was passed it was at the railroad station unpacked. Subsequently he placed it in his store and sold some of it, for which act he was subjected to this prosecution. The expert evidence in support of the necessity of the ordinance was to the effect that contagious diseases are caused by germs which might be carried in woolen fabrics and could not be absolutely destroyed by anything but heat of 250 degrees F. which degree of heat would injure the fabric.

Further facts appear in the opinion.

Messrs. **Charles M. Cooke & Son** for appellant.

Mr. **F. S. Spruill,** for appellee:

If the immediate acts of the legislature may not be investigated by the judicial department, it must logically follow that its acts done through the medium of municipal agency may not likewise be investigated.

Rex v. *Arundel*, Hob. 109; *Brodnax* v. *Groom*, 64 N. C. 244; *Field* v. *Clark*, 143 U. S. 649, 36 L. ed. 294; *State, Pangborn*, v. *Young*, 32 N. J. L. 29; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

The ordinance is a fair and proper exercise of the police power given to the town.

Dill. Mun. Corp. § 95, pp. 137, 138; Tiedeman, Pol. Powers, § 1226, p. 432.

Town authorities where the power is given in the charter may regulate trade.

17 Am. & Eng. Enc. Law, p. 254, note 2.

The town may pass ordinances to protect health.

2 N. C. Code, § 3802, Acts 1887, chap. 142; *Hill* v. *Charlotte*, 72 N. C. 55; Dill. Mun. Corp. § 369, p. 439; act 1893, Quarantine Acts.

The presumption is in favor of the reasonableness and validity of the ordinance.

Van Hook v. *Selma*, 70 Ala. 361, 45 Am. Rep. 87; 17 Am. & Eng. Enc. Law, p. 248; *Taunton* v. *Taylor*, 116 Mass. 260; *Com.* v. *Patch*, 97 Mass. 221.

If the ordinance operate indiscriminately upon and is enforceable by the same species of process against all persons it is constitutional.

State v. *Tenant*, 110 N.C.612, 15 L R. A. 423.

This is so although by its terms it is confined in its operations to a particular locality.

State v. *Moore*, 104 N. C. 721; *State* v. *Pendergrass*, 106 N. C. 664; *State* v. *Summerfield*, 107 N. C. 898; 1 Dill. Mun. Corp. § 380; *State* v. *Muse*, 4 Dev. & B. L. 319; *State* v. *Chambers*, 93 N. C. 600; *State* v. *Joyner*, 81 N. C. 534; *State* v. *Stovall*, 103 N. C. 416; Cooley, Const. Lim. *390.

Montgomery, J., delivered the opinion of the court:

The ordinance for a violation of which the defendant was convicted is as follows: "No. 47. That it shall be unlawful for any person, merchant, or dealer to import into the town of Louisburg, for the purpose of selling or offering for sale, any second hand clothing, garment, cloth, or bed furniture; and any person, merchant, or dealer who shall import any such article into said town with the purpose aforesaid, or shall sell or offer the same for sale, shall for every such act be subject to a fine of $25." It is enacted in chapter 142 of the private acts of 1887 that the general laws in regard to cities and towns, in the Code, shall apply to the town of Louisburg; and it is provided in that chapter of the Code that the commissioners of towns "may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens," and that "they may enforce their by laws and regulations by imposing penalties on such as violate them." The preamble sets forth that

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ness of selling or dealing in them may be carried on without danger to the public health. Greensboro v. Ehrenreich, *supra*.

Where an ordinance reaches beyond the scope of necessary protection and prevention, into the domain of restraint of lawful trade, by permanently prohibiting the importation, selling, or otherwise dealing in second-hand or cast-off garments, blankets, bedding, and bed clothes, though they may not have been used by persons or in districts infected with such diseases, it will not be upheld. *Ibid.*

In Greensboro v. Ehrenreich, *supra*, the town charter conferred authority "to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious diseases, and to preserve the health of the inhabitants of the same," and under such power the corporate authorities passed an ordinance declaring "that it shall be unlawful for any person to import, sell, or otherwise deal in cast-off garments, blankets, bedding, or bed-clothes in said town . . . provided, that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases." The court held that the municipal authorities had not power under the charter to pass the ordinance in question.

Although the municipal government may pass sanitary ordinances for the preservation of health within its limits, may prevent articles of merchandise or other things, which have been used by persons or in places infected with contagious diseases, from being brought into the town, may establish quarantine and reasonable inspection regulations, and provide for disinfecting or destroying the germs of disease as far as practicable, and, it may be, for obtaining satisfactory assurance that such articles have not been exposed to an infectious or

See also 37 L. R. A. 673; 42 L. R. A. 403.

the object of the ordinance was the protection of the health of the community. Beyond question, the general assembly has power to authorize the commissioners of towns to pass by-laws intended to prevent the introduction of infectious or contagious diseases, and to preserve the public health, and the powers conferred under the statutes above referred to are admitted to be sufficient for those purposes. Such ordinances are regarded as police regulations, are of the utmost consequence to the general welfare, and if they be reasonable, impartial, and not against the general policy of the state, must be submitted to by individuals, for the good of the public. In truth, the public health, and the peace and good order of the community, ought to be the chief concern of the authorities of cities and towns; and the courts are quick to encourage watchfulness in this respect on their part, will always presume that they have acted from a sense of propriety and necessity, and will never interfere with or set aside their ordinances unless it appears clearly that they are unreasonable, or beyond the scope of their authority. It is not to be doubted, however, that the courts have the right to inquire into any alleged abuse of their powers, and to restrain them when they transcend the limits of their authority.

The question presented in this case for our consideration is whether the commissioners can, under the powers given them by law, in their discretion, absolutely prohibit a lawful business, not in itself necessarily a nuisance, but which may be conducted without danger to the community, when properly regulated. The sale of second hand clothing is not a nuisance *per se*, but is, on the other hand, a lawful business, and, under proper regulations, may be so conducted as to be without danger to the health of the community, and at the same time to be of great benefit to a large portion of the people. There is nothing dangerous to health in articles of second-hand clothing, of themselves. They can only become noxious by reason of prior use,—of having been worn or possessed by persons themselves infected, or living in infected communities. The town authorities would have the right to compel fumigation and disinfection of second hand clothing. They might require proper assurances, before such articles were imported or offered for sale, that they have not been bought in or brought from markets or places where epidemics of contagious or infectious diseases were or had been recently prevailing, or they might prohibit the further sale of such stocks from which articles had been sold and had communicated disease. In the case of *Greensboro* v. *Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, the ordinance was not as prohibitory as the one before us, and the court there, in passing upon its validity, said: "Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell, or otherwise deal in second-hand or cast off garments, blankets, bedding, and bedclothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places, it is infected with trichina." The same principle is also decided in *Weil* v. *Ricord*, 24 N. J. Eq. 169. We are of the opinion that the commissioners transcended their powers in the passing of this ordinance; that it is unreasonable, in that it is prohibitory of a business lawful in itself, and that it is void.

Error.

J. ROSENBAUM, *Appt.*,
v.
City of NEWBERN.

(.....N C.....)

1. **The term "merchant"** embraces all who buy and sell any species of movable goods for gain or profit.
2. **A merchant may be compelled to pay a license tax** for the sale of second-hand goods, although he pays another for the business of selling general merchandise.
3. **A tax of $4 per month levied upon a person as a dealer in second-hand**

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contagious disease, yet the power cannot be carried beyond what is necessary for protection. *Ibid.*

In Eastman v. Chicago, 79 Ill. 178, it was held that a book seller who dealt in such stock as was usually kept in a retail book store, and bought and sold in connection with his other business second-hand books, was not a dealer in second-hand goods within the provisions of § 1, chap. 24, of an ordinance of the city of Chicago which declared: "Any person who keeps a store, office, or place of business for the purchase or sale of second hand clothing, or garments of any kind, or second-hand goods, wares, or merchandise, is hereby declared to be a dealer in second-hand goods."

In Duluth v. Bloom, 55 Minn. 97, 21 L. R. A. 689, the defendant was convicted, under an ordinance of the city of Duluth, of "carrying on and conducting the business of dealer in second-hand goods without first having obtained a license so to do." The facts showed that he dealt in new and second-hand furniture exclusively, and the question was whether such business came within the provisions of the city ordinance which gave the city authority power to license and regulate, *inter alia*, pawnbrokers, dealers in second-hand goods, junk dealers, etc., and provided that the council should have power to regulate and define who should be considered as such dealers. The first section provided that no person should carry on or conduct the business or calling of a pawnbroker or dealer in second-hand goods without first obtaining a license, but did not attempt to define who should be considered as pawnbrokers or dealers in second-hand goods; and the last clause of the 7th section provided that all the provisions of that ordinance should apply to any person keeping a second-hand store or junk shop. The court held that the defendant's store was not a junk shop within the meaning of the ordinance which applied only to pawnbroker's shops and to second-hand stores, or shops of the class commonly known as junk shops.

E. W.

32 L. R. A.

See also 37 L. R. A. 673; 42 L. R.A. 403.

clothing, and a tax of $1 per month on the occupation of selling general merchandise, do not violate a constitutional requirement of uniformity, since this requires uniformity only between those belonging to the same class.

4. **A penal ordinance requiring second-hand clothing to be disinfected** by fumigation, and requiring payment of a fixed price therefor according to the nature of the garment, must be deemed, in the absence of direct and unquestionable proof to the contrary, to be for the protection of the public health.

5. **It is matter of universal knowledge** that second-hand clothing is often the means of communicating contagious and dangerous diseases.

(*Faircloth, Ch. J.*, and *Furches, J., dissent.*)

(March 10, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Craven County in favor of defendant in an action brought to enjoin the collection of certain taxes imposed for the privilege of doing business. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. E. Clarke, M. De W. Stevenson,** and **W. D. McIver** for appellant.

Mr. **W. W. Clark** for appellee.

Avery, J., delivered the opinion of the court:

Where a municipality is clothed with the power to impose a tax upon persons engaged in mercantile business, the authority is subject to the fundamental restriction that it shall not be so exercised as to discriminate between persons of the same class. *State Railroad Tax Cases,* 92 U. S. 575, 23 L. ed. 663. "It is unquestionably, however, in the discretion of the taxing power to graduate the tax according to the extent of the business so taxed, or to impose a single tax upon the occupation without regard to its extent." *State* v. *Powell,* 100 N. C. 527. But the law of uniformity does not prohibit the classification by the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same generic term. The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit. But courts everywhere lend their sanction to legislative acts putting dealers in dry goods and dealers in spirituous liquors, drugs, or fresh meats into different classes, and imposing a license tax upon the one, and a tax in proportion to capital employed or sales made on the others, or a tax or license fee of the same kind, but differing in amount, upon each of the subclasses created. In *State* v. *Worth,* 116 N. C. 1007, it was held that the business of manufacturing ice was comprehended under the general term "trade," and that, where a municipality was acting under the grant of authority to impose a privilege tax upon trades and professions "a levy of $66 per annum for storage, manufacture, or sale of ice at wholesale, with the privilege of retailing," was reasonable and constitutional, because it provided for no discrimination between persons engaged in storing, manufacturing or selling at wholesale or retail the particular kind of merchandise upon which the burden was imposed, but fixed the levy upon a class of traders distinctly defined in the ordinance. It was expressly held there that dealers in or manufacturers of different articles of merchandise might, in the discretion of the municipal authorities, be subjected, in separate classes, to license taxes varying in amount as to each of the classes. Of course, it follows that the overlooking of manufactures of shoes would not render invalid a tax upon another company whose product was ice, tobacco, or cotton goods. It is therefore settled that the only uniformity contemplated in the constitutional restriction (Const. art. 5, § 3) is that between those belonging to the same class (*State Railroad Tax Cases, supra*), and it would seem almost needless to cite authorities, other than *State* v. *Worth, supra,* in support of the proposition that the legislature had the authority to delegate to the defendant the power to make such levies. Const. art. 5, § 4.

The levy complained of was not imposed upon property, but upon the business of selling second-hand clothing. Had the tax been imposed upon the clothing sold as a property tax, it must have been levied in conformity to the requirements of the Constitution, both as to uniformity and value. But it was within the sound discretion of the municipal legislators, if they were empowered to tax the occupation or business at all, to determine what amount should be paid by every person belonging to a well defined class pointed out in an ordinance. *State* v. *Powell, supra.* It is clear that the city had authority to "levy and collect a license tax for the privilege of carrying on any trade, profession, or business" within the limits of the city, not only under the charter, but under the general law. *State* v. *Worth, supra;* Code, § 3800. Whatever power the legislature possesses under the Constitution has been delegated to the municipality, and the question for consideration here is, not whether the court, in the exercise of a sound discretion, will hold the ordinance to be just, reasonable, or wise, but whether, resolving all doubts as to the exercise of legislative authority by its agent as would be done in favor of a statute enacted by the legislature itself, it clearly appears that the ordinance is unconstitutional. The authority "to levy and collect a license tax for the privilege of carrying on any trade, profession, or business," subject to a prescribed limit as to amount, necessarily carried with it, by implication, the power to classify the various kinds of business, just as the legislature might have done. If, therefore, it be conceded that the court can revise the classification adopted by the city, when it does not appear upon its face that there was a purpose to discriminate in restraint of trade, there is no reason why any one of the taxes imposed in Schedules B and C of the revenue act (Laws 1895, chap. 116) should not be brought before the courts for review, on the ground that it is unreasonable to levy it on that particular class of subjects, though it be admitted that it sometimes constitutes a distinct kind of business, because some dealer may have chosen to make his business more general in its character. In the absence of any evidence of a purpose to break down the sale of this species of goods, courts are powerless. It is the peculiar province of the legislature to

reform the laws so as to make the benefits extend to and the burdens bear equally upon all classes of people.

The plaintiff complains that, in addition to the tax of $4 per month levied upon her as a dealer in second-hand clothing, she is liable, under another ordinance, to a license tax of $1 per month for the privilege of selling other general merchandise. If the city of Wilmington would have been authorized to levy the tax imposed in *Worth's Case* upon a general merchant, notwithstanding the fact that he added to his general business that of wholesale dealer in ice, it is clear that the plaintiff could not evade a tax on one distinct business by combining with it another. Because clothing may be comprehended under general merchandise, the courts cannot question the honesty or the soundness of the discretion of the city authorities in subdividing a larger class of dealers into two or more, distinguished by the lines of goods sold by each. Indeed, it is the duty of the courts to impute to all who exercise legislative authority proper motives, and, as between two constructions of their legislation, to adopt, if possible, that which brings it within the purview of their powers. *State* v. *Moore*, 104 N. C. 714. It does not seem to be contended that the municipality is attempting to exact from the plaintiff license taxes greater in the aggregate yearly amount than the limit fixed by the charter, though another ordinance provides that a tax of $1 per month shall be imposed on general merchants, and $4 on any dealer whose business, in part or in whole, is selling second-hand clothing, since the limit applies only to the amount of any single license tax, not to the aggregate amount of two when they are lawfully imposed. The rule laid down in *State* v. *Powell* precludes us from reviewing the exercise of the discretion in classifying those subjected to such burdens, or in determining what amount shall be imposed upon each. But the Constitution of North Carolina authorizes the legislature, not only to impose a license tax upon the occupation of selling, but a property tax upon the goods sold, provided the statute, upon its face, allows no discrimination; and, subject to the same restrictions, the legislature may delegate this power to municipalities. *State* v. *Stevenson*, 109 N. C. 731.

The plaintiff by way of recital sets forth that the defendant has passed, and has already enforced, another ordinance, which imposes a fine of $50 for selling or offering for sale second-hand clothing without having it disinfected by fumigation, and by paying a price fixed according to the nature of the garment, as set forth in the ordinance. A part of the relief asked is, not only that the city authorities be restrained from collecting more than $1 per month as a license tax, but that they be restrained from exacting, in future, fees so large as plaintiff has paid for disinfecting the clothing now on hand. This ordinance was passed, clearly, in the exercise of police power claimed to have been delegated by the state, and is an assumption of authority quite distinct from the power to levy license or taxes. Though relating to the same subject-matter, the validity of the two acts is in no way dependent upon the same grants of power (*State* v. *Stevenson*, *supra*), and the passage of the one has no bearing upon the right to enact the other. The previous passing of the ordinance requiring disinfection does not tend to show that the ordinance, the enactment of which was declared in *Powell's Case* to be an unreviewable exercise of sound discretion, was unauthorized. The license tax was lawfully imposed, if the municipality was clothed with the power to classify, and did not discriminate in the exercise of its delegated authority. The ordinance requiring disinfection was enacted ostensibly—and, until direct and unquestionable proof to the contrary is offered, must be deemed in reality to have been passed—for the protection of the public health. "The legislature is empowered under the organic law to restrict an individual by direct enactment in the exercise of such dominion and control over his own house or premises, as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over others. And, though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing." *State* v. *Tenant*, 28 Am. St. Rep. 716, and note; Id. 110 N. C. 609, 15 L. R. A. 423; *State* v. *Moore*, 104 N. C. 721; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205. When the municipality, however, attempts to abuse a power expressly and rightfully granted to it, by restricting the dominion of the owner over his property, not according to a rule general and uniform in its application to a class of persons or to a classification of property, the ordinance imposing such restraint is unconstitutional and void. *State* v. *Tenant*, *supra*, and authorities there cited. But the charter (Priv. Laws 1879, chap. 42, § 18) empowers the municipal authorities "by all needful ordinances to secure order, health, quiet, and safety" within the limits of the city. It was not unreasonable to require one who was engaged in the sale of second hand clothing to turn it over to the city authorities to be disinfected. It is a matter of universal knowledge that such clothing is the means, often, of communicating contagious and dangerous diseases; and it was but a proper and lawful use of the authority to protect the health of the community, under local government of the city, to use the means adopted to prevent the introduction of disease. The right to sell or to buy such articles is not an absolute one, but may be subjected to such restriction, by the lawmaking power intrusted with the authority, as may be necessary to make its exercise consistent with the safety and security of others.

The general property tax, being imposed under a distinct grant of authority, must be considered separate and apart from the exercise of any other power, and, so considered, just such an ordinance as that under consideration has been declared to be in conformity with the constitutional requirements and consistent with the ad valorem levy on property. *Gatlin* v. *Tarboro*, 78 N. C. 119. The plaintiff was not entitled to recover damages from the municipality for passing an ordinance in the exercise of its legislative authority as a branch of the

government (*Moffitt* v. *Asheville*, 103 N. C. 237; Id. 14 Am. St. Rep. 810 and note) and cannot maintain her status in court upon any such claim as a cause of action.

The only other remedy which the plaintiff demands, and upon which she bases her claim of right to maintain the action, is an injunction against the collection of the license tax of $4 per month, and against collecting the amount now paid for disinfecting. Under the provision contained in section 76, chap. 119 of the Laws of 1895, the injunction will not lie to restrain the municipality, unless it appear that the levy or assessment was illegal. If, as has been shown, it was competent to classify dealers in second-hand clothing separately from vendors of other articles of general merchandise, it would follow that it was no more illegal for the city to exact $1 per month on one class and $4 per month on another, as license tax for distinct kinds of business, than it would have been to exact $66 per annum and an additional merchant license fee of $1 per month in *Worth's Case*, had the wholesale ice dealer's establishment constituted a part of a general merchant's store, or to levy, in addition to a particular license tax, a uniform ad valorem tax on property. *State* v. *Stevenson*, 109 N. C. 730. The ordinance imposing a fine for failure to have the clothing disinfected, and fixing the cost of fumigating, was also within the purview of the powers of the city, and this court has no authority to review the schedule of charges fixed by it. If the municipality has abused the powers granted, it is a grievance for which complaint may be made to the legislature, whose province it is to restrict or withdraw entirely its legislative authority; but it is obvious that the extraordinary power of the courts cannot be invoked to restrain the exercise of a discretionary legislative power, and it is as well settled that the action for damages at law for the alleged wrongful exercise of such powers will not lie. We think, therefore, that there is not, in any aspect of the case, a statement of a cause of action, since no amendment could be made, which would establish an apparent right to either a restraining order now or a verdict for damages on the trial of the action.

There was no error in dissolving the restraining order.

Furches, J., dissenting:

The plaintiff is a merchant in the city of Newbern, carrying a stock of about $1,500, one tenth of which, or $150, is second-hand clothing. The city has one ordinance taxing all merchants $1 per month for the privilege of merchandising within its corporate limits, and another ordinance requiring all merchants dealing in second-hand clothing to submit it to city authorities for fumigation to be done at the expense of the owner, and imposing a fine of $50 if this is not done, and a third ordinance imposing another tax on dealers in second hand clothing of $4 per month. The plaintiff claims that this legislation on the part of the city is unlawful, unconstitutional, and oppressive, and brings this action to enjoin and restrain the city from enforcing these ordinances which require her to submit the clothing for fumigation, and to pay the privilege tax of $4 per month for selling second-hand clothing. The first of these ordinances, providing for fumigation, falls under the doctrine of police regulations; and it has been held at this term, in *State* v. *Taft* (N. C.) *ante*, 122, that second-hand clothing is not *per se* a nuisance, and its sale could not be prohibited without evidence that they were infected, or had been brought from a place known to be infected, with contagious diseases. Then, under what is known, in law, as the power of police regulation, they might do so. And as it is known that more than ordinary danger exists in the handling and distribution of this class of goods than in first-hand goods, the city or town might require them to be subjected to a process of fumigation, as a kind of quarantine and protection against this extra danger. All this is allowed under what is known as the police power of the government, city, or town and we do not see that plaintiff has any grounds to complain of the second ordinance, requiring her to submit her goods of this kind to fumigation. But the next ordinance, requiring her to pay a tax of $4 per month for the privilege of selling these goods, falls under the law of taxation. The police power of the city has nothing to do with it. The power of taxation exists in all municipal governments. They could not exist without this power. Desty, Taxn. 50. But this power is regulated and restricted by the Constitution, and also by the acts creating municipalities. All taxes levied on property must be ad valorem and uniform. Const. art. 5, § 3. This section also authorizes the taxation of trades, professions, etc., and does not in terms provide that they shall be uniform. But this court, in construing this section of the Constitution, has held that it means that this tax shall be uniform. *Gatlin* v. *Tarboro*, 78 N. C. 119. And the question presented is, Is this uniform tax levied for the purpose of revenue to support the city government, or is it an attempt to do by taxation what it has no right to do under its police power,—destroy this business in the city of Newbern? This is a business in which persons of small means are most likely to engage, as it does not require much capital to carry it on. And it is easy to see that a tax upon the privilege of carrying on any mercantile business, of nearly one third of the capital per annum, will destroy it. And while it is the duty of the court to attribute good motives to the city authorities, and to put such a construction upon their legislation as to sustain its legality, if it is susceptible of such construction, it is equally the duty of the court not to sustain them if it appears that their acts are in contravention of the Constitution, or of well-defined personal rights. Treating this, as we must treat it, as purely an act for revenue, we cannot see why persons engaged in the sale of this kind of merchandise shall pay four times as much for the privilege as those engaged in selling first-hand clothing. And taking into consideration the three ordinances referred to above, it is apparent to us that the purpose of this legislation was to run this business out of the trade in Newbern, and in coming to this conclusion we do not attribute bad motives to the city fathers who passed these ordinances. We sup-

pose they thought it would be a good thing for the city to do so. But we only hold that there are legal reasons why they cannot do so.

But is this tax uniform, as required by the Constitution, and construed in *Gatlin* v. *Tarboro*, *supra*? It is seriously contended that it is: and *State* v. *Worth*, 116 N. C. 1007; *State* v. *Moore*, 104 N. C. 714, and *State* v. *Stevenson*, 109 N. C. 731, are cited as authorities to sustain this contention. And, while this case presents an interesting question, involving constitutional powers and personal rights, it seems to us that it is distinguishable from the cases cited for defendant. *State* v. *Stevenson* was for not returning purchases as required by the revenue act, for the reason, as he claimed, that he was protected by the law of interstate commerce. *State* v. *Moore* was an indictment for selling thirteen pounds of cotton after night, without complying with the terms required by the statute, and was sustained by this court upon the ground that it fell within the lines of the police powers of the state, which, we have seen, have nothing to do with the case now under consideration. *State* v. *Worth* was an indictment for violating an ordinance of the city of Wilmington putting a tax on all manufacturers of ice, who also should have the privilege of selling at wholesale or retail. And this court held that the ordinance was constitutional, that manufacturers of ice were a distinct class, and that the tax applied to all such manufacturers alike; and, nothing more appearing to the court, the ordinance was sustained. It was contended in that case that "manufacturer" was a generic term, and the same tax should be put on all manufacturers,—on the shoemaker at his bench; on the manufacturer of steam engines or of ice,—to make the tax uniform. The court did not agree to this proposition, and it is claimed that the decision in *Worth's Case* is, in effect, an adjudication of this case in favor of the defendant. We do not think so. There must be a line drawn somewhere, or that beneficent provision of the Constitution requiring uniformity of taxation will be emasculated and destroyed. It may be that *Worth's Case* is as far as we ought to go. But whether this be so or not, there seems to be quite a distinction between it and the one under consideration. It is true that "manufacturer" is a generic term, but this is subdivided into many kinds of manufacturers, such as a manufacturer of cotton, of tobacco, of steam engines, farming implements, and so many others that the generic term, "manufacturer" does not amount to a definition, and one gets no definite information as to the business in which the party is engaged from this general term.

It is contended that "merchant" is a generic name, and includes all persons who buy and sell goods of any kind; that a man who sells liquor or drugs or horses is a merchant. So he may be in the broad, "generic" sense. But they have another well-defined cognomen. If you were asked as to the business of a druggist, you would not be likely to say he is a merchant in Raleigh. If you were to ask as to what business B was engaged in, and he was a liquor dealer, you would not be likely to say he is a merchant in Morganton. Or, if you were asked as to the business of C., who owns a livery stable, and buys and sells horses, you would not be likely to say he is one of the merchants of Newbern. But, if you were asked as to the plaintiff's business, you would most likely say she is a merchant in Newbern. That would convey the business definition as to her occupation. You would be no more likely to go on and say that she has a mixed stock of goods of first-hand clothing and second-hand clothing, than you would be likely to say that Sherill & Co., of Statesville, carry a general line of merchandise, also ready-made clothing and family groceries. Such definitions as these would not likely be given unless specially called for, by some one interested in knowing more about the business than simply to know whether he was a merchant. It is admitted that, in order to sustain this legislation on the part of defendant, treating it simply as a revenue act, it may make the same distinction and discrimination against any merchant in Newbern who sells shoes as a part of his stock, or who sells tobacco as a part of his stock, or who sells first-hand clothing as a part of his stock: and without enumerating further, that they may select any article of merchandise and discriminate against the merchant who sells it 400 per cent, if they choose to do so. And it is contended there is no Constitution, no law, and no power to protect the unfortunate merchant from such unjust discrimination. We cannot give our assent to such a proposition; and as it is admitted that, unless the term "merchant" can be thus chopped up, the tax imposed by this ordinance is not uniform, I therefore think that there is error.

Faircloth, Ch. J.: I concur in the dissenting opinion.

ALABAMA SUPREME COURT.

Mary T. WHITE, *Appt.*,
v.
Albert BREEN.

(.....Ala.....)

1. Several different writings may be read together as constituent parts of the memorandum within the statute of frauds, where, when they are viewed together in the light of the situation and circumstances of the parties at the time they were written, they show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, although there is no express reference from one to the other.

2. The omission of one or more of the essential elements of a memorandum of the sale of real property under the statute of frauds from a writing containing some of the elements signed by the appointee in a power of

NOTE.—For a few authorities on the right to read several papers together to make a memorandum under the statute of frauds, see *note* to Louisville Asphalt Varnish Co. v. Lorick (S. C.) 2 L. R. A. 212.

For requisites and memoranda generally, see also Mentz v. Newwitter (N. Y.) 11 L. R. A. 97, and *note*.

attorney to sell that particular land may be supplied by reference to the power of attorney which contains such elements.

3. A description of lots by reference to the streets and the city in which they are located and the name of the owner sufficiently identifies them for the purposes of the statute of frauds requiring a power of attorney to sell lands to be evidenced by a memorandum in writing identifying the property, in connection with evidence that the principal owned no other property in the city.

(April 12, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Colbert County in favor of defendant in an action brought to recover damages for breach of contract to sell real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. **Roulhac & Nathan,** for appellant:

The property was sufficiently described in the correspondence.

Scanlan v. *Geddes*, 112 Mass. 15; *Doherty* v. *Hill*, 144 Mass. 465; *Jenkins* v. *Harrison*, 66 Ala. 345; *Beckwith* v. *Talbot*, 95 U. S. 289, 24 L. ed. 496; *Clements* v. *Pearce*, 63 Ala. 292; *Louisville & N. R. Co.* v. *Boykin*, 76 Ala. 565; *Guilmartin* v. *Wood*, Id. 210; *Meyer* v. *Mitchell*, 77 Ala. 312; *Black* v. *Pratt Coal & C. Co.* 85 Ala. 510; *Chambers* v. *Ringstaff*, 69 Ala. 140; *Morris* v. *Robinson*, 80 Ala. 291; *Gaston* v. *Weir*, 84 Ala. 193; 2 Devlin, Deeds, § 1012; *Pennington* v. *Flock*, 93 Ind. 378; *Smiley* v. *Fries*, 104 Ill. 416; *Phillips* v. *Hooker*, Phill. Eq. 193; *Mead* v. *Parker*, 115 Mass. 413, 20 Am. Rep. 110; *Simmons* v. *Spruill*, 3 Jones, Eq. 9.

Mr. **Thomas Seay** for appellee.

Head, J., delivered the opinion of the court:

The question in this case is whether the writings appearing in evidence constitute such a memorandum of a contract of sale of the lots by Breen to Mrs. White as satisfies the statute of frauds. Breen was the owner of lot numbered 4 in block numbered 72, situated on Montgomery avenue, and lots numbered 4 and 5 in block numbered 96, situated on Annapolis avenue, in the city of Sheffield, Colbert county, Ala. He owned no other property in that city. On November 6, 1890, he wrote from New Kingston, Pa., to W. H. Ruffin, Esq. of Sheffield, as follows:

Would you be kind enough to hunt up a purchaser for my property in Sheffield, Ala.? I will sell at a reasonable price. Hoping to hear from you on the subject soon, I remain yours truly, Albert Breen.

Ruffin replied that he was not a real-estate agent, but, if he (Breen) desired, he would secure the service of an agent in whose hands he would place the property for sale, to which he received the following reply, written from New Kingston, November 13, 1890:

Your favor of the 8th came to hand last evening. I wish you would please secure the services of some good reliable person to sell my property at any sum above five thousand dollars ($5,000), nothing less. . . . Please start the sale as soon as you can, and oblige yours truly, Albert Breen.

Thereupon Ruffin placed the above described lots (which, as we have said, were the only property owned by Breen in Sheffield) in the hands of A. J. Moses, a real-estate agent, and so notified Breen by letter. In the latter part of November, 1890, Breen came to Sheffield, when Ruffin introduced him to Moses as the person in whose hands he had placed the sale of the property. Thus the writings to this point, without the aid of extrinsic evidence, place Breen's property in Sheffield, Ala., by his act, in the hands of Moses, as his agent, for the purpose of finding a purchaser. On December 9, 1890, Moses wrote Breen, from Sheffield, as follows:

I have a customer who will take the property, *viz.*, lot on Montgomery ave. and the two lots and improvements on Annapolis ave., for $5,000, at $1,666.66 payable January 1st, 1891, balance in twelve months. He will, if you desire, pay down $100 to close the trade; this sum to be deducted from cash payment. Reply at once. Yours, etc.,

A. J. Moses.

To this letter Breen replied as follows:

Birmingham, Ala., December 14th, 1890.
A. J. Moses, Esq., Sheffield, Ala.:

I returned this morning from Greensboro, Ala., where I have been on business. Your letter of Dec. 9th was handed to me on my arrival here this morning. I regret very much, indeed, that I was not here when it came. I will accept the trade if $100 are paid down as a security. Hope you can make a trade with same party. Hoping to hear from you soon on the subject. Address as before.

Very truly,
Albert Breen.

To which Moses replied as follows:

Sheffield, Ala., Dec. 16th, 1890.
Albert Breen, Esq.—Dear Sir:

I have closed with Mrs. W. S. White for the sale of the two houses on Annapolis avenue and lot on Montgomery avenue for $5,000, as follows: $100 cash; $1,566.66 payable January 1st, 1891; $3,333.33 payable in twelve months. I wish you to have deeds forwarded so as to execute new deeds and mortgage. The former will have to be sent to Mrs. Breen for her signature, so you had better not delay forwarding papers to my address, and state where new deeds will reach you for signature. I hold $100 to confirm trade.

Very truly,
A. J. Moses.

To this, Breen replied, by telegraph, as follows:

Birmingham, Ala., Dec. 17th, 1890. 9.45.
To A. J. Moses:

Yours all received, and contents noted. Have sent for deeds. Shall forward as soon as received. Let me know if mortgage is to bear interest. See if Ruffin got letter for me at Cleveland House, and forward the same.

Albert Breen.

To which Moses replied by letter, as follows:

Sheffield, Ala., Dec. 17th, 1890.

Mr. Albert Breen,—Dear Sir:

Your telegram received. Mr. Ruffin forwarded your letter yesterday. While nothing was said in reference to interest on deferred payment, it is customary, and I so understand it, as custom in every case shows deferred payments bear interest, particularly where property is improved and producing an income.

Very truly,

A. J. Moses.

On the next day, December 18th, Breen, by a message to Moses, through a letter to Ruffin, repudiated, or attempted to repudiate, the trade, on the ground that his wife would not sign at such a low figure, to which Moses replied by letter on the 20th, insisting that he (Breen) was bound, and urging him to carry out the contract. On the 26th, he wrote Moses, expressing a willingness to close the trade by executing the papers and accepting a mortgage, but exacting 8 per cent interest on the deferred payments, to which he thereafter adhered. Mrs. White refused to submit to this exaction of interest, and brought this action to recover for the alleged breach of agreement to sell. When Moses made the bargain with Mrs. White relied on, she paid him $100 in cash, and he executed to her a receipt, as follows:

Sheffield, Ala., Dec. 15th, 1890.

Received from Mrs. Mary T. White one hundred dollars, on account of purchase of two houses and lots on Annapolis avenue and one lot on Montgomery avenue, belonging to Albert Breen.

A. J. Moses, Agent.

The foregoing are the material facts. Upon them, two questions arise: (1) Did Moses, as agent of Breen, make a contract of sale binding upon his principal? (2) Did Breen himself make such a contract binding him to its performance? The first question subdivides itself into two inquiries, *viz.*: (1) Was Moses lawfully authorized, in writing, by Breen, to make the contract? (2) If so, do the writings show that, in pursuance of such authority, he made a contract, evidenced by some note or memorandum thereof, in writing, expressing the consideration, and subscribed by him?

The principles of law growing out of our statute of frauds, in reference to contracts for the sale of land or any interest therein, have been often and fully discussed in our adjudications. It is well settled that the form of the writing required by the statute is not material. The contract may be evidenced by one writing or more. It may be shown entirely by written correspondence. Whatever form the agreement may assume, if the writing or writings, viewed as a whole, constitute, in essence or substance upon their face, a note or memorandum in writing, subscribed by the party sought to be charged, or his agent lawfully authorized in writing, showing who the contracting parties are, the subject-matter of the sale, and the consideration, the statute is satisfied. *Jenkins* v. *Harrison*, 66 Ala. 357; *Carter* v. *Shorter*, 57 Ala. 253; *Knox* v. *King*, 36 Ala. 369. In cases of single instruments their sufficiency is generally of easy determination. Greater difficulties arise when, in cases like the present, the required evidence of the contract is sought to be produced by the adjustment and adaptation to each other of several letters and writings containing the negotiations of the parties, and the supposed culmination of these negotiations in a binding agreement of sale. In cases of this character it is certainly not essential that the party charged should have subscribed each paper forming a link in the chain of evidence. If the several writings, upon their faces, viewed in the light of the situation and circumstances of the parties at the time they were written, clearly relate to, and connect themselves with, each other, and when their contents are adjusted, and adapted to each other, according to their reasonable and practical import, involving in form and order the manifest sense and meaning of the parties, there appears to have been clearly made known the names of the contracting parties, the subject-matter of the sale, and the consideration, and if it appears that all this has received the sanction of the subscription of the party sought to be charged, or some person by him thereunto lawfully authorized in writing, the statute requirement in reference to subscription, as well as all other particulars, is met. We said the several writings must, upon their faces, clearly relate to, and connect themselves with, each other. The rule, however, does not necessarily require express mention in one document of another, or in each of all the others; and this statement, we conceive, does not modify the rule, when properly interpreted, as it is stated in *Knox* v. *King*, 36 Ala. 367, *viz.*: "When the memorandum in writing is itself incomplete, it cannot derive aid from another writing unless the memorandum refer to the other writing;" and that "oral evidence cannot be received to connect the two or to supply the wanting link." This last rule is subject to the exception which obtains generally in the construction of written contracts,—that the situation and circumstances of the parties may be looked to, when necessary, to aid in arriving at the meaning of what they have written. An explanation of these rules will be found in *Jenkins* v. *Harrison*, *supra*. We are of opinion that when all the writings adduced, viewed together, in the light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, so that the mind can come to no other reasonable conclusion, from the evidence so afforded, than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded in reason; and when, as practical men, we look at the writings, and see, inhering in them, evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so considered. There is in such case a direct reference of the one to the other, within the meaning of the law. The application of the principle to the facts of this case will illustrate our meaning. The case of *Beckwith* v. *Talbot*, 95 U. S. 289, 24 L. ed. 496, aptly illustrates it.

These rules of law relating to the form of the agreement, and by which several papers may be considered as bearing a connection with each other, apply as well to the creation of a power of attorney to sell lands as to the requisite note or memorandum of the contract of sale; but in other respects the characteristics of the two (the power of attorney, and the note or memorandum of the contract) are essentially different, and controlled by different principles. Unlike the former, the present statute requires the authority of an agent to subscribe the note or memorandum of the contract for the sale of land for his principal to be conferred in writing. No form or method of execution of the power of attorney is prescribed. It may be in any form clearly showing the agent's authority, and be executed according to any recognized common-law method of executing written instruments. The power may be general, to sell any lands of the principal to any purchaser upon any terms; or it may be partly general and partly special or limited, as to sell particular land to any purchaser on any terms, or particular land to any purchaser on particular terms; or it may be entirely special, as to sell particular land to a particular purchaser on particular terms. In either case, the agent, keeping within the scope of his authority, may make the contract and execute the necessary written evidence binding his principal to its performance.

We think it is not to be denied that, if the lands were sufficiently identified, Breen did execute to Moses a power of attorney to sell these lands. Let us settle, first, whether the identification was sufficient. The power to sell is contained in the letter of Moses to Breen of December 9, 1890, and Breen's direct reply thereto, expressly referring to it, of December 14, 1890. These letters are above set out. In them, the only description given is "the property, *viz.*, lot on Montgomery ave. and the two lots and improvements on Annapolis ave." This, unaided, is clearly insufficient. Is it rendered sufficient by other writings? Here the principles herein discussed, touching the manifestation of agreements by several writings and reference to and connection with each other, are applicable. We have seen that on November 6, 1890, Breen wrote to Ruffin requesting him to hunt him up a purchaser for "my property in Sheffield, Ala." Ruffin replied that he was not a real estate agent, but that, if he (Breen) desired, he would secure the services of an agent in whose hands he would place "the property" for sale. Breen replied on November 13, 1890, expressly referring to Ruffin's letter, saying: "Please secure the services of some good reliable person to sell my property," etc. Thereupon Ruffin wrote to Breen, informing him that, pursuant to instructions, he had placed in the hands of A. J. Moses lot numbered 4 in block numbered 72, and lots numbered 4 and 5 in block numbered 96, the former being on Montgomery avenue, the two latter on Annapolis avenue, all in the city of Sheffield, county of Colbert, and state of Alabama. The bill of exceptions leaves no room for any other interpretation than that this letter of Ruffin to Breen described the property he had placed in the hands of Moses as above stated. It was also proved that Breen was so circumstanced at that time that he owned no other property in Sheffield. Following close upon this correspondence came the letter of Moses to Breen, of December 9, saying he had a customer who would take "the property, *viz.*, lot on Montgomery ave.," etc.; to which Breen replied, conferring authority to sell. This letter of Moses does not expressly refer to the Ruffin correspondence, but, in pointing out the property to which it relates, he employs the definite article, implying, beyond all doubt, some precedent matter understood by both, which rendered a more definite reference unnecessary. It also gives the avenues on which the lots are situated. It is impossible, we think, for the mind to conclude that this letter did not have direct reference to the precedent correspondence between Breen and Ruffin, though express reference to that correspondence was omitted. We accordingly hold that the correspondence with Ruffin properly enters into the make-up of Moses' power of attorney, and, with the other letters, renders sufficient the identification of the property authorized to be sold. The result would be the same if the last letter of Ruffin to Breen had not minutely described the lands as above set forth. In that case the description afforded by bringing together the several letters would be, substantially: "The three lots in Sheffield, Alabama, belonging to Albert Breen, *viz*, the one located on Montgomery avenue and the two on Annapolis avenue;" the proof being that Breen then owned no other property in Sheffield than the lots in question. This is a sufficient description. See authorities cited on brief of appellant's counsel.

What then were the nature and effect of this power of attorney. It was of the class we designated as entirely special and limited. The authority was to sell the particular lots, to the particular customer, at a specified price, and on specified terms. The judgment and discretion of Breen, in respect of every element of the bargain, were expressed in the power, and were to be exercised by the agent. Indeed, this power of attorney, save in a single particular, contains within itself a statement of every element of the contract requisite to a sufficient note or memorandum, under the statute of frauds. It fails only in that the name of the purchaser is not stated. She is pointed to the agent, not by name, but as the customer who had proposed to buy. This, as we have shown, while insufficient as evidence of the contract, because it does not disclose the name of the purchaser, was sufficient for the purposes of Moses' power to sell to Mrs. White; she being in fact the customer referred to. It authorized him to close the bargain, and execute to her the necessary note or memorandum under the statute; and, if the receipt he executed to her had set forth the lands, the price, and the terms of sale, there could be no further question of its binding force upon Breen, the principal. But it omitted these essentials, and the question arises whether they are supplied by reference to the power of attorney which sets them forth. The receipt itself discloses all other essentials, *viz.*, the names of the contracting parties. The receipt was subscribed by the agent thereunto lawfully authorized in writing. The

power of attorney was subscribed by Breen himself. The two combined express all the elements of the contract required by the statute. Neither of itself does. The principles of law growing out of that provision of the statute under consideration, as we have already remarked, have been often discussed in this court. We can go to no better source of information on the subject than the elaborate and able opinion of Chief Justice Brickell in *Jenkins* v. *Harrison, supra.* We will not enlarge this opinion by reproducing what he there said. We extract from it, and from the books at large, that the purpose from which a note or memorandum relied on was made is not always controlling. "Writings, even letters addressed to third persons, of which the party availing himself as evidence had no knowledge when they were written, and which were not written with any view to the execution, or to furnish evidence of the contract, have been received as evidence to meet the requirements of the statute of frauds, and, upon the evidence derived from them, the contract enforced." Undelivered deeds, deeds delivered in escrow, may furnish the necessary evidence of the contract. In short, all that the law demands is a written statement of the essential elements of the contract over the signature of the party sought to be charged or his duly-authorized agent, so that the establishment of the contract be not left to oral evidence. When an agent contracts, for his principal, with another under written authority, the writing, in contemplation of law, is before the parties at the time the contract is made. They are bound to know its contents. The contract derives validity from the power. If the agent executes written evidence of the contract, the power of attorney enters into and forms a part of it. The two constitute a unity, and are inseparable. Under the power, in the present case, Moses was authorized to execute a full and complete note or memorandum, binding Breen. That cannot be disputed. If so, then he was authorized to execute such a note or memorandum as, under the particular circumstances, was necessary to the production of full written evidence of the contract, under the statute. Hence, when called upon to act, he found that Breen had himself defined, over his own signature, the vendor, the land, the price, and terms of sale, in a writing which must needs enter into and become part of any writing he (the agent) could execute; thus furnishing all the evidence of what the contract was, except the name of the purchaser; and, being thereunto duly authorized in writing, he executed the receipt, supplying that deficiency. We have no doubt that this was a full compliance with the statute. Full legal evidence of the contract was thereby provided.

We stated for decision the second question, *viz.*, whether Breen did not himself conclude the contract of sale after Mrs. White was reported to him as purchaser. We deem it, however, unnecessary to decide it, as the views we have announced are evidently conclusive of the plaintiff's right of action. *Reversed and remanded.*

Rehearing denied February 8, 1896.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* William CORCORAN, *Appt.*,
v.
Charles E. CHAPEL, *Respt.*

(.....Minn.....)

***The provision of Gen. Laws 1893,** chap. 124, § 9, as amended by Gen. Laws 1895, chap. 115, § 5, that "it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof except the head or skin," is valid, and not in violation of either the state or Federal Constitution.

(February 6, 1896.)

APPEAL by relator from an order of the District Court for Ramsey County denying a writ of habeas corpus to obtain his release from the custody of defendant, sheriff of Ramsey County, to which he had been committed upon conviction of violating the game laws. *Affirmed.*

The facts are stated in the opinion.

*Headnote by MITCHELL, J.

Messrs. **Akers & Williams,** for appellant:

By law of the land is meant a general and public law, operating equally upon every individual in the community.

Bank of the State v. *Cooper*, 2 Yerg. 605, 24 Am. Dec. 517.

Laws that are general in their operation, and that affect the rights of all alike.

Sears v. *Cottrell*, 5 Mich. 254.

Every person who undertakes to carry for a compensation the goods of all persons indifferently is, as to the liability imposed, to be considered a common carrier.

Bank of Orange v. *Brown*, 3 Wend. 161; *United States Exp. Co.* v. *Backman*, 28 Ohio St. 150.

To forbid an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness.

Cooley, Const. Lim. 493; *State, McCue*, v. *Sheriff of Ramsey County*, 48 Minn. 236; *Johnson* v. *St. Paul & D. R. Co.* 43 Minn. 224, 8 L.

NOTE.—The constitutionality of game laws, although affecting interstate commerce, which was sustained by a majority of the decisions found in the *note* to State v. Geer (Conn.) 13 L. R. A. 804, as well as by that case, is fully established by the decision of the Supreme Court of the United States affirming the Connecticut case *sub nom.* Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793.

R. A. 419; *Nichols* v. *Walter*, 37 Minn. 272; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Pearson* v. *Portland*, 69 Me. 278, 31 Am. Rep. 276.

Messrs. **W. E. Bramhall** and **Pierce Butler** for respondent.

Mitchell, J., delivered the opinion of the court:

Appeal from an order of the district court denying the petition of the relator, on a writ of habeas corpus, for his discharge from the custody of the respondent, as sheriff of Ramsey county.

The relator is held under a commitment issued upon a conviction of a violation of Gen. Laws 1893, chap. 124, § 9, as amended by Gen. Laws 1895, chap. 115, § 5, which provides that "it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof except the skin or head." He claims that this provision is unconstitutional, as class legislation, and is in violation of both the Federal and state Constitutions, because it deprives the citizen of his privileges and property without due process of law. An analysis of the provision shows that there is no discrimination between persons in the matter of killing game, or in the use or transportation of it after it is killed. Any one may kill or buy it during the open season, and every one is allowed equal privileges for shipping it after it is thus acquired; also, when a common carrier is not used as the means of transportation, every one is allowed to ship it to any one for any purpose; also that, when it is not consigned to a commission merchant or sale market, any means of transportation, either a common or a private carrier, may be used. The only restriction is that, when consigned to a commission merchant or sale market,—that is, to one handling game for sale,—it cannot be consigned by a common carrier. In its practical working, the only effect of the law is to limit the means of transportation of game killed for the market, and consigned to commission men for sale, either for themselves or on account of the consignors. The result would be to prevent, in a great measure, such game from becoming an article of general commerce, and thereby materially decrease the amount killed. The object of the statute, as its title indicates, is to protect and preserve the game of the state from extinction or undue depletion. The most usual method adopted to effect such an object is to limit in some way the amount of game killed. One way of accomplishing this is to limit the open season. But this is not always effectual; for, even if the open season is reduced to the shortest reasonable period, the number of hunters, especially those who hunt for the market, may be so great as to unduly deplete the game even during that period. Another method resorted to is to limit the amount that any one person may kill, and to restrict the modes of killing. Experience proves that such provisions are difficult to enforce, because of the difficulty of procuring the evidence of their violation, especially in the case of large game, which is usually killed in the secrecy of the forest.

It is a matter of common knowledge that the rapid depletion of game, especially large game, such as deer, is caused by its indiscriminate slaughter by "pot hunters," who kill it for the general market. The practical question which confronted the legislature was how to prevent the undue depletion of such game from this cause. This could only be done by adopting some means that would, as far as possible, prevent the game from becoming a subject of commerce in the general market, and thereby reduce the amount that would reach such market. It is also a matter of common knowledge that the facilities for regular, rapid, and cheap transportation furnished by common carriers, especially railways, are practically essential to the business of these pot hunters, and furnish its chief stimulant and aid, and that, without this method of transportation, hunting for the general market would be quite limited, and the amount of game killed very much reduced. Hence, the enactment of the provision under consideration. The legislature has a very large discretion in such cases as to the means to be adopted to effect the desired object, and, if these means do not violate any constitutional provision, the courts will never set up their judgment against that of the legislature as to whether they are the best or most equitable means that might have been adopted. Neither will the courts declare a law invalid, unless it is in plain violation of some express provision of the Constitution. All reasonable doubts must be solved in favor of the legislative action.

The provision under consideration certainly has a natural and reasonable tendency to preserve the game of the state from extinction or undue depletion, and we cannot say that the restriction upon the method of transporting game consigned to commission men or sale markets is arbitrary, or not founded upon an apparent natural reason, suggested by the necessities of the case. If the law is otherwise unobjectionable, the mere fact that, in its operation, it may incidentally deprive common carriers of some business which they would otherwise get, or may render it more difficult for those to procure game in the market who live at a distance from those parts of the state where it is killed, will not render the law invalid. If this restriction was sought to be applied to some article in which the citizen had an absolute and unlimited right of private property, it could not be sustained. But wild game, before it is reduced to possession, belongs to the state in its sovereign capacity, in trust for the whole public. Hence, in the exercise of it police power, the state may impose such limitations and restrictions upon the right of property in it, after it is taken or killed, as will tend to prevent its extermination or undue depletion. *State* v. *Rodman*, 58 Minn. 393. One who kills a deer does not acquire an absolute and unlimited right of property in it. His right of property, from its very inception, is subject to all the limitations imposed upon it by the police laws of the state, one of which is the restriction upon the mode of transportation under consideration. Hence, no question of taking private property without due process of law is involved.

Order affirmed.

FLORIDA SUPREME COURT.

Ex parte Edward SENIOR, Jr.

(.....Fla.....)

1. The rule stated in Ex parte Edwards, 11 Fla. 174, that in the absence of statutory limitations or restrictions the power of the several courts over contempt is omnipotent and its exercise is not to be inquired into by any other tribunal, is subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it, for if the act be plainly indifferent or meritorious, or if it be only the assertion of an undoubted right of the party, it will not become a criminal contempt by being adjudged to be so.

2. The ancient maxim of the common law, "Nemo tenetur seipsum prodere," is imbedded in the provision in the 12th section of the Bill of Rights of our Constitution, that no person shall be compelled in any criminal case to be a witness against himself; and such provision should be broadly and liberally construed, to secure the protection designed to be accomplished by it.

3. The purpose of the provision mentioned is to exempt one from being compelled, in any judicial or other proceeding against himself, or upon the trial of issues or investigation of facts between others, to disclose facts or circumstances that can be used against him as admissions tending to prove guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or his connection with it may be obtained.

4. The right of privilege against disclosure of incriminatory statements or evidence is personal to the witness, he alone being entitled to invoke its protection, and it may be waived by him.

5. While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine, under all the circumstances of the case, whether such will be its tendency from the question asked; and where, from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate, or tend to criminate, the witness has the right to claim his privilege, and is not bound to answer.

6. The court should inform a witness of his right of privilege when the circumstances of the case call for it, but when he, with full knowledge of his rights, consents to testify about the very matter that may criminate him, without claiming his privilege, he must submit to a full, legitimate cross-examination in reference thereto.

7. Section 2787, Rev. Stat., providing that whoever casts knowingly an illegal vote at an election in this state held according to law shall be punished by imprisonment in the state prison not exceeding six months, or by fine not exceeding $100, applies to illegal voting at municipal elections in this state; and a party who votes at such an election is not compelled to testify as to his vote when examined as a witness in a suit involving the validity of the election; but if, with full knowledge of his rights, he consents to testify that he did vote, and his ballot was received by the judges and inspectors of the election, he must submit to a full cross-examination as to his qualifications as a voter.

(February 28, 1896.)

APPLICATION for a writ of habeas corpus to procure petitioner's discharge from the custody of the sheriff of Escambia County to which he had been committed for contempt in refusing to answer questions propounded to him as a witness in a quo warranto proceeding. *Petitioner remanded.*

The facts are stated in the opinion.

Messrs. **Blount & Blount, C. B. Parkhill,** and **John Eagan,** for petitioner:

Habeas corpus lies, when upon the admitted facts the court did not have the legal right to make the order, or when, in disobeying it, the person committed was in the exercise of a constitutional right.

People, Hackley, v. *Kelly,* 24 N. Y. 74; *People, Tweed,* v. *Liscomb,* 60 N. Y. 559, 19 Am. Rep. 211; *Re Dill,* 32 Kan. 668, 49 Am. Rep. 505; *Counselman* v. *Hitchcock,* 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816; 9 Am. & Eng. Enc. Law, p. 218.

In such case the court may have jurisdiction of the person and of that offense, but it has no authority to make the particular order complained of.

People, Tweed, v. *Liscomb, supra; Ex parte Lange,* 85 U. S 18 Wall. 163, 21 L. ed. 872.

The witness had a right to refuse to answer.

Fla. Const. § 12, Declaration of Rights.

The privilege is one which the witness may claim at any stage, and even though he has answered other questions about the same matter.

Reg. v. *Garbett,* 2 Car. & K. 474, 1 Den. C. C. 236; *Foster* v. *People,* 18 Mich. 266; *Counselman* v. *Hitchcock, supra.*

The witness who consents to testify to one thing does not waive his privilege to refuse to testify unless he has already so testified as to furnish conclusive evidence of his guilt.

Foster v. *People, supra.*

Or unless the thing inquired about is necessary for an explanation of that which has been testified to before.

Lombard v. *Mayberry,* 24 Neb. 674; *Amherst* v. *Hollis,* 9 N. H. 107; *Coburn* v. *Odell,* 30 N. H. 540; *Taylor* v. *McIrvin,* 94 Ill. 488; *People, Taylor,* v. *Forbes,* 143 N. Y. 219.

The transaction of voting was a complete thing in itself, and the testimony sought was not to explain it, but to impeach it, and was sought for the sole purpose of showing the witness to be a felon. Questions which related to distinct transactions at other times and places and having no connection with this act were not admissible.

Ex parte Boscowitz, 84 Ala. 463; *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *Amherst* v. *Hollis,* and *People, Hackley,* v. *Kelly, supra; People* v. *Sharp,* 107 N. Y. 427; *People, Taylor,* v. *Forbes, supra; McFadden* v. *Reynolds,* 20 W. N. C. 312; *Williams* v. *Dickenson,* 28 Fla. 90; *Barber* v. *State,* 13 Fla. 675; *Dedric* v. *Hopson,* 62 Iowa, 562; *Pickard* v. *Collins,* 23

NOTE.—The cross-examination of a defendant in a criminal case is the subject of annotation to the case of People v. Tice (N. Y.) 15 L. R. A. 669.

Barb. 444; *Bellinger* v. *People*, 8 Wend. 595; *Mitchell* v. *Hinman*, Id. 667.

This privilege cannot be waived.

Higdon v. *Heard*, 14 Ga. 255.

Messrs. **John C. Avery, S. R. Mallory, John S. Beard,** and **C. M. Jones,** for respondent:

This court will not review such order by appeal or writ of error.

Caro v. *Maxwell*, 20 Fla. 17.

The power of the several courts over the matter of contempt is omnipotent.

Ex parte Edwards, 11 Fla. 174.

It is the province of the court to pass upon the tendency to criminate of the question which the witness refused to answer.

9 Crim. L. Mag. & Rep. 301; *Richman* v. *State*, 2 G. Greene, 532; *State* v. *Duffy*, 15 Iowa, 425; *Com.* v. *Braynard*, Thacher, Crim. Cas. 147; *Kirschner* v. *State*, 9 Wis. 140.

It does not appear that the witness gave to the court any intimation as to how any of the questions not answered would elicit testimony which would incriminate him. Under such circumstances the judgment of the trial judge should prevail.

Queen v. *Boyes*, 1 Best & S. 311, 9 Week. Rep. 960.

In case the witness had complied with the court's order, after asserting his privilege, the evidence would be regarded as given under compulsion and could not thereafter be used against him.

Thompson, Trials, § 310; *Reg.* v. *Garbett*, 2 Car. & K. 474.

The preliminary question, Can any answer responsive to the question subject the witness to a criminal prosecution?—must be decided by the court and not by the witness. If the court holds the affirmative of that question then the witness has a right to decide whether the answer he would give to the question would have such effect.

9 Crim. L. Mag. & Rep. 302.

In England a witness may not there use his privilege arbitrarily to make a partial statement of facts to the prejudice of either party, as this petitioner tried to do.

East v. *Chapman*, Moody & M. 47; *Austin* v. *Prince*, 1 Sim. 348; *Dixon* v. *Vale*, 1 Car. & P. 279.

The American rule is that if the witness voluntarily discloses a part of a transaction tending to criminate him he waives his privilege and must answer freely and disclose the whole.

Com. v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *Com.* v. *Lannan*, 13 Allen, 569; *Com.* v. *Nichols*, 114 Mass. 286, 19 Am. Rep. 346; *Mayo* v. *Mayo*, 119 Mass. 292; *People* v. *Carroll*, 3 Park. Crim. Rep. 83; *Brown* v. *Brown*, 5 Mass. 820; *Foster* v. *Pierce*, 11 Cush. 437, 39 Am. Dec. 152; *People* v. *Arnold*, 40 Mich. 710; *State* v. *K———*, 4 N. H. 562; 1 Greenl. Ev. § 451; Whart. Crim. Ev. § 471; *State* v. *Foster*, 23 N. H. 354, 55 Am. Dec. 191; *State* v. *Nichols*, 29 Minn. 357; *Com.* v. *Pratt*, 126 Mass. 463; *People* v. *Freshour*, 55 Cal. 375; *Norfolk* v. *Gaylord*, 28 Conn. 312; *Roddy* v. *Finnegan*, 43 Md. 502; *Chamberlain* v. *Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Este* v. *Wilshire*, 44 Ohio St. 636; *Youngs* v. *Youngs*, 5 Redf. 505; Bradner, Rules of Ev. § 2; 2 Crim. L. Mag. & Rep. 317.

The court may in a proper case strike out from the evidence the circumstance or fact stated, but will not permit it to stand as the whole truth.

Pinkard v. *State*, 30 Ga. 757; *Dandridge* v. *Corden*, 3 Car. & P. 11.

In an action to try title to office a witness cannot be compelled to testify whether he voted, when the evidence would tend to criminate him.

State, Hopkins, v. *Olin*, 23 Wis. 309.

Mabry, Ch. J., delivered the opinion of the court:

The return of the sheriff to the writ of habeas corpus shows that on the 17th day of February, 1896, pending the trial of a case in quo warranto proceedings instituted in the name of the attorney general on the relation of William E. Anderson against Pat. McHugh—the issue being whether the said Anderson or McHugh had received the highest number of votes at an election for mayor of the city of Pensacola held in said city on the 4th day of June, 1895—the petitioner, Ed. Senior, Jr., was called and sworn as a witness for respondent McHugh, and having been advised by the court that he need not testify to any fact tending to convict him of crime, testified, in reply to questions by respondent's counsel, that he voted at said election, in election precinct 13, for Pat. McHugh for mayor, and that his ballot was received by the inspectors. Thereupon, being turned over to the state for cross-examination, the following questions were propounded to said witness, *viz.*:

Where were you living at the time you cast your ballot?

How long had you been living at that place?

At what place were you living at the time of the last city election?

Did you have a certificate of registration?

Where were you born?

Were you born in the United States?

Did you ever take out any naturalization papers?

Are you twenty-one years of age?

How long have you been living in the state of Florida?

How long have you been living in the county of Escambia?

How long have you been living in the city of Pensacola?

Were you ever registered?

Did you take any oath?

Thereupon he refused to answer either of said questions, upon the ground that the answers would tend to criminate him, and the court deciding that the witness should answer the questions, and ordering him to make answers thereto, and still persisting in his refusal, he was adjudged to be in contempt of court, and ordered to pay a fine and stand committed to the custody of the sheriff until the fine was paid. Upon the refusal of the witness to pay the fine he was taken into custody by the sheriff, and still remaining in custody, has sued out a writ of habeas corpus and asks to be discharged.

A suggestion comes *in limine* from counsel opposed to the writ that the court will not review, on habeas corpus, an order made by the circuit court adjudging a person guilty of con-

tempt. Reference is made to the decision in *Caro* v. *Maxwell*, 20 Fla. 17, holding that a contempt order will not be reviewed on appeal or writ of error, and also to the language used in *Ex parte Edwards*, 11 Fla. 174, "that in the absence of any statutory limitations or restrictions, the power of the several courts over contempts is omnipotent, and its exercise is not to be inquired into by any other tribunal. This is the great bulwark established by the common law for the protection of courts of justice, and for the maintenance of their dignity, authority, and efficiency, and neither in England nor in the United States has this unrestricted power been seriously questioned." The first case referred to has no application here, as we have no writ of error or appeal to review an order of a circuit court in a contempt matter. The rule announced in the second case is not now questioned, but its application must be confined to proper limits. As a general rule habeas corpus does not lie to correct mere irregularities of procedure where there is jurisdiction, and in order to sustain the writ there must be illegality or want of jurisdiction. *Ex parte Pitts*, 35 Fla. 149; *Ex parte Prince*, 27 Fla. 196; *Ex parte Bowen*, 25 Fla. 214. When a person has been taken into custody under an order of a court exercising proper jurisdiction, a habeas corpus to discharge the person so taken involves a collateral attack on the order under which he is held, and well-established rules forbid an investigation into matters of mere irregularity in procedure. But illegality in matter of law or want of jurisdiction may be inquired into and the decision of the lower court, as to such matter, is not conclusive. The following language taken from *People, Hackley*, v. *Kelly*, 24 N. Y. 74,—a contempt proceeding,—is expressive of our view on the subject, *viz.*: "But this rule is of course subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment. Hence, if the refusal of Mr. Hackley, the relator, to answer the question propounded to him, was only an assertion of a right secured to every person by the Constitution, it was illegal to commit him for a contempt." It cannot certainly be true that the decision of an inferior court adjudging a matter to be a contempt precludes all investigation as to the legality or proper authority of the court to make such order; and, on the other hand, it must not be forgotten that in such matters when the court is acting within the sphere of its legitimate powers the appellate tribunal will not undertake to review the correctness of conclusions as to matters of fact or questions of mere procedure. *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505.

In the present case there was a refusal to answer questions propounded in open court during the trial of a cause within the jurisdiction of the circuit court to hear and determine, and the refusal was placed upon the ground that the answers to the questions would tend to criminate the party to whom the questions were propounded. If, under the circumstances disclosed by the record, the party questioned had a clear constitutional or legal right to insist on his privilege not to answer the questions on the ground stated, it would be illegal to adjudge him in contempt for refusing to answer, and hence it becomes necessary for us to see if such right of privilege as claimed in the circuit court did exist as a matter of law. The ground of the refusal to answer the questions propounded was that the answers thereto would tend to criminate the petitioner, and what we have to say in this opinion will be confined to such ground of privilege.

It is an ancient maxim of the law that no man shall be compelled to criminate himself. The origin and necessity of this maxim, as others of the common law, grew out of conditions found in the early history of English jurisprudence in reference to the administration of criminal law, and which, it must be admitted, evince many traces of cruelty and barbarity. There was a time when suspected persons were not only deprived of an opportunity to have witnesses produced in their favor, and of the advice and aid of counsel, but were put to torture for the purpose of extorting from them confessions of guilt, or statements which could be used in securing their conviction. Securing the conviction of even suspected persons by such means, justly became odious, and we find the humanity of the common law proclaiming that no man shall be compelled to criminate himself—*Nemo tenetur seipsum prodere*. This principle of the common law was fully recognized in this country when the formation of governments began, and we find it imbedded in the national and all the state Constitutions that we have examined. In our Constitution it is found in the 12th section of the Bill of Rights, that "no person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation." The provision that no person shall be compelled in any criminal case to be a witness against himself, should be broadly and liberally construed to secure the protection designed to be accomplished by it, and to this end no technical limitation should be placed upon the terms employed. The terms "in any criminal case" might on casual reading be taken to confine the protection against self-accusation to investigations in criminal cases, but such is not the true meaning. Our constitutional provision is the same as those found in the Constitutions of the United States and of the state of New York, as well as other states, and the cases of *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, and *People, Taylor*, v. *Forbes*, 143 N. Y. 219, clearly demonstrate that a broad and liberal construction of such provisions should obtain

in furtherance of the right sought to be secured. In the first case cited it is said that the privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." In the New York case, after stating that the matter had frequently been adjudicated both in the Federal and state courts, the following language is used, *viz :* "The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained." A witness is exempt by his privilege from answering not only what will criminate him directly, but also what has any tendency to crim nate him, the reason being, as stated by Phillips on Evidence, vol. 2, p. 929, "because otherwise question might be put after question, and though no single question may be asked which directly criminates, yet enough might be got from him by successive questions whereon to found against him a criminal charge." In showing the extent of the immunity which a witness is entitled to claim, the foll wing language used by Chief Justice Marshall on the trial of Aaron Burr has often been quoted, *viz.:* "Many links frequently compose that chain of testimony which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compelled to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness by disclosing a single fact may complete the testimony against himself, and to a very effectual purpose accuse himself as entirely as he would by sta'ing every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule that declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

The authorities agree that the right of privilege against compelling disclosure of incriminatory evidence is personal to the witness, he alone being entitled to invoke its protection, and that it may be waived by him. Whether the court or the witness has the right to deter mine the question of privilege, or to what extent the claim of privilege is left to the determination of the witness, has not been so uniformly stated in the decisions. It has never been recognized that he alone has the right in all cases to decide whether his answer will tend to criminate him. Such a rule would be mischievous and enable unscrupulous witnesses to defeat the ends of justice in many cases. The privilege must be claimed in good faith, and not as a shield to defeat justice. It was held in *Queen* v. *Boyes*, 1 Best & S 311, that to entitle a witness to the privilege of silence "the court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things." The New York court, in *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122, stated the right of privilege to be that when the witness "claims to be excused from answering . . . the court are to determine whether the answer he may give to the question can criminate him, directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer may in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give." To require the witness to explain how his answer would criminate him would, of course, expose him to the very danger against which the privilege was designed to protect him. In *People, Taylor*, v. *Forbes, supra*, it is said that "the weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected." While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine, under all the circumstances of the case, whether such will be its tendency from the question asked, and where, from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate or tend to criminate, the witness has the right to claim his privilege, and is not bound to answer. *State* v. *Duffy*, 15 Iowa, 425; *Kirschner* v. *State*, 9 Wis. 140; *Chamberlain* v. *Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Ex parte Boscowitz*, 84 Ala. 463.

As stated above, the witness may waive his privilege, but to what extent he is held to waive it by consenting to answer some questions, or at what stage of an examination he must insist on his privilege in order to avoid a waiver, is a matter in reference to which there is some considerable confusion in the application of the rule to the various cases. Mr. Phillips, in referring to the early decisions in England, says, in substance, that from the nature of the right a witness by consenting to answer some questions ought not to be barred

from the right of objecting to others, but that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party. And upon this principle it was ruled in *Dixon* v. *Vale*, 1 Car. & P. 278, and *East* v. *Chapman*, 2 Car. & P. 570, that if a witness waives his privilege so far as to answer part of the questions tending to subject him to an indictment, he cannot be exempted from answering the remainder, but must give the whole truth. He further states that a majority of the judges, in *Reg.* v. *Garbett*, 2 Car. & K. 474, 1 Den. C. C. 236, thought that it made no difference to the right of the witness to protection that he answered in part, but that he was entitled to it at whatever stage of the inquiry he chose to claim it, and that they did not consider themselves bound by the cases cited. 2 Phill. Ev. 935. *Garbett's Case* was decided in 1847, and the question arose in a criminal prosecution against the accused upon the introduction, on the part of the Crown, of his testimony on a cross-examination in a civil suit. The accused had gone a long way in his testimony towards opening up the matter in reference to which he was being prosecuted, but he refused to answer some questions pointing directly to his guilt and frequently put himself in the hands of the court for protection. The testimony was rejected in the criminal case, and several of the most eminent judges dissented. In the later editions of Greenleaf the ruling in *Garbett's Case* is adopted. 1 Greenl. Ev. § 451.

The American rule, following to some extent the early English cases, is said to be the other way, and that if a witness discloses a part of a transaction or conversation tending to criminate him, he waives his privilege and must answer freely, and disclose the whole transaction or conversation, unless the partial disclosure is made under an innocent mistake, or does not clearly relate to the transaction as to which he refuses to testify. In *Low* v. *Mitchell*, 18 Me. 372, it was held that if the witness consents to testify to one matter tending to criminate himself, he must testify in all respects relating to that matter, so far as material to the issue; that if he waives the privilege, he does so fully in relation to that act, but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue.

It seems to us that it is a just and correct rule that if a witness, with full knowledge of his rights, consents to testify about the very matter that may criminate him, without claiming his privilege, he must submit to a full, legitimate cross-examination in reference thereto. Otherwise a witness would have it in his power to make a partial statement of a matter to the detriment of one party without any adequate means of relief. The following authorities bear on the subject: *Foster* v. *Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Com.* v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *Com.* v. *Pratt*, 126 Mass. 462; *Com.* v. *Trider*, 143 Mass. 180; *State* v. *K—*, 4 N. H. 562; *Amherst* v. *Hollis*, 9 N. H. 107; *State* v. *Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Coburn* v. *Odell*, 30 N. H. 540; *Chamberlain* v. *Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Norfolk* v. *Gaylord*, 28 Conn. 309; *People* v. *Freshour*, 55 Cal. 375; *State* v. *Nichols*, 29 Minn. 357; *Foster* v. *People*, 18 Mich. 266; *Lombard* v. *Mayberry*, 24 Neb. 674; 2 Phill. Ev. pp. 929 *et seq.*

In *Counselman's Case*, *supra*, he was examined before a grand jury, and in reply to questions stated that he was a grain dealer, and had made shipments of grain over certain lines of railroad. When interrogated as to rates of freight secured less than the tariff or open rate, and as to rebates, he refused to answer. While freely admitting that he received freights over certain lines, he stated that he did not recollect of shipping over other lines mentioned. It was not insisted on the part of the government that the witness had waived his privilege by answering some questions, and the court makes no reference to this matter in its opinion, but, as the party was discharged, it is evident that the court did not consider he had waived his privilege. The privilege claimed in the case of *People, Taylor*, v. *Forbes*, *supra*, was also in an examination before a grand jury when the conduct of students at Cornell University was being investigated. The witness, who was a student, answered that he had no connection whatever with the transaction being investigated, but when questioned as to particular facts connected with it, he claimed his privilege and refused to answer. The court was of the opinion that the witness by answering the general questions as to his connection with the affair, whether his answers were true or false, did not waive his right to remain silent when it was sought to draw from him some fact or circumstance which in his judgment might form another link in the chain of facts, capable of being used under any circumstances to his detriment. Under the peculiar surroundings of that investigation it presented a case, in the judgment of the court, where the witness might claim his privilege as to collateral circumstances that tended to imperil him. The question presented in *Amherst* v. *Hollis*, *supra*, was whether or not a certain person was a pauper, and therefore a charge upon a town. The witness stated that he was destitute of property during the time for which the charge was made, and upon further inquiry admitted that he had considerable money three or four years previously, but that the money had gone to adjust matters which he could not disclose without exposing himself to criminal prosecution. After admitting the rule that a witness should not be compelled to criminate himself, and observing that there were cases in which a witness could not be heard to relate a part of a transaction, and refuse to disclose the rest, the court held that the testimony sought to be elicited, although not entirely independent of the facts the witness had testified about, was so far distinct that he was authorized to claim the privilege. The court said that "when asked, in the first place, if he was destitute of property, there is no obvious propriety in his alleging that he could not disclose that without subjecting himself to a prosecution. If he had gone on to speak in part of the disposition that had been made of his property, it might have presented a different case." The cases present illustrations of witnesses testifying in part without being fully advised of their danger and right of privilege,

and of the allowance of the privilege by the court after the witness was informed on the subject. The court should inform the witness of his rights when the circumstances of the case call for it, and there are instances where the privilege has been allowed after the witness had spoken, when it was evident that he had spoken in ignorance of his rights, and in such cases all the testimony, as to which a full examination could not be allowed, may be stricken out.

There is also, it appears, a distinction between the case of a witness proper and an accomplice or a party in interest. An accomplice admits his guilt and seeks to implicate others, and it is not apparent why he should claim immunity from exposure about the very matter which he is willing to confess. As to distinct collateral matters it may be different. When a party in interest volunteers to testify in his own behalf, the rule seems to be not so liberal in his favor as in the case of a disinterested witness who is summoned to testify in controversies between others. Statutes have been passed in several of the states, as was done here at the last session of the legislature, permitting defendants to testify in their own behalf, and under such statutes, when the defendant elects to testify, the question arises as to the extent he must submit to a full cross-examination. Statutes have also been enacted in several states providing that witnesses shall be required to testify in certain cases, and when they do so, that their statements shall not be used against them in any subsequent prosecution. There is a review of the decisions under such statutes in *Counselman's Case*. We have no statute on the subject, so far as the present case is concerned. All we know of the proceeding in which the claim of privilege was insisted on in the present case is, that petitioner was called and examined as a witness for the respondent in a quo warranto case involving the right to the office of mayor of the city of Pensacola under the recent election held for that purpose on the 4th of June last. The petitioner, after being fully advised of his rights, testified that he voted for respondent in the quo warranto case, and that his ballot was received by the inspectors. It is not questioned here, and we must assume it to be the fact, that the testimony voluntarily given by the witness was admissible and material in the case. The office of mayor of the city of Pensacola is elective, and the election held in June, 1895, was conducted under the general law governing state elections existing at the last state election. Section 2787, Rev. Stat., provides that "whoever casts knowingly an illegal vote at any election in this state held according to law, shall be punished by imprisonment in the state prison not exceeding six months, or by fine not exceeding $100." The provisions of this statute are broad enough to cover illegal voting at municipal elections, and one who knowingly cast an illegal vote at the election in question would be subject to the penalties of the statute. No question is made of this in the present case, nor is it doubted that a voter at said election when called on to testify as to voting would be entitled to the privilege of silence if his testimony would tend to bring upon him the penalties of the statute. *State, Hopkins*, v. *Olin*, 23 Wis. 309. The petitioner then, was not compelled to state whether he voted at all at the election in question, if his answers would tend to criminate him, but, after being duly advised by the court, he voluntarily stated that he voted and for whom he voted. This statement, in the absence of any other showing, tended to establish the fact of a valid vote for the party for whom the ballot was cast, and it also included the principal or essential criminating charge against the voter, if he, as a matter of fact, had knowingly voted when he did not possess the requisite qualifications. Whether or not the vote was legal and entitled to be counted depended upon prescribed qualifications of the voter, and we are of the opinion that a proper application of the rule demands that the petitioner should answer the questions touching his qualifications as a voter after he had willingly stated that he had voted at the election. It is a just and reasonable requirement that a witness shall not be allowed, by an arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party to the suit. It is stated in *State, Hopkins*, v. *Olin, supra*, that a person who has voted at an election is always considered as a party when the result of the election is in controversy, and from this standpoint the rule as to subjecting interested parties to a full cross-examination would have more or less effect.

The strongest authority relied on for petitioner is the decision in *Counselman's Case*, but we think there is a clear distinction between that case and the present one. The matter testified about by Counselman shipping of grain over railroads was not criminal, nor did it contain any elements of criminality. The crime consisted in paying a less freight than the tariff or open rate, and when asked about this matter he refused to disclose anything about it. He stopped on the border of the criminating matter, and the case presented no ground of waiver of privilege as to such matter. The distinction is sharply drawn in the pauper case from New Hampshire. If petitioner was not a qualified person to vote at the city election, the crime of illegal voting was consummated in the act of casting his ballot, which is the principal criminating act, and having gone into this matter with full knowledge, he should state the matters tending to develop his qualifications as a voter.

Our conclusion is, that the *petitioner should be remanded to the custody of the sheriff* of Escambia county. Order to be entered accordingly.

ILLINOIS SUPREME COURT.

Weeden LOVE, *Plff. in Err.*,
v.
PEOPLE of the State of Illinois.

(160 Ill. 501.)

1. **The evidence of an accomplice** is in general admissible against a prisoner on trial.

2. **One jointly indicted** with others may be called as a witness for the state after the entry of a *nolle prosequi* against him.

3. **The wife of a defendant** in an indictment may be called as a witness against his co-defendants, where a *nolle prosequi* has been entered as to him.

4. **A general verdict of guilty not fixing the value of the property,** under an indictment charging burglary and larceny in the same count, is a conviction of burglary, as a conviction for larceny must find the value of the property stolen.

5. **Burglary is not committed by those assisting a detective** in entering a building and taking money from a safe in pursuance of a previously arranged plan between him and the owner, with the sole intent of entrapping the others into the apparent commission of a crime.

6. **No crime is committed** where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act, and to lead and encourage them in its commission by one acting in concert with the owner.

7. **The owner of property and his agent may wait passively for a would-be criminal** to perpetrate an offense and each and every part of it for himself, but must not aid, encourage, or solicit him that they may seek to punish.

(March 28, 1896.)

ERROR to the Circuit Court for Kankakee County to review a judgment convicting defendant of burglary. *Reversed.*

The facts are stated in the opinion.

Mr. **W. R. Hunter,** for plaintiff in error:

At common law the prosecuting attorney had no authority to discharge the defendant and place him on the witness stand until an application had been made to the court for that purpose. Upon which a judicial inquiry was had by the court to determine whether the testimony of the proposed witness would convict the other defendants or whether the defendants, including the proposed witness, could be convicted without his testimony. Upon which the court acted judicially and until such judicial action he was not a competent witness.

Phill. Ev. 9th ed. 28; Roscoe, Crim. Ev. 7th ed. p. 127; *Gray* v. *People*, 26 Ill. 344.

The verdict, "We the jury find Weeden Love guilty and fix his penalty at one year in the penitentiary; Mulligan O'Brien not guilty," —is irregular in not finding for which offense the plaintiff was indicted for burglary and larceny.

Ruth v. *People*, 99 Ill. 185; *Thomas* v. *People*, 113 Ill. 531.

Before the crime of burglary can be established the people must prove beyond a reasonable doubt the dissent of Hoag to such entry, and if the prosecuting witness Hoag either directly or indirectly consented to the entry of the building in question, then no offense has been committed by plaintiff in error.

1 Whart. Crim. L. 9th ed. § 915; *Reg.* v. *Johnson*, Car. & M. 218; *Allen* v. *State*, 40 Ala. 334, 91 Am. Dec. 476; *People* v. *Collins*, 53 Cal. 185; *Brown* v. *State*, 7 Tex. App. 569; *Macé* v. *State*, 9 Tex. App. 110; *Speiden* v. *State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Williams* v. *State*, 55 Ga. 391; 2 Russell, Crimes, 9th ed. 10; 3 Am. & Eng. Enc. Law, p. 662; 1 Bishop, Crim. L. 4th ed. § 570.

If the act of the principal were not criminal aiding and encouraging him would be no crime.

People v. *Collins*, 53 Cal. 185; *Allen* v. *State*, 40 Ala. 334, 91 Am. Dec. 476; 2 Russell, Crimes, 9th ed. p. 10; *Speiden* v. *State*, and *Williams* v. *State*, *supra*.

Mr. **H. L. Richardson** for the People.

Phillips, J., delivered the opinion of the court:

Plaintiff in error was convicted of burglary under an indictment charging Mulligan O'Brien, Weeden Love, William Shoof, Al. Robinson, and Aaron Perkins with burglariously breaking and entering the office building of Arthur L. Hoag on the 20th day of January, 1895. On the morning of the day on which the trial of this plaintiff in error was commenced, the state's attorney *nolle pros'd* as to the defendant William Shoof. On motion of Aaron Perkins, he was granted a separate trial, and the cause was continued as to him. Plaintiff in error and O'Brien were tried, and the latter found not guilty. The punishment of Love was fixed at imprisonment in the penitentiary for the term of one year. Robinson was not arrested.

William Shoof was called as a witness for the state, and his competency as a witness was denied by the defendant. The evidence of an accomplice is in general admissible against a prisoner on trial. *Gray* v. *People*, 26 Ill. 344; *Earll* v. *People*, 73 Ill. 329; *Friedberg* v. *People*, 102 Ill. 160. The state's attorney had a right to *nolle* the indictment as to one of the persons indicted, and call him as a witness for the state. He is a competent witness. His credibility is to be determined by the jury. The error assigned on this question cannot be sustained, and for the same reason the error assigned for permitting the wife of William Shoof to testify is not well taken.

The indictment contained three counts, in each of which the offense of burglary is charged, and in each count the indictment then proceeds to charge that the defendants, then and there being in said office building, "did steal, take, and carry away," etc. Such an indictment charges both burglary and lar-

NOTE.—For the effect of instigation or consent to crime when given for the purpose of discovering criminals as a defense to a prosecution, see *note* to Connor v. People (Colo.) 25 L. R. A. 341.

See also 46 L. R. A. 862.

ceny, and these offenses may be found in the same count. 1 Hale, P. C. 556; 1 Russell, Crimes, 827; 2 Archbald, Crim. Pr. & Pl. 329–331. Where a defendant is found guilty generally, and a punishment imposed which is by law authorized to be inflicted for either offense charged in such a count, the verdict must be sustained. *Crowley* v. *Com.* 11 Met. 575; *Cook* v. *State*, 24 N. J. L. 846; *Manly* v. *State*, 7 Md. 148; *Frolich* v. *State*, 11 Ind. 213; *State* v. *Hooker*, 17 Vt. 658. The effect of this general verdict is, logically, the jury found the defendant guilty of burglary. They did not find the value of the property stolen, which would not be necessary in a conviction for burglary, but is necessary in a conviction for larceny. The verdict finding the defendant Love guilty, generally, and fixing his punishment, was therefore a conviction for burglary, and not obnoxious to the error assigned,—that it failed to specify the offense for which he was convicted. *Lyons* v. *People*, 68 Ill. 271. Had the conviction been for larceny, it would then have been necessary to find the value of the property stolen, and had the court been asked to instruct the jury that they were warranted in finding the defendant guilty of larceny if the evidence authorized it, it would doubtless have done so. *Ruth* v. *People*, 99 Ill. 185.

Without undertaking a consideration of the instructions to which exceptions are taken, we will enter into a discussion of the facts of the case, which we deem the question of paramount importance, and on which the decision must depend. In the latter part of 1894 and early part of 1895, much complaint had been made in the city of Momence of existing lawlessness. Robberies and burglaries had occurred, until complaints reached the members of the city council, whereupon a consultation of certain members was held, which resulted in the employment of a detective agency in the city of Chicago, from which a detective was sent to investigate, report, and seek to arrest the offenders. Within two weeks prior to the commission of this act, that detective, who went by the name of Robinson, visited the city of Momence. He seemed to be well supplied with money, which he used lavishly and ignobly. The uncontradicted evidence shows he made the acquaintance of this plaintiff in error, who was impecunious and with bad habits as to the use of intoxicating liquors and haunting saloons and billiard rooms. Through this acquaintance with Love, he, at his own request, was introduced to O'Brien, Perkins, and Shoof by Love. These were all young men without much money, and similar in their habits to this plaintiff in error, frequenting the same resorts. After becoming thus acquainted, this detective, by the liberal and extravagant use of money in treating to whiskey, beer, and cigars, caused these young men to follow after him, seek his association, answer his requests, and comply with his wishes. Plausible, self-contained, and strong, he was calculated to work on their weaker natures; well dressed and affable, he pleased them; and an apparent liberality with money, even giving $1 or $2 at a time to these young men on different occasions, made him an object of admiration, and he easily led and influenced them. He endeavored to excite a desire for crime, by intimating his means were thus acquired. He suggested and proposed they should engage in the commission of burglaries, robberies, etc., and sought to induce them to engage with him in such acts. Day after day and night after night his efforts were not directed to the arrest of criminals, but his mental powers and robust health, with the use of money, were directed towards an effort to make criminals of these young men. With plenty to drink and smoke and eat at his expense, he sought to undermine and dazzle their mental and moral strength, and lead them into the commission of crime. Ambitious, doubtless, to succeed in his chosen pursuit, with him the conviction of those theretofore guilty was less an object than that he might fasten on some one the commission of a crime. If he could make the criminal, and induce the commission of the crime, and cause the arrest of the actor, or throw around him a web of circumstances that would lead to conviction, it would redound to the glory of his chief, and cause his advancement. With him the end justified the means, and the reputation of the agency to which he belonged and his own advancement were apparently his object. Such means and agents are more dangerous to the welfare of society than are the crimes they were intended to detect, and the criminals they were to arrest. Robinson, having for several days been in close association with Love, proposed he should accompany him to Exline, and while there he called on Hoag, whose office was subsequently alleged to have been burglarized.

From the testimony it is apparent that Hoag knew his office was to be entered and safe opened, and he acted in concert with the detective, complied with his request in leaving money in the safe, with the expectation of the office being burglarized and safe opened, etc. He not only expected it to be done, but he made the safe ready. He marked his money for the purpose of having it taken by a burglarious entry. In brief, he left money in the safe to be stolen, with knowledge from the detective that he (the detective) had "some fellows he was trying to catch, and he might probably want to come there to catch them. . . . I expected the money to be stolen and for that reason marked it. . . . I locked the safe. . . . Thought the detective would open it in some way. . . . I left the money believing the office was to be burglarized. . . . He (the detective) asked me to leave the money there, and I told him I would." One cannot read this evidence of this witness without being impressed with the fact that he prepared his safe and office to be burglarized, and his money to be taken, and was willing and consented to its being done. With such an arrangement perfected between the occupant of the building which was to be burglarized and this detective, the latter, under the pretense of taking a train from Kankakee on a certain night, requested the plaintiff in error to take him to the latter city; and it is apparent he induced him to have Shoof, O'Brien, and Perkins accompany them, that they might have a good time. With this object in view two buggies were procured, the hire was paid by the detective, and he and Love in one, with Perkins, O'Brien, and Shoof in the other, started from Momence for Kankakee,

and with each buggy there was a half pint of whiskey, furnished by Robinson. Arriving at Kankakee, the five men went to a saloon, where Robinson further evidenced his hospitable character, and there from fifteen to twenty drinks to each man were taken, between about 4 o'clock and 6 o'clock,—whiskey, beer, etc. About the latter hour the detective took the whole party to a restaurant, where he had supper furnished, for which he paid. They then again returned to the saloon, from which Robinson sent one man for sacks, another for candles, and another for oil, he in each case furnishing the money. Shoof and Love went from the saloon voluntarily, and Shoof obtained some money which was owing him, and he then purchased a revolver and some cartridges, and, at the request of Love, purchased a revolver for him, which the latter loaded. This, with reference to these transactions, is the first act shown to have been done by this defendant which was not influenced by the detective. When the party was again in the saloon, more drinks were had, which were paid for by Robinson; and about 10 o'clock the party repaired to a house of ill-fame, where three bottles of beer were paid for by Shoof. Who suggested the visit to this place is not shown by the evidence. Remaining there about an hour, they again repaired to the same saloon. In all this time, while at this saloon, Robinson frequently, in private conversations with some of these parties separately, suggested and urged the commission of burglaries and robberies. When the latter proposition was proposed to O'Brien, he refused to have anything to do with it. Robinson now, at a late hour, provided two pint bottles of whiskey, and, with one to each buggy, left Kankakee for Exline, where they left their buggies, went direct to Hoag's office, the door of which was unlocked by Robinson with one of a bunch of keys taken from his pocket, and the parties entered. O'Brien was so drunk he fell over a chair or other object while in the room. Robinson went direct to the safe, and, within five minutes, made the combination, unlocked and opened the safe, took therefrom the money which Hoag left there to be taken, and handed the same to this plaintiff in error. That money was subsequently divided by Robinson, and each of these parties had a part thereof. The safe was again locked, the office vacated and door shut, and Robinson suggested that they would need some tools for further operations, and led the way to a blacksmith shop, where he forced open a window, took therefrom some sledges, etc., and handed them to O'Brien. These were carried to their vehicles, and the party returned to Momence, where the horses and vehicles were returned to the livery stables, and about 4 o'clock in the morning, as soon as they could do so after returning their vehicles to the stables, the entire party met at Momence, in front of the bank. The uncontradicted testimony is that this meeting was with the expectation that they were to go to the train, to see Robinson off. After meeting all the party in front of the bank, Robinson stepped to the door of the bank and violently shook it, creating a noise; whereupon, from the opposite side of the street, the single policeman of the city rushed, while from the rear of the bank came the chief of the detective agency, with one of his employees and a third party, and, firing their pistols, rushed towards these indicted parties, some of whom ran. Love was seized, and the others soon arrested. The marked money taken from Hoag's safe was found on the arrested parties; tools from the blacksmith shop found, etc. The presence of the chief of the detective agency and one of his employees, with a third party, at the rear of the bank, and the location of the single policeman of the city opposite the bank at this opportune time, may have resulted from the fact that Robinson sent from Kankakee on that afternoon a telegram, but to whom is not shown.

These are the material facts in evidence. The indictment for burglarizing Hoag's office, under which this defendant was convicted, rests on this evidence. One does not escape the conviction that Robinson entered that office with Hoag's consent. If Robinson entered the building with Hoag's consent, and took the money with no intent of stealing it, but in pursuance of a previously arranged plan between him and Hoag, intending solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed; there being no felonious intent on the part of Robinson in entering the building or taking the money. If no burglary was committed by Robinson, because of an absence of a felonious intent, the defendant could not have been an accomplice and privy to a burglary. *Speiden* v. *State*, 3 Tex. App 156, 30 Am. Rep. 126; *People* v. *Collins*, 53 Cal. 185; *Allen* v. *State*, 40 Ala. 334, 91 Am. Dec. 476; *Eggington's Case*, 2 East, P. C. 666; *Reg.* v. *Johnson*, Car. & M. 218; *McDaniel's Case*, Fost. C. L. 121; *Reane's Case*, 2 East, P. C. 734; *Kemp* v. *State*, 11 Humph. 320; *Lyons* v. *People, supra.*

Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold that where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act, by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish. After a careful consideration of the evidence in this record, and with a deliberative regard for the importance of the question under discussion, we are constrained to hold the evidence does not sustain this conviction.

The judgment is reversed, and the defendant is ordered discharged.

MICHIGAN SUPREME COURT.

Louise M. TUNNICLIFFE, by Next Friend,
v.
BAY CITIES CONSOLIDATED RAILROAD COMPANY, *Plff. in Err.*

(102 Mich. 624.)

1. **The mere fact that a woman injured by being dragged by a street car on which her clothing was caught** testified that she should think the bolt on which the clothing caught had no part in throwing her down, aside from the jerking of the car, will not require the exclusion from the jury of the question as to negligence in the position of the bolt, since the jury from all the circumstances may decide that the bolt was, without her knowledge, the cause of the accident.

2. **That an injured woman brings suit by her husband** as next friend will not justify the inclusion, as an element of damages, of lost wages which belong to him.

3. **The loss of the society and prospective earnings of the child** is not a proper element of damages in an action by a married woman for injuries which resulted in a miscarriage.

(December 7, 1894.)

ERROR to the Circuit Court for Bay County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **T. A. E. Weadock** and **J. C. Weadock,** for plaintiff in error:

The plaintiff was a minor, and in addition to this she was a married woman. Single or married her services under the proofs in this case were not her own. She was not entitled to recover for their loss.

Hicks v. *McLachlan,* 94 Mich. 282; *Lacas* v. *Detroit City R. Co.* 92 Mich. 417; *Barnes* v. *Moore's Estate,* 86 Mich. 585; *Mason* v. *Dun-*

NOTE.—*Recovery of damages for miscarriage.*

I. *Right to damages.*
II. *Elements of damages.*

I. *Right to damages.*

It has become fully established by the decisions that damages for miscarriage resulting from any wrongful or negligent injury to a pregnant woman may be included in the recovery for the injury if the miscarriage was a direct effect of such injury. Many of the cases decide this without much discussion of the elements of the damages, but apparently authorize the recovery for the miscarriage only so far as it constitutes a part of the personal injury to the mother.

In a few of the cases herein referred to, especially those as to the effects of mere fright, the question is as to the existence of any actionable wrong, but in most of them such wrong is undisputed, and the question is as to the extent of liability for its consequences. Where any actionable wrong has been done to the person liability for its consequences may include a miscarriage of which the wrong is a proximate cause, as will clearly appear in the particular cases here cited.

The mere fact of the premature birth of a child whose death resulted from injury and fright occurring to the mother does not make a case for damages, without showing that the mother's health was impaired or that she was caused any suffering by reason of such injury and premature birth. Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L. R. A. 808.

If a personal injury caused by a defect in a sidewalk was such as to cause the mal-position of a child and unusual pain and suffering on the part of the mother at its birth, these facts constitute elements of the damages. De Forest v. Utica, 69 N. Y. 614.

Miscarriage resulting from fright caused by a horse breaking through a defective bridge when being driven across it was held not to be too remote for recovery of damages therefor in Oliver v. La Valle, 36 Wis. 592.

The death of an unborn child, caused by personal injury to the mother in a fall from a defective bridge, was held properly proved in determining the extent of the injury to the mother, in Shartle v. Minneapolis, 17 Minn. 308.

A miscarriage caused by fright and nervous shock sustained by a woman in consequence of a train of cars running into her house was held to constitute a basis of recovery. Chicago & N. W. R. Co. v. Hunerberg, 16 Ill. App. 387.

A recovery for injuries causing a miscarriage was sustained in Bloomington v. Schrock, 17 Ill. App. 40, in which the chief question was as to evidence.

For an assault producing a miscarriage and serious personal injury and suffering, damages were recovered in Pryor v. Chadwick, 86 Hun, 75.

The mistake of a druggist in furnishing sulphate of zinc in place of Epsom salts, in consequence of which there resulted a miscarriage and subsequent death of the person to whom the medicine was administered, was held to make the druggist liable for damages. Walton v. Booth, 34 La. Ann. 913.

One who engaged in a quarrel with another man and boy within the hearing but out of the sight of a woman, who was so frightened by the disturbance as to cause a miscarriage, is held not to be liable for the injury when he did not know that she was within hearing. Phillips v. Dickerson, 85 Ill. 12, 28 Am. Rep. 607.

This decision is clearly based on the theory that defendant had not done any actionable wrong although he might have been chargeable with liability if he had frightened the woman knowingly or known of her position where she might be frightened by his conduct.

Threats and demonstrations of violence by a drunken man, which so frightened a woman that she fled from her home and jumped or fell several feet from a fence in her flight, thereby causing a miscarriage, were held to create a liability for her injuries. Barbee v. Reese, 60 Miss. 906.

A landlord who made a violent assault upon some negroes on the leased premises in the presence of a woman who occupied the premises, and so frightened her as to seriously impair her health and cause a miscarriage, was held liable in an action for damages, where he knew her condition. Hill v. Kimball, 76 Tex. 210, 7 L. R. A. 618.

But no cause of action for a miscarriage is created when it results from the fright of a woman at seeing a person in a highway near by, who is not aware of her presence, while she is standing at a pump with the view partly intercepted by trees, shoot a dog which did not belong to her because it attacked another dog in the highway. Renner v. Canfield, 36 Minn. 90. The court held in this case that the gist of the action must be negligence in shooting in such proximity to a human residence

See also 34 L. R. A. 781; 35 L. R. A. 252.

bar, 43 Mich. 407, 38 Am. Rep. 201; *Hall* v. *Manson*, 90 Iowa, 585; *Britton* v. *Grand Rapids Street R. Co.* 90 Mich. 159; *Hirshfield* v. *Waldron*, 83 Mich. 116; *Cousins* v. *Lake Shore & M. S. R. Co.* 96 Mich. 390.

The court erred in permitting the attending physician to testify as to expressions of pain given out by the plaintiff during the time he was attending her.

Lacas v. *Detroit City R. Co.* 92 Mich. 416; *Jones* v. *Portland*, 88 Mich. 598, 16 L. R. A. 437.

Mr. **James VanKleeck,** for defendant in error:

Statements of present suffering are competent to go in evidence.

Lacas v. *Detroit City R. Co.* 92 Mich. 412; *Girard* v. *Kalamazoo*, 92 Mich. 610.

The loss or material impairment of any of the powers or faculties is matter for compensation, irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce.

Dotton v. *Albion*, 57 Mich. 575; *Atlanta Street R. Co.* v. *Jacobs*, 88 Ga. 647; *Powell* v. *Augusta & S. R. Co.* 77 Ga. 192; *Baker* v. *Flint & P. M. R. Co.* 91 Mich. 298, 16 L. R. A. 154.

Montgomery, J., delivered the opinion of the court:

Plaintiff is a married woman and a minor. She sues by her next friend to recover for personal injuries received while attempting to alight from a car of the defendant. Plaintiff recovered, and defendant brings error. The negligence alleged was that "while plaintiff with the consent and permission of said defendant, with due care and diligence on her part, was passing out of said car, and onto and over the rear platform of the same, for the purpose of alighting therefrom and leaving said car, and was stepping from the platform of said car to the steps thereof, said car being then and there stationary, said defendant carelessly and negligently caused said car, from which she was then departing and stepping off, to be suddenly and violently started, jerked, and moved forward by means whereof this plaintiff, while in the exercise of proper care and diligence on her part, was thrown down and against said

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as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise, and this was not shown in this case, although the court says: "We are by no means prepared to say that, upon the evidence, a verdict for plaintiff could be sustained even upon that ground." But it held that the case was erroneously submitted to the jury.

Damages for miscarriage caused by threatening a woman with the arrest of her husband in legal proceedings, and the attachment of their store to close it up, in order to induce her to execute a security, are held to be too remote for recovery on account of such duress, where no physical violence was inflicted, attempted, or threatened. Wulstein v. Mohlman, 25 Jones & S. 50.

The fact that the wrong done in this case was not done to the person distinguishes the case from those as to personal injuries. It can be distinguished from those as to mere fright caused unintentionally, only in respect to the reasonable probability of the result as one that should have been contemplated.

Miscarriage from a nervous shock caused by the fall of a bundle of laths which did not strike the person is too remote to sustain a recovery of damages for negligence in respect to the fall. Rock v. Denis, Mont. L. Rep. 4 Super. Ct. 356.

Injury to a pregnant woman from fright caused by a runaway horse which did not touch her will not sustain an action. Lehman v. Brooklyn City R. Co. 47 Hun, 355.

In case of an indecent assault by a porter in a sleeping car upon a passenger, it is held that if a miscarriage results therefrom the suffering and injurious effects, temporary or permanent, thereby caused to the person, health, or strength of the woman were to be included in the damages. Campbell v. Pullman Pallace-Car Co. 42 Fed. Rep. 484.

If the misconduct of an employee of a sleeping-car company in ejecting a woman from a berth to which she had a right resulted in a miscarriage as a proximate result, the carrier is liable for the damages thus caused, even if her condition was not known to the carrier or its employees. Mann Boudoir Car Co. v. Dupre, 54 Fed. Rep. 646, 21 L. R. A. 289, 13 U. S. App. 183.

A miscarriage caused by a personal injury to a passenger, and great pain suffered in consequence thereof, may be inquired into and are not consequences too remote to authorize a recovery. Augusta & S. R. Co. v. Randall, 79 Ga. 304.

The upsetting of a stage coach by reason of the driver's drunkenness, causing injury to a passenger and the premature birth of a child, were held to make the carrier liable for such injury, although no injury might have resulted to persons in a different condition. Sawyer v. Dulany, 30 Tex. 479.

Damages for the wrongful ejection of a passenger from a train are held to include injury to the feelings and physical pain, suffering, and anguish caused by a miscarriage which resulted from the injury. Texas & P. R. Co. v. Casey, 52 Tex. 112.

A miscarriage and sickness brought on by exertion when a woman was carelessly directed to leave a train several miles from the depot on a cloudy night when she supposed she had reached her destination were held to make the carrier liable for the damages. Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41.

Damages resulting from a miscarriage caused by negligence of a street-car company were recovered in Reading City Pass. R. Co. v. Eckert (Pa.) 2 Cent. Rep. 791, and the court charged that it was not necessarily contributory negligence for the plaintiff to ride on the street car.

Fright causing nervous convulsions and illness, including a miscarriage, which is occasioned by imminent danger of a collision of street cars and the confusion of ringing alarm bells and the rushing out of passengers, was held, in Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L. R. A. 203, to render the carrier liable for the damages. The court says: "It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury."

A collision of street cars caused by the breaking of the chain of a car brake on down grade in which the glass of the car was broken, the dashboard smashed, passengers thrown out, and one of them so injured that she suffered a miscarriage was

car, and down and upon the platform thereof, and down and upon and against the steps of said car, and her dress skirt or skirts caught on said bolt, so negligently put, placed, and permitted to be and remain in said platform by said defendant as aforesaid, and she was held fast to and against said car, and to and against the platform of said car, and to and against the steps thereof, and partially upon the ground, and was so held, dragged, and carried along by the motion of said car," etc. The declaration had previously alleged that defendant had "carelessly and negligently placed, and permitted to be and remain, an iron bolt, extending and projecting above the real platform, to wit, 5 inches."

1. In the course of the charge to the jury, the circuit judge asked for suggestions from counsel. Defendant's counsel thereupon asked the court to charge that the plaintiff could not recover under any circumstances by reason of the location of the bolt or pedal, and called attention to a portion of the charge of the court as follows: "I do not understand that it is seriously contended by the defendant if the accident happened because of this bolt remaining in an improper place during the journey, to endanger women getting off the car, but what the company is liable,"—and asked that it be modified. The plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, and that she was thrown backward, and her clothing caught. She further testified: "I took it for granted that my clothes were caught; I didn't know in what. I could not see, but in my struggle I threw my arm behind me, and as I did so, my hand came down on something that projected from the platform, and I pulled my skirt, and a bolt came out from the platform." On cross-examination she testified: "I should think the bolt had no part in throwing me down, aside from the jerking of the car." It is claimed by the defendant that there was no room under this testimony for the jury to find that plaintiff's clothing was caught before she was thrown backward. But we think this construction of the testimony is too narrow. It would appear from the charge of the court that defendant had contended before the jury that plaintiff's story was unreasonable and that the injury could not have occurred in the man-

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held to give her a right of action for the damages resulting therefrom. Wynn v. Central Park, N. & E. R. R. Co. 38 N. Y. S. R. 181.

For injury to a passenger on a street car resulting from a collision with a railroad train the damages were held to include a miscarriage as well as injury to the spine and permanent impairment of the nervous system. Gulf, C. & S. F. R. Co. v. Pendery (Tex.) 27 S. W. 213.

A declaration alleging fright and alarm of a passenger caused by a collision whereby she became sick, etc., and suffered great pain and anguish, and that by reason of such terror and alarm caused by the collision and of sickness caused thereby she bore a still-born child, was held good on general demurrer in Fitzpatrick v. Great Western R. Co. 12 U. C. Q. B. 645.

II. *Elements of damages.*

The cases are not numerous in which an attempt has been made to include in the recovery for miscarriage any compensation for the loss of prospective offspring. In the few cases in which such a claim has been made it has been rejected by the courts in harmony with the doctrine of the above case of TUNNCLIFFE v. BAY CITIES CONSOL. R. CO.

Thus, it was directly decided in a recent New York case that the loss of prospective offspring by miscarriage cannot be considered as an element for the recovery in an action by a husband for the loss of his wife's services and the expense resulting from a personal injury to her. Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L. R. A. 46. The court in this case, after adverting to the difficulty of finding any safe basis upon which to estimate the pecuniary damages caused by the death of a child, says that in cases like this "there are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery." It adds further: "It is not in the interest of justice to extend the field of speculation in jury trials beyond its present limits"—and declares that to sustain the ruling which allowed damage for the loss of offspring "would go beyond what has been hitherto sanctioned by the courts."

The other cases following are to similar effect.

Any physical or mental suffering attending a miscarriage caused by accident is a part of the injury for which damages are recoverable, but any injured feelings following the miscarriage, and not a part of the pain naturally attending it, are too remote. Bovee v. Danville, 53 Vt. 183.

The death of a child before birth and the grief and sorrow of its parents thereby occasioned cannot be elements of damages for injury to the mother caused by delay in delivering a telegram by which a physician is summoned, but the damages are limited to the injury to the mother alone, although both mental and physical suffering on account of her own condition may be considered. Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728.

Maternal anguish is not allowed as an element of recovery for the loss of a child at birth by mere want of skill or proper care on the part of an attending physician, where there is nothing to indicate that he did not have the proper sympathy and regard for the patient's welfare. Smith v. Overby, 30 Ga. 241.

The refusal of a charge to the jury against allowing damages for disappointed maternal hopes and anticipations was held to constitute no error in Powell v. Augusta & S. R. Co. 77 Ga. 192, but this was on the ground that the jury had been properly instructed already by calling their attention to the matters they were to consider in assessing damages without including such hopes and anticipations.

So, in reviewing instructions to the effect that pain and suffering or sorrow resulting from a miscarriage constituted elements of damages, the court held that the word "sorrow" should be omitted because sorrow was too remote to be considered, unless it was that sorrow which accompanies the actual injury and if suffered at the time of the miscarriage. Augusta & S. R. Co. v. Randall, 85 Ga. 297.

The review of the decisions shows that they are in almost entire harmony in holding that miscarriage may be one of the effects of wrong for which recovery may be had. They also show that the effect on the mother alone is to be considered, and recovery for miscarriage allowed only so far as it is part of her personal injuries, not including any recompense for loss of anticipated offspring.

B. A. R.

ner supposed by plaintiff. The jury had a right to construe the facts, and if in their judgment it was more reasonable to suppose that her clothing had been caught upon the bolt without her knowledge before the car started and threw her to the ground, we cannot say that the circumstances of the case did not furnish a justification for that inference.

2. On the trial the plaintiff was permitted, against the defendant's objection, to testify that before the injury she had painted for profit, and was able to earn $5 to $10 and $15 per week, and that by the injury she was rendered unable to do this kind of work. The court charged the jury upon the subject of damages as follows: "She is entitled to recover, in case you so determine from the evidence,—she is entitled, first, to the value of her time. Whatever it was worth, a month or week, you will give it her, if you come to that conclusion, as I said before." It was error to admit this testimony, and permit the recovery for the impairment of the plaintiff's ability to earn money. The husband is, prima facie, entitled to the earnings of the wife. *Hicks* v. *McLachlan*, 94 Mich. 282. But it is contended in the present case that, as the husband was a party to the proceedings as next friend to the plaintiff, he would be estopped by the verdict from bringing suit hereafter to recover these damages, and hence that no injury could have been done defendant; and *Baker* v. *Flint & P. M. R. Co.* 91 Mich. 298, is cited as sustaining this contention. The case cited fully recognizes that the objection as made in a suit prosecuted by the next friend is good; but it was held in that case that inasmuch as such testimony was admitted, and as plaintiff actually received payment upon the judgment in his capacity as next friend, he ought not to be permitted to recover it again in his individual capacity. In the present case, the defendant, upon making the objection, had no reason to apprehend that the plaintiff expected to claim a recovery for any damages not within the issue, and particularly was this true under the circumstances of this case, as it appears conclusively that the defendant could not have understood that it was necessary to offer any proof to meet the plaintiff's testimony; for, after the plaintiff's testimony, above quoted, had been given, a question was put to another witness on the same line, which was objected to, and the court said: "I think the husband is entitled to the wages. I guess there is no use going into that in this case at all." After this certainly the defendant's counsel could not be expected to meet such proofs as had crept in on this subject; and the subsequent charge above quoted was not only erroneous, as matter of law, but given, as it was, after the previous intimation which cut off proofs, on the part of the defendant, was based upon a necessarily *ex parte* showing.

3. The testimony tended to show that one of the results of the injury to plaintiff was a miscarriage. The court charged the jury as follows: "As to this child, if the plaintiff lost a child by reason of the liability of the defendant in this case, you may give damage for it. The society, enjoyment, and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth." This charge was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such loss. Nor would the loss of the child's society be a proper element of damages. While the jury is allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother. As was said in *Bovee* v. *Danville*, 53 Vt. 183, "If the violence done her person results in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject for compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented." The only case which we have found which is in seeming conflict with this is that of *Smith* v. *Overby*, 30 Ga. 241; but the supreme court of that state, in the later case of *Augusta & S. R. Co.* v. *Randall*, 85 Ga. 297, in treating of a charge which permitted of a recovery for the pain, suffering, or sorrow resulting from miscarriage, said: "We would suggest that the word 'sorrow' be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury, and is suffered at the time of the miscarriage. The loss of the child by a miscarriage would affect women so differently that it would be hard for men, sitting as jurors, to estimate it as an element of damage; and we therefore think that it would be better to omit, in the future, any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage,"—citing the case of *Bovee* v. *Danville*, above cited. See also 5 Am. & Eng. Enc. Law, 42.

Numerous other questions are discussed in the briefs of counsel, but we think it unnecessary to consider them at length. Those relating to the expressions of pain and complaints of present suffering are within the

previous rulings of this court. See *Girard* v. *Kalamazoo*, 92 Mich. 610; *Lacas* v. *Detroit City R. Co.* Id. 412, and cases cited. None of the other questions are likely to arise on a new trial.

For the errors pointed out, *judgment will be reversed with costs, and a new trial ordered.*

Grant, J., did not sit; the other Justices concurred.

INDIANA SUPREME COURT.

CONSUMERS' GAS TRUST COMPANY, *Appt.*,
v.
Frances PERREGO

(.....Ind.....)

1. **Ample notice of a leak in a high-pressure main of natural gas** is given to the owner of the main by a continuance of the leak for several years, and also direct information given to line walkers.
2. **The destruction of a building by the explosion of natural gas** which escaped from a leak in a high-pressure main 80 or 90 feet distant across a street, and reached the building by penetrating the soil under its frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, although this had continued for several years and notice of the fact had been given to line walkers.

(March 26, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Lamb & Hill** and **William H. Dye**, for appellant:

Plaintiff was bound to notify appellant of the leak before she could hold it liable for the consequences.

Hunt v. *Lowell Gaslight Co.* 1 Allen, 343; *Peyton* v. *London*, 9 Barn. & C. 725; 2 Greenl. Ev. § 473; *Holly* v. *Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233; *Adams* v. *Carlisle*, 21 Pick. 146; *White* v. *Winnisimmet Co.* 7 Cush. 155; Shearm. & Redf. Neg. § 338.

It is the duty of consumers to give notice at once of a leak of gas, and failure to do this within a reasonable time is contributory negligence.

Chicago Gaslight & C. Co. v. *People's Gaslight & C. Co.* 121 Ill. 530; *Hunt* v. *Lowell Gaslight Co. supra; Parker* v. *Wordsworth Gas Co.* 26 Gas J. 946; *Hunt* v. *Lowell Gaslight Co.* 3 Allen, 418; *Bartlett* v. *Boston Gaslight Co.* 122 Mass. 209; *Holly* v. *Boston Gaslight Co. supra; Hills* v. *Gaslight Co.* 13 Gas J. 877.

The burden is upon the appellee to establish the material with which, and the manner in which, this line was constructed: whether with or without sleeves; whether sleeves were necessary to make a good and safe line and if so that they were not used.

Holly v. *Boston Gaslight Co.*, *Adams* v. *Carlisle*, and *White* v. *Winnisimmet Co. supra.*

A corporation charged with the duty of keeping a bridge in repair must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made. If, however, when ordinary care is used in selecting suitable persons and in requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability.

Vermillion County Comrs. v. *Chipps*, 131 Ind. 56, 16 L. R. A. 228; 2 Thomp. Neg. 745; *Ross* v. *Madison*, 1 Ind. 281; *Logansport* v. *Wright*, 25 Ind. 512; *Stackhouse* v. *Lafayette*, 26 Ind. 17, 89 Am. Dec. 450; *Roll* v. *Indianapolis*, 52 Ind. 547; *Greencastle* v. *Martin*, 74 Ind. 449, 39 Am. Rep. 93; 2 Dill. Mun. Corp § 761.

If the plaintiff knew that illuminating gas was escaping from the main, and also knew that from it an explosion might reasonably be expected, it was his duty to have withdrawn from the premises or to have taken other precautions for his safety until the leak could be discovered and stopped.

Kibele v. *Philadelphia*, 105 Pa. 41; *Lanigan* v. *New York Gaslight Co.* 71 N. Y. 29.

An express company is not obliged to use on its wagons all the appliances generally known and in use to prevent injuries to persons in the street, but only such as reasonable care requires; and whether reasonable care was used is a question for the jury.

Rattagliata v. *Hubbell*, 7 Misc. 103; *Holman* v. *Boston Land & S. Co.* 20 Colo. 7.

Messrs. **Carson & Thompson** for appellee.

Howard, J., delivered the opinion of the court:

This action was by appellee against appellant and others to recover for injuries received from an explosion of natural gas. It is alleged in the complaint that on the day of the accident, February 14, 1893, and for a long time prior thereto, the appellee was lawfully an occupant of the dwelling house at the southeast cornor of Illinois and Twenty-Sixth streets, in the city of Indianapolis; that during the whole period of such occupancy the appellant was engaged in drilling and mining for natural gas, and conveying the same to said city by means of high and low pressure mains, service pipes, and regulators laid along and in said Illinois street, immediately in front of and adjacent to said dwelling house so occupied by appellee; that said natural gas so conducted along and through said mains, pipes, and regulators subjected the same to a great strain and pressure, to wit, often of 150 pounds to the square inch; that the said gas is of highly dangerous, penetrating, elusive, and explosive nature, and requires great care, caution, and

NOTE.—For *note* on the liability for negligence in the escape and explosion of gas, see Ohio Gas Fuel Co. v. Andrews (Ohio) 29 L. R. A. 337.

See also 33 L. R. A. 366; 44 L. R. A. 92; 47 L. R. A. 790.

perfectly tight mains, pipes, and regulators, in order to secure safety in its management and control, all of which was well known to the appellant; that the appellant so carelessly, negligently, and unskillfully constructed and maintained its said mains, pipes, and regulators that they leaked, and permitted said gas to escape from control, in large quantities, for many weeks, in the immediate vicinity of appellee's said dwelling; that such escaping gas percolated and penetrated through the loose sand and gravel until it reached and accumulated in large quantities within the foundation and under said dwelling house, all without the knowledge or fault of appellee; and that the same became ignited without any fault or negligence of appellee, thereby causing a violent explosion within and under said dwelling, completely demolishing the same, destroying the personal property of appellee, and causing her great physical and mental pain and injury. To this complaint a general denial was filed, and the cause was submitted to a jury for trial. On a verdict for appellee, judgment was entered in her favor for $6,000, and this appeal followed. The only error assigned is that the court overruled the motion for a new trial.

The ground was frozen over solid at the time of the explosion, and the leak from which the gas escaped into the earth was in the large main, at a point where the main was covered by a sleeve. It appears that in the fall and winter of 1887 the Broad Ripple Natural Gas Company laid its high-pressure main line from the city of Indianapolis northward, along the west side of Illinois street, to the wells from which the gas was obtained. The pipe was an 8-inch, screw-joint, wrought-iron pipe. In constructing the line the company had a force of men laying pipe from the city north, and another force laying pipe from the field to the city, and those two forces met a little south of the house under which the explosion afterwards took place. At the point of intersection the pipes could not be screwed together, but the ends were brought up close, and connected by a sleeve. When the two ends were brought together the sleeve was fitted over them, and calked with lead. The appellant purchased the Broad Ripple line in July, 1889; and the main question for decision is whether appellant was careless and negligent in the purchase, inspection, and maintenance of the line during the three years and a half from said purchase until the accident, in February, 1893. The evidence submitted to the jury on this question is exceedingly voluminous. It appears that there was no connection by pipe between appellant's main and appellee's house. The latter was supplied with gas by the Indianapolis Natural Gas Company, which company had its gas main also in Illinois street, and close to appellant's line. The location of the sleeve on appellant's pipe, where the gas leaked, was across the street, and about 90 feet distant from appellee's dwelling. The sleeve was smooth on the inside, as was the pipe on the outside. The inner diameter of the sleeve was an inch and a half greater than the outer diameter of the pipe over which it fitted. This open space was filled in with lead. There was evidence that there had been a leak at this point, and that the gas escaped through the earth from the first laying of the pipe, six years before the explosion. It is the theory of the appellee that during all these years the gas permeated the surrounding earth; that it escaped more readily from the surface during the summer, but that, when the ground was frozen over, the gas was forced to greater distances under the hardened crust. At the time of the purchase of the line by the appellant a test of the line was made, by turning on full gas pressure, being nearly or quite 300 pounds to the square inch. It is argued that there being a leak, even at that time, under the sleeve, the great pressure thus turned on still further opened or displaced the lead between the pipe and the sleeve, and, consequently, that the escape of gas was greater after that test.

Counsel for appellant, in arguing that there was no negligence in the purchase, care, and maintenance of the pipe line contend (1) that appellant employed, as superintendent of its pipe lines and gas wells, a man of large experience in such work; (2) that before the purchase from the Broad Ripple Company the line was carefully tested, and found in good condition; (3) that appellant did not know, and had no means of knowing, without digging up its entire line, of the existence of the sleeve in question; (4) that after the inspection and purchase of the line the appellant, by its line walkers and other employees, kept up a careful supervision and inspection of its pipe lines, including that on Illinois street, almost every day, up to the time of the explosion; (5) that the line was properly laid, and the sleeve and joint were properly and skilfully constructed; and (6) that the "appellant did not know of the existence of this sleeve, or of a leak at that point, until after the explosion. Its employees, Watson, the foreman of field work, laying pipe, making repairs, etc., and the line walkers, Reichardt and Harrison, who walked over the line every few days, had never discovered any evidences of a leak at that point, though it was their special business to look for leaks." The first, second, third, and fifth of these contentions have reference chiefly to care exercised in testing and discovering the condition of the line at the time of its purchase from the Broad Ripple Company, while the fourth and sixth contentions relate chiefly to care exercised by the appellant in the inspection and repair of the pipe line after its purchase. On appeal, all presumptions are in favor of the judgment; and, if there is sufficient competent evidence to sustain it, the verdict will not be overthrown by reason of any conflict in such evidence. Mr. Shackleton, general superintendent of the appellant company, and who had full charge of the lines and wells, gave, as the only test or examination of the condition of the line made at the time of the purchase from the Broad Ripple Company, that a full pressure, or about 300 pounds, was turned on at the wells; and he said that the line "stood the pressure all right appar-

ently," and that he did not know of any leaks thereby disclosed. He also knew, he said, that the main pipe was 8 inches in diameter, and he said that he did not learn of the existence of the leak until a few days after the accident. At the time of the purchase he did not, as he testified, make any inquiry as to the location of sleeves on the line. They received from the Broad Ripple Company a surveyed chart of the line, but he did not examine it particularly. The chart does not seem to have been produced on the trial, although in possession of the appellant company. Mr. Shackleton had never looked on the chart for sleeves, but said he knew from what he saw that they were not indicated on the chart. He did not make inquiry of any one for sleeves, and did not find out whether there were any on the line or not. In the city they do ordinarily keep memoranda of all sleeves, so that, if there is a break or a leak, they can examine the memoranda and determine where it is located. They had never examined the place where the leak was at the sleeve in question. No repairs had ever been made by the company at that point from the time of the purchase until after the explosion. Mr. Watson, general foreman of the company, and assistant of the superintendent, in charge of all repairs, testified that after the explosion he had the earth dug up at the sleeve, and found a leak on the underside of the sleeve, between the sleeve and the pipe, where the lead seemed to have been "drawn out." He had the leak calked by hammering the lead all back in tight, with calking tools. It has not since leaked. He found the earth all around blackened with the gas, and thought it would take some time to discolor the earth in that way. Mr. Lyman, the secretary, testified that there is but little gas turned on the main line in summer, and that there is no regular inspection during that time. Mr. Everett, who lives in the neighborhood, and who was a witness for the appellant, had smelled gas on the street for a long time, but he thought it came from a regulator below Twenty-Sixth street, or from one above that street. Mr. Reichardt, a line walker of the company, whose business, among other things, was to examine the line for leaks, and to calk them when found, testified that soon after he went on the line, a few months before the explosion, he smelled gas a few feet north of Twenty-Sixth street, but he thought it came from a regulator about 200 feet further north. Mr. Harrison, another line walker, was at one time told by a Mr. Watson, riding by in a buggy, that he smelled gas near Twenty-Sixth street; but Mr. Harrison testified that he could not discover any leak, and did not report the matter to the office. At other times he smelled gas himself, but thought it came from a regulator. This was about two years before the explosion. Mr. Page, a witness for the appellant, and who lived on Illinois street, near Twenty-Fifth street, had frequently smelled gas near the locality of the sleeve, but, until the explosion, had no knowledge as to where it came from. Appellant's evidence shows only irregular inspection of the line, except in cold weather, at which time, it is admitted, it would be difficult to detect leaks in the main line, for the reason that the gas could not penetrate to the surface through the frozen ground.

Appellee produced a multitude of witnesses,—among them, one of the contractors and other persons who had aided in digging and covering up the trench when the Broad Ripple line was first laid; also, plumbers, gas fitters, and others who had occasion to pass along the sidewalk where the sleeve was placed; also, very many neighbors and other persons residing on the street in the immediate vicinity. These witnesses, without an exception, testified that there had been a gas leak at the sleeve almost from the time the main was first put down, six years prior to the explosion. It was matter of common talk in the neighborhood. The odor was sometimes so strong that passers-by crossed the street to avoid it. One witness, in going along the sidewalk in the evening with a lantern, turned out the light at that point, for fear of setting fire to the escaping gas. Several of the witnesses had at different times seen the gas on fire as it came up through the earth, as if kerosene oil had been poured out and was burning upon the ground. After rains, and when water stood in the gutter, the gas was often seen to bubble up through the water. In at least two instances, appellant's agents, the line walkers, Reichardt and Harrison, were notified of the escaping gas at the sleeve, and asked to repair the leak. No repairs, however, were ever made at that point until after the explosion. To say nothing of the notice directly given to appellant's line walkers, it would seem that the continuous leak of gas at this sleeve for the whole period of six years, and particularly during the three years and a half from appellant's purchase to the date of the accident, was ample notice to the company of the existence of this dangerous defect in its high-pressure main.

The appellee testified as to the particulars of the accident; that it occurred in the evening. She had lit the lamp. There was no one else in the house at the time. She had need to go to the cellar to take down a crock of milk. She opened the cellar door, and set the lamp on a bench near by, to show light down the cellar way. As she went down, she thought the light grew dimmer; and as she returned, when halfway up the stairs, she looked up at the lamp standing on the bench, and saw that the light had grown small, and burned blue. Immediately after, and before she reached the top of the stairway she saw the lamp blaze up. She remembered no more until she found herself fastened in the ruins of the house, which had blown up and was already on fire. Her neighbors extricated her from the wreckage. She had not smelled the gas, having been deprived of the sense of smell for many years. She had no thought of there being any gas in the cellar. As the house was supplied with gas by the Indianapolis Company, it was thought at first that the explosion had been caused by an escape from that company's pipes. Accordingly, the Indianapolis Com-

pany spent some time uncovering its service pipe from the house across the street, and also its main pipe for some distance, but found no leak. It was sixteen days after the explosion that the appellant company began to uncover its main, to discover whether there was a leak there; and, on uncovering the pipe at the sleeve, the gas rushed out from the leak with great force. During the whole period, of sixteen days, from the explosion to the uncovering of the sleeve, the escaping gas continued to burn in jets from two to eight inches high, all around the inside of the north, south, and west foundation walls of appellee's house. The gas came out between the brick, and from the ground along the bottom of the walls. Within two minutes after the uncovering of the sleeve, as the evidence shows, the jets of gas in the foundations of the house ceased to burn, and no gas could be discovered there afterwards. The earth around the sleeve was found blackened with gas. The ground was frozen above the pipe, and the pipe itself lay in loose gravel and sand. There can be no doubt, as the jury found, that the gas passed from the leak in the sleeve, through the loose soil, until it reached the foundations of appellee's house, 80 or 90 feet distant, across the street.

Counsel for appellant say that appellee was negligent in not notifying the company of the leak. The leak was across the street from appellee. She did not receive her gas from the appellant. It is hard, therefore, to understand how she should have thought that the leak at appellant's sleeve, 90 feet distant, —even if she knew of its existence, which does not appear from the evidence,—could have been the source of any danger to her.

Other matters are discussed by counsel, including the instructions of the court, but we are unable to discover any substantial error for the reversal of the judgment. The rulings of the court throughout the trial, and the instructions, were quite as favorable as appellant could ask; and, in view of the almost uncontradicted evidence, we are unable to see how the jury could have reached a different conclusion.

As to liabilities of parties in cases of explosions of natural gas, see, generally, *Ohio Gas Fuel Co.* v. *Andrews*, 50 Ohio St. 695, 29 L. R. A. 337; *Lebanon Light, H. & P. Co.* v. *Leap*, 139 Ind. 443, 29 L. R. A. 342; *McGahan* v. *Indianapolis Nat. Gas Co.* 140 Ind. 335, 29 L. R. A. 355; and, especially, the exhaustive and valuable *note* to those cases in *Ohio Gas Fuel Co.* v. *Andrews*, 29 L. R. A. 337.

Judgment affirmed.

August OLESON, *Appt.*,
v.
LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY.

(143 Ind. 405.)

1. A verdict is properly directed for defendant in an action for personal injuries, where the plaintiff fails to prove affirmatively that his fault or negligence did not contribute to the injury, even though he has established all the other facts of his cause of action.

2. One who, in approaching a railroad track, has an unobstructed view of an approaching train, is not relieved from contributory negligence in attempting to cross the track by the fact that his view becomes obstructed by the smoke from a train going in an opposite direction.

3. One who attempts to cross a railroad track immediately after the passage of a train whose smoke obscures the view, in the opposite direction, but is rapidly being carried away by the wind, is guilty of contributory negligence in not waiting until the view becomes clear.

(January 23, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Porter County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. **John B. Peterson,** for appellant:

The question of whether or not the appellant was guilty of contributory negligence was a mixed question of fact and of law that should have been submitted to the jury for its decision.

Cincinnati, I. St. L. & C. R. Co. v. *Grames*, 136 Ind. 39; Cooley, Torts, 2d ed. p. 800; *Ohio & M. R. Co.* v. *Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Indianapolis Union R. Co.* v. *Ott*, 11 Ind. App. 564; *Parke County Comrs.* v. *Sappenfield*, 6 Ind. App. 577; *Rogers* v. *Leyden*, 127 Ind. 50; *Citizens' Street R. Co.* v. *Spahr*, 7 Ind. App. 23; *Chicago & E. I. R. Co.* v. *Ostrander*, 116 Ind. 259.

Appellant did all things that the rule of law required him to do.

Chicago, St. L. & P. R. Co. v. *Spilker*, 134 Ind. 383; *Cadwallader* v. *Louisville, N. A. & C. R. Co.* 128 Ind. 518; *Grand Rapids & I. R. Co.* v. *Cox*, 8 Ind. App. 29; *Chicago, & E. I. R. Co.* v. *Hodges*, 105 Ind. 398; *Cleveland, C. C. & I. R. Co.* v. *Harrington*, 131 Ind. 436; *Pittsburgh, C. C. & St. L. R. Co.* v. *Burton*, 139 Ind. 357.

Before contributory negligence can be adjudged against the appellant in this case by the court, it must appear that the danger incurred by him was known and immediate, and that a prudent man would not, under the circumstances, have assumed the risk, and that the evidence tends but to that conclusion alone.

Indianapolis Union R. Co. v. *Ott*, *supra*.

Messrs. **Baker & Miller, George C. Greene,** and **O. G. Getzen** for appellee.

Monks, J., delivered the opinion of the court:

This action was brought by appellant to recover damages for an injury received while attempting to cross appellee's railroad track a a grade crossing. There was a general denia

NOTE.—As to the duty to stop, look, and listen before attempting to cross a railroad, see also Fletcher v. Fitchburg R. Co. (Mass.) 3 L. R. A. 743; Rupard v. Chesapeake & O. R. Co. (Ky.) 7 L. R. A. 816, and *note;* Cincinnati, I. St. L. & C. R. Co. v. Howard (Md.) 8 L. R. A. 593; Phillips v. Milwaukee & N. R. Co. (Wis.) 9 L. R. A. 521; Newhard v. Pennsylvania R. Co. (Pa.) 19 L. R. A. 563; Van Auken v. Chicago & W. M. R. Co. (Mich.) 22 L. R. A. 33.

to the complaint, and trial by jury. After appellant had introduced all his evidence, and rested his case, the jury, by direction of the court, on motion of appellee, returned a verdict for appellee. The court thereupon, over a motion for a new trial, rendered judgment against appellant. The only question presented is, Did the court err in instructing the jury to find for appellee? This instruction was given on the ground stated therein,—that the appellant had not shown that he was free from contributory negligence. Appellant contends that the evidence was such that the question of whether or not appellant was guilty of contributory negligence should have been submitted to the jury. The determination of the question presented requires an examination of the evidence. The only evidence given was the testimony of plaintiff, and upon his statements the case must be determined.

It appears from the evidence: That at Miller's Station, where the injury occurred, the railroad tracks of appellee run east and west. That at the time of the injury, and for several years prior thereto, there were two main tracks. The north track was used by trains going east, and the south track by trains going west. There was a highway running north and south, which crossed these tracks. That running east from this highway was another highway, immediately south, and adjoining the right of way of appellee. That the right of way of appellee is 100 feet wide. That appellant had lived a number of years within 150 feet of this highway crossing, had crossed it often, and was thoroughly familiar with the method of running trains upon these two main tracks. He knew that the north track was for east-bound trains, and the south track was for west-bound trains, and that freight and passenger trains passed each other frequently at this point. Immediately before the accident, appellant was going west upon the east and west highway, south of the tracks, driving one horse, attached to a light wagon, upon which there were three or four dump boards, upon which he was sitting sideways, between the wheels of the wagon, with his face to the south and his back to the tracks. As he turned north, in the highway running north and south, he faced to the north, and looked both ways, east and west, and saw a freight train coming from the west, going east on the north track. He stopped about 40 feet from the south track to wait for this east-bound train to pass. When he stopped he looked to the east, and saw nothing. When he stopped the east-bound train, on the north track, was west of the depot, and about 400 feet west of the crossing. The day was somewhat dark and overcast, atmosphere heavy, and the clouds obscured the sun, and appellant could not see over ½ mile, to distinguish objects. The wind was blowing from the northeast to the southwest. The east-bound train, on the north track, was going at about the rate of 15 miles per hour, and was blowing out large volumes of dense, black smoke, which fell to the ground on the south side of the train, or between the train and appellant, as it passed the highway crossing and proceeded east, and continued to throw out smoke as it proceeded east until after the accident; and the dense, black smoke obscured the view on the south track east of the crossing. There were about thirty cars on the east bound train, and the train was about 900 feet in length After the caboose at the rear of the east-bound train had passed the crossing about two or three rail lengths, appellant, who had remained sitting upon his wagon when it had stopped, started his horse, and drove upon the crossing. Just before he started his horse he looked to the east and west and listened, but he could not see to the east, along the south track, but a short distance, on account of the smoke which had been thrown from the engine drawing the east bound train. At the time appellant started his horse, the wind was clearing away the smoke, and to the west of the crossing it had almost disappeared, and appellant could see to the east about 100 feet. As his horse stepped upon the track, appellant, who was, and had been from the time he started, looking east for a train, saw an engine and train of cars about 100 feet away, approaching him from the east, on the south track, at the rate of 10 or 15 miles per hour. He whipped his horse with the lines, and endeavored to pass in front of the engine, but the rear wheel of the wagon was struck by the train, and appellant injured. Appellee's servants on the train which struck appellant did not sound the whistle or ring the bell while approaching said crossing. From the point where appellant stopped, about 40 feet south of the south track, he could see, except for the smoke, a distance of at least ½ mile eastward along the south main track; and there was no smoke to obscure this view to the east, along the south main track, until the engine in front of the east-bound train, on the north main track, passed upon said crossing. There were no intervening objects or obstructions, except a wire fence and telegraph poles.

It is thoroughly settled that if the facts are undisputed, and only one inference can reasonably be drawn from them, the question whether there is or is not contributory negligence is one of law for the court. *Korrady* v. *Lake Shore & M. S. R. Co.* 131 Ind. 262; *Rogers* v. *Leyden*, 127 Ind. 50, and cases cited; *Vermillion County Comrs.* v. *Chipps*, 131 Ind. 56, 16 L. R. A. 228. But if the facts are disputed, or whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is a question for the jury. *Rogers* v. *Leyden*, *supra*. We think it is also correct doctrine that where the evidence given at the trial, with all the inferences which the jury may justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned should be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Weis* v. *Madison*, 75 Ind. 254, 39 Am. Rep. 135, and cases cited; *Faris* v. *Hoberg*, 134 Ind. 269, 272-274; *Ohio & M. R. Co.* v. *Dunn*, 138 Ind. 18, 27; *Sharpe* v. *Commercial Mut. Acci. Asso.* 139 Ind. 92, 95; *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Continental Imp. Co.* v. *Stead*, 95 U. S. 161, 24 L. ed. 403; *Baylis* v. *Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989; *Schuylkill & D Imp. Co.* v. *Munson*, 81 U. S. 14 Wall. 442, 20 L. ed. 867; Thomp. Trials, §§ 2249, 2250, 2262; Elliott, Gen. Prac. §§ 876,

889; 11 Am. & Eng. Enc. Law, § 3, pp. 243-246. The rule is thus stated by Judge Elliott in his General Practice (§ 889): "The test for determining when a case should be taken from the jury is substantially the same as upon a motion for a nonsuit; and where a verdict, if against the party seeking to have the case taken from the jury, would have to be set aside as contrary to the law and the evidence, a verdict in his favor should be directed, upon proper application. . . . The doctrine once prevailed in many jurisdictions that wherever there is any evidence, however slight, tending to support a material issue, the case must go to the jury; and this rule is still applied in some states, but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, —not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed; of course if there is no evidence whatever upon a material and necessary point a verdict should be directed upon proper application, against the party having the burden of proof, and as we have seen, this is the better rule also, where the evidence, with all legitimate inferences, will not support a verdict." It is settled law in this state that, when a person crossing a railroad is injured by a collision with a train, the fault is prima facie his own, and he must affirmatively show that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury. *Smith* v. *Wabash R. Co.* 141 Ind. 92, and cases cited; *Cincinnati, H. & I. R. Co.* v. *Duncan* (Ind.) 42 N. E. 37, and cases cited. It is essential to appellant's right to recover that he aver and prove that he was free from negligence proximately causing his injury. *Cincinnati, H. & I. R. Co.* v. *Duncan* (Ind.) 42 N. E. 37, and cases cited; *Smith* v. *Wabash R. Co.* 141 Ind. 92, and cases cited; *Cincinnati, I. St. L. & C. R. Co.* v. *Howard*, 124 Ind. 280, 284, 8 L. R. A. 593; *Mann* v. *Belt Railroad & S. Y. Co.* 128 Ind. 138, and cases cited; *Pennsylvania Co.* v. *Meyers*, 136 Ind. 242, and cases cited. If he failed to prove this essential and indispensable element of his cause of action, it was the duty of the trial court to instruct the jury to find against him, even though he established all the other essential facts of his cause of action. *Cincinnati, H. & I. R. Co.* v. *Duncan*, *supra*, and cases cited; *Chase* v. *Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744.

It is settled law in this jurisdiction that, when one approaches a point where a highway crosses a railroad track on the same level, the railroad track is itself a warning of danger and it is his duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any kind, he must exercise ordinary care under all the circumstances. He must assume that there is danger, and act with ordinary care and prudence upon that assumption. The law defines precisely what the term, "ordinary care under all the circumstances," means in these cases. The question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The *quantum* of care is exactly prescribed, as a matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and listen for approaching trains. In proportion as the danger increases must the vigilance of the person attempting to cross increase. He is rigidly required to do all that care and prudence would suggest to avoid injury. And when, from physical infirmities, darkness, snow, fog, smoke, steam, the inclemency of the weather, noise of any kind, buildings, or other obstructions and hindrances, it is more difficult to see or hear, greater precautions must be taken to avoid injury than would otherwise be necessary, and under such circumstances there can be no excuse for a failure to use such reasonable precautions as would probably have prevented injury. If the traveler, by looking, could have seen an approaching train, or, by listening, could have heard it, in time to have avoided injury, it will be presumed, if he is injured by collision, that he did not look and listen, or, if he did look and listen, he did not heed what he saw or heard. Such conduct is negligence *per se*. Mental absorption or reverie, from business, grief, or other cause, will not excuse the omission of duty to look and listen. From the numerous cases sustaining the foregoing propositions, we cite the following. *Smith* v. *Wabash R. Co. supra*, and cases cited; *Cincinnati, H. & I. R. Co.* v. *Duncan*, *supra*, and cases cited; *Cadwallader* v. *Louisville, N. A. & C. R. Co.* 128 Ind. 518; *Mann* v. *Belt Railroad & S. Y. Co.* Id. 142; *Indiana, B. & W. R. Co.* v. *Hammock*, 113 Ind. 1; *Cones* v. *Cincinnati, I. St. L. & C. R. Co.* 114 Ind. 328; *Stewart* v. *Pennsylvania Co.* 130 Ind. 242; *Thornton* v. *Cleveland, C. C. & St. L. R. Co.* 131 Ind. 492; *Cincinnati, H. & I. R. Co.* v. *Butler*, 103 Ind. 51; *Cincinnati, I. St. L. & C. R. Co.* v. *Howard*, 124 Ind. 280, 288, 289, 8 L. R. A. 593; *Heaney* v. *Long Island R. Co.* 112 N. Y. 122; *Foran* v. *New York, C. & H. R. R. Co.* 64 Hun, 510; *Whalen* v. *New York C. & H. R. R. Co.* 40 N. Y. S. R. 566; *Chase* v. *Maine C. R. Co.* 78 Me. 346; *Merkle* v. *New York, L. E. & W. R. Co.* 49 N. J. L. 473; *Seefeld* v. *Chicago, M. & St. P. R. Co.* 70 Wis. 216; *Wilcox* v. *Rome, W. & O. R. Co.* 39 N. Y. 358, 100 Am. Dec. 440, 448 (note); *Tolman* v. *Syracuse, B. & N. Y. R. Co.* 98 N. Y. 198, 50 Am. Rep. 649, 653 (note); *Pennsylvania R. Co.* v. *Beale*, 73 Pa. 504, 13 Am. Rep. 753; *North Pennsylvania R. Co.* v. *Heileman*, 49 Pa. 60, 88 Am. Dec. 482; *Butler* v. *Gettysburg & H. R. Co.* 126 Pa. 160; *Brady* v. *Toledo, A. A. & N. M. R. Co.* 81 Mich. 616; *Fletcher* v. *Fitchburg R. Co.* 149 Mass. 127, 3 L. R. A. 743; *Marty* v. *Chicago, St. P. M. & O. R. Co.* 38 Minn. 103; *McCrory* v. *Chicago, M. & St. P. R. Co.* 31 Fed. Rep. 531. There is no exception to the rule stated as to a traveler's duty at a crossing, except where the traveler, by some act of the company, has been misled and thrown off his guard, and thus prevented from taking the proper precautions. *Smith* v. *Wabash R. Co. supra; North Pennsylvania R. Co.* v. *Heileman*, *supra*, and on page 62; *Cadwallader* v. *Louisville, N. A. & C. R. Co. supra; Korrady* v. *Lake Shore & M. S. R. Co.* 131 Ind. 261, 264, 265; *Cincinnati, I. St L. & C. R. Co.* v. *Howard*, *supra*. The failure of the engineer

to sound the whistle or ring the bell does not relieve the person approaching a crossing from the necessity of taking ordinary precaution for his safety. Negligence of the employees of a railroad company is no excuse for negligence on the part of the person injured. *Korrady* v. *Lake Shore & M. S. R. Co.* 131 Ind. 261, 264, and cases cited; *Thornton* v. *Cleveland, C. C. & St. L. R. Co.* 131 Ind. 492, 497, 498, and cases cited; *Smith* v. *Wabash R. Co.* 141 Ind. 92; *Cadwallader* v. *Louisville, N. A. & C. R. Co.* 128 Ind. 518, and cases cited; *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Tolman* v. *Syracuse, B. & N. Y. R. Co.* 98 N. Y. 198, 50 Am. Rep. 653, note; 4 Am. & Eng. Enc. Law, p. 73 (note 1), 74 (note 3); Beach, Contrib. Neg. § 185.

It is clear from appellant's testimony that when he came to a stop, 40 feet south of the south main track, the east-bound train was about opposite the depot, which was 250 feet west of the crossing. This train was about 900 feet long, and going east, on the north main track, at about the rate of 15 miles per hour. When the caboose of the east-bound train had passed two or three rail lengths east of the crossing, appellant saw the engine of the west-bound train 100 feet east of the crossing. This train was going at about the rate of 14 or 15 miles per hour,—about the same rate per hour as the east-bound train. It is clear that from the time the east-bound train was 250 feet west of the crossing until it reached the crossing the west-bound train on the south main track was within ¼ mile of the crossing, and in plain view thereof. During all this time, and until the engine drawing the east-bound train passed onto the crossing, there was no smoke to obscure appellant's view east on the south main track; and if he had looked in that direction at any time between the time he stopped, 40 feet south of the track, and the time the engine of the east bound train passed onto the crossing, he would have seen the train on the south main track approaching from the east. He had an unobstructed view to the east, and he either did not look in that direction, or if he looked, did not heed what he saw. It would be no excuse that immediately afterwards the smoke obscured his view of the approaching train so that he could not see its approach. He knew it was approaching, and went upon the track at his peril. Such conduct, under the authorities cited, is negligence *per se*.

If, however, it were conceded that when the smoke from the engine going east on the north main track settled down on the south main track east of the crossing, and obstructed the view, the train going west had not come in sight, yet the court's action in directing a verdict was proper, for another reason: The smoke was only a temporary obstruction. Appellee's engine threw out the smoke, but it was the wind and the condition of the atmosphere that caused it to come between the appellant and the east-bound train, approaching on the south main track. Appellant knew and observed that the wind carried the smoke away, and at the time his horse stepped on the south track the smoke had cleared away so that he could see about 100 feet to the east. The train approaching was on the south main track, nearest to him. He knew that a train could and did run west on that track while trains were going east on the other track. He was thoroughly familiar with this crossing, and that such was the manner of operating the railroad. He knew that he could see ½ mile to the east, except for the smoke. He saw and knew that the wind was carrying the smoke away. Appellee had done nothing to mislead or throw him off his guard. Under the circumstances, it was his duty to wait in a place of safety until he could see and hear, and thus, with reasonable certainty, ascertain that no west-bound train was approaching on the south track. If the obstruction had been of a permanent character, the question would be a different one, but here the smoke was, as he knew, but a temporary obstruction; and, if he had but waited a few moments, he could have seen the approaching train, and avoided the injury. The case of *Heaney* v. *Long Island R. Co. supra*, is similar in this respect to this case. In that case the railroad had two main tracks, the same as in this case. The accident occurred on Atlantic avenue, in the city of Brooklyn,—a street which, for some distance, runs east and west. The deceased left his house, which was on the avenue, about 6 o'clock in the morning, and started to cross the railroad tracks at that point. The morning was cloudy and rainy or drizzly. A train had just passed on the south track, which was nearest the deceased, and the smoke from the engine settled down behind it upon the road sufficient to temporarily obscure objects in the line of vision. The deceased, however, went ahead, and while upon the north track, was struck by the north-bound train, and killed. Concerning the decedent's contributory negligence, the court said: "But we think, from the proofs, that the intestate was, as a matter of law, guilty of negligence which contributed to the accident. . . . According to the plaintiff's evidence, the deceased, after entering upon the defendant's track, went straight ahead, regardless of the smoke which was between him and the track on which he was struck. . . . We think it was unquestionably his duty to await the disappearance of the smoke, and thus be reasonably sure that he had a clear crossing. . . . We think it perfectly clear that the deceased voluntarily went upon the track,—always a situation involving peril, and calling for the vigilant exercise and use of one's senses,—when the clouds of smoke made, or tended to make, objects indistinguishable. Where a person voluntarily places himself in a position of peril, under circumstances which render him less able to protect himself by the use of his senses, he cannot fairly be deemed competent to complain of the consequent injury as due wholly to the acts of the other party. The plaintiff's proofs leave no other conclusion possible than that the deceased had failed to observe those usual precautions which the law requires of those who approach a place of peril. They must be on the alert, and vigilant in the use of their eyes and ears, and display that prudence of conduct which the situation dictates." It was held in *Foran* v. *New York C. & H. R. R. Co. supra*, that, when one drives on

a railroad crossing when the smoke which has suddenly descended from a neighboring factory obscures the view which he would otherwise have had of an approaching train, he cannot recover for an injury from a collision with the train; that, as the traveler could have seen the train if it had not been for the smoke, in such case it was his duty to wait until the smoke had lifted, so that he could see that it was safe to make the crossing. The court said: "It seems to us, from the whole of the evidence, that the plaintiff received his injuries through the careless—not to say reckless—effort which he made in passing upon the tracks of the defendant while the smoke obscured his vision. The first track which was approached by the driver was the easternmost track, and it was the second track upon which the train was approaching. The plaintiff himself testified that he could not see on account of the smoke, and that what prevented his seeing the train was the trees and smoke. . . . Where smoke obscures the approach of a train, it is the duty of a passer-by to wait until the smoke has lifted so that he can see that it is safe for him to make the crossing."

The case of *Whalen* v. *New York C. & H. R. R. Co. supra*, decided by the supreme court of New York, general term, was an action to recover for injuries received at a crossing. It appeared in that case that when plaintiff approached defendant's tracks, on a dark evening, a freight train was passing eastward on one of the tracks. After the freight train had passed, plaintiff attempted to cross, but was struck by an east bound passenger train as soon as she stepped on the first track. The headlight of the passenger train was burning, and the view of the track was not obstructed. Plaintiff testified that she was prevented from seeing the approaching passenger train by the smoke from the engine of the freight train. It was held that she was guilty of contributory negligence, as a matter of law. The court said: "Either the engine by which she was struck was in plain sight when she stepped upon the track, or it was obscured by a cloud of smoke, and it was negligence on her part to attempt the crossing until the smoke should be so far dissipated as to enable her to see whether an engine was close upon her. . . . We think the defendant was entitled to a nonsuit, on the ground of contributory negligence of the plaintiff."

In *McCrory* v. *Chicago, M. & St. P. R. Co. supra*, a verdict was directed for the defendant. The court said: "There is but one question to be determined. The railroad company was clearly negligent, not merely in violating the ordinance by an excessive rate of speed, but also in approaching this crossing without signals. The only question is whether the deceased is guilty of contributory negligence. . . . He could see in either direction. A freight train was approaching from the east, and its rumble and roar, and perhaps its whistle, attracted his attention; and coming from the west was a passenger train. There was nothing to obstruct the vision towards the west, except the matter of smoke. If he had looked, there being no smoke in the way, he must have seen the train; and there cannot be a shadow of a question but that he would have been guilty of contributory negligence, thus approaching the track without noticing it. Does this question of smoke change the case? We must remember that he was familiar with the track, because he had crossed it daily during the two months prior thereto. He must have known that there were two tracks, and that a train was liable to come on each track, and if, when approaching a track, he finds anything which temporarily obstructs his vision, it is his duty to wait until the temporary obstruction is removed. He cannot say, 'There is something temporarily obstructing my vision, but I will take it for granted that there is no danger,' and undertake to cross the track. . . . If he came to the track, and found the air full of smoke, and could not see, or, if able to see, did not look, then, and in either case, he is guilty of contributory negligence. So, whether he could see, and did not look, or could not have seen, and did not wait until that obstruction had passed away, is immaterial. One or the other must have been true, and in either event he is guilty of contributory negligence. The law lays it down clearly that a man must look and listen. And if, by looking and listening, he could ascertain the approach of a train, and fails to do so, he is guilty of contributory negligence, and cannot recover." This case is cited and approved by the supreme court of Massachusetts in *Fletcher* v. *Fitchburg R. Co. supra*.

In *Marty* v. *Chicago, St. P. M. & O. R. Co. supra*, it was held that when a highway crosses a double track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction. The court said: "The plaintiff was familiar with the situation and the danger, and it is quite clear that there is no reason why a man should be caught at this crossing, if he uses care and chooses to look. A trifling delay would have enabled him to look, and this precaution was the more important because the noise of the passing freight train would prevent him from hearing the approach of the other train. The evidence is clear, not conflicting, and the facts not complicated, and the case was properly passed on by the court without submitting it to the jury." It follows, then, that whether appellant could have seen before the smoke obscured his view, and did not look, or, seeing, did not heed what he saw, or could not have seen, and did not wait until the smoke had passed away, is not material. One or the other must be true, and, in any view of the case, he was, as a matter of law, guilty of contributory negligence, and it was the duty of the court to direct the jury to find for appellee. There is no error in the record.

Judgment affirmed.

Susannah SCOTT, *Appt.*,
v.
CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY.

(.....Ind.....)

1. **The want of a theory** does not make a complaint demurrable if it states sufficient facts to constitute a cause of action.
2. **Averments that a conductor negligently and carelessly mistreated a passenger** in carrying her beyond her destination and in stopping at a distance from the depot and roughly ordering and forcing her to get off the train are not sufficient to constitute a cause of action, where it is not alleged that she had conformed to the rules of the company and had paid her fare or offered to do so.
3. **Averments that a carrier's servants carelessly and negligently caused a passenger** to enter a train for which she had a ticket given her by mistake without averment of their knowledge that she did not desire to take passage on the train indicated by the ticket she held do not constitute a cause of action against the carrier.
4. **A railroad company whose ticket is given by mistake to a passenger** in lieu of a ticket of another company which was called for, where it was bought in a union depot of an agent who had authority to sell tickets for both companies, is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket was desired.

(March 4, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Putnam County in favor of defendant in an action brought to recover damages for failure to properly transport plaintiff upon defendant's railroad. *Affirmed.*

The facts are stated in the opinion.

Messrs. **East & Miller, C. C. Matson,** and **S. C. Matson** for appellant.

Messrs. **Byron K. Elliott, William F. Elliott,** and **Frank L. Littleton,** for appellee:

The complaint has no definite theory, and therefore is bad.

Chicago, St. L. & P. R. Co. v. *Bills,* 104 Ind. 13; *Bremmerman* v. *Jennings,* 101 Ind. 253; *Mescall* v. *Tully,* 91 Ind. 96.

There was no negligence on the part of any agent of the appellee.

A principal is liable only for the acts of his agent done within the scope of the agent's authority. Where a person is the agent for two or more persons, and the agent performs acts within the scope of his authority as agent of one, or one principal, that principal alone, and not the others, is liable.

Atchison, T. & S. F. R. Co. v. *Cochran,* 43 Kan. 225, 7 L. R. A. 414; *Isaacson* v. *New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142.

There was no breach of duty on the part of the conductor in carrying appellee to and beyond Greencastle.

Hurt v. *St. Louis, I. M. & S. R. Co.* 94 Mo. 255.

Where a reasonable opportunity has been given the passenger to alight after his destination has been reached and announced, and the passenger fails to alight, his failure puts an end to the relation of carrier and passenger, and for any injury sustained by the passenger thereafter, the carrier is only liable if he would have been liable to a person under such circumstances who was not a passenger.

Imhoff v. *Chicago & M. R. Co.* 20 Wis. 344.

There was no actionable wrong in causing the appellant to leave the train at Terre Haute.

Hutchinson, Carr. § 580; *Gulf, C. & S. F. R. Co.* v. *Head* (Tex.) 15 S. W. 504.

The appellant was guilty of negligence.

A person about to enter a train to be carried to a certain point must ascertain at his peril whether or not that train will convey him to the point to which he wishes to go.

Hutchinson, Carr. p. 724; *Ohio & M. R. Co.* v. *Hatton,* 60 Ind. 12; *Pittsburgh, C. & St. L. R. Co.* v. *Nuzum,* 50 Ind. 141, 19 Am. Rep. 703; *Ohio & M. R. Co.* v. *Applewhite,* 52 Ind. 540; *Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 436, 10 Am. Rep. 711; *Chicago & A. R. Co.* v. *Randolph,* 53 Ill. 510, 5 Am. Rep. 60; *Pittsburgh, C. C. & St. L. R. Co.* v. *Lightcap,* 7 Ind. App. 249.

McCabe, J., delivered the opinion of the court:

The appellant sued the appellee for damages suffered by her on account of the alleged negligence of the defendant. The circuit court sustained a several demurrer to both paragraphs of the complaint, for want of sufficient facts. The appellant refusing to amend or plead further, the appellee had judgment, upon demurrer, that plaintiff take nothing by her suit. The error assigned is upon the ruling upon the demurrer.

The substance of the first paragraph of the complaint is as follows: That on June 20, 1893, appellant resided at Bloomington, Ind., on the Louisville, New Albany, & Chicago Railway, about 40 miles south of Greencastle junction, on said road, where the Terre Haute & Indianapolis Railroad, commonly known as the "Vandalia," crosses the former; that about one mile and a half east of said junction was what was known as the "Greencastle South Depot, at both of which points all passenger trains on said Vandalia stop, and let off and take on passengers; that appellant had frequently traveled from said Bloomington to Indianapolis, Ind., by the way of said Vandalia Railroad, and knew that all passenger trains on said road stopped at each of said points; that on said day, at about 11 o'clock P. M., appellant being at the Union Depot in Indianapolis, and wholly unacquainted with appellee's road, or the stops made thereon, and desiring to return to Bloomington by way of said Vandalia, and

NOTE.—In connection with the above case as to the relation of a ticket agent in a union depot to a railroad company for which he sells tickets, see also Hillary v. Great Northern R. Co. (Minn.) *post,* 32 L. R. A. —, holding that a person selling tickets in such depot is an acting ticket agent for the purpose of service of process on a company whose tickets he sells.

See also 32 L. R. A. 535.

by way of said Greencastle Junction, she applied to an agent in said depot for a ticket over the Vandalia to Bloomington, which agent was duly authorized to sell tickets for all roads leading out of Indianapolis from said station, among which were the appellee's and the said Vandalia, though she had no knowledge of his authority to sell tickets for the appellee; that said agent negligently and carelessly gave her a ticket, for $1.85, over and by way of appellee's road, which did not pass by said Greencastle Junction, but did pass at what is known as the "North Depot" at Greencastle, Ind., but made no stop east thereof after leaving Indianapolis; that the amount paid was the usual fare rates from Indianapolis to Greencastle over both roads; that after she had purchased said ticket the appellee's agents and servants further carelessly and negligently caused her to enter one of defendant's passenger trains, then about to move west, and relying on the directions so given, and relying on the further fact that the agent so selling said ticket had given her a ticket over the said Vandalia, and believing she was then entering the train of the latter company, she entered said car, and not otherwise; that said train immediately departed, and in about an hour thereafter defendant's servants announced the station of Greencastle, and believing she was on said Vandalia Railroad, and knowing, if she was, she could not change to the Louisville, etc., Railway until she reached said Greencastle junction, a mile and a half west thereof, and appellee's servants further negligently failing to notify her that she had reached the crossing of said Louisville, etc., Railway, she remained on said train, when she was taken to the city of Terre Haute, Ind., and put off said train, in the night, in the mud and cinders, more than a half mile away from any depot, without any one to protect, guide, or direct her to a depot or hotel, and where, by reason of such negligence, she was compelled to remain for the space of twelve hours, during which time she was greatly frightened, annoyed, and humiliated, took cold, and suffered six months, and was compelled to expend $20 for medical attendance. That at the time she purchased said ticket she was sixty-five years old, crippled in her limbs, enfeebled in eyesight, and was unable to read the ticket handed her by said agent, and had no knowledge that said ticket was for passage over defendant's said railroad, and without fault in the purchase of said ticket; that she received her injuries aforesaid solely on account of the carelessness and negligence of the defendant, and without any fault on her part, to her damage $5,000, for which she demands judgment. The second paragraph differs in no material respect from the first, except that in the second it is alleged, in addition to the facts averred in the first, that she made inquiries while at said Greencastle as to what the distance was to the junction, but could obtain no information thereon, and that the conductor, with full knowledge of the facts herein set forth, negligently and carelessly mistreated her, in this, to wit: that he carried her to Terre Haute, Ind., stopped his train a half mile from the depot, and there angrily and roughly ordered plaintiff from said train, and hurridly removed her therefrom, at 2 o'clock in the morning, forced her to get off, etc.

It has been the subject of much discussion as to what the true theory of the complaint is, and it has even been charged that it is bad because it has no theory. But the statute does not make the want of a theory in a complaint a ground of demurrer; but a want of sufficient facts is the only defect, in that direction, which the statute makes a ground of demurrer. If facts sufficient to constitute a cause of action are stated in the complaint, it is difficult to see how a demurrer assigning want of sufficient facts could be sustained because the theory of the complaint was not apparent, or because it is difficult to tell which of two theories is the true one, where the complaint is so framed as to make either theory consistent therewith. Such a defect would be uncertainty, the remedy for which is a motion to make more certain, and not a demurrer. But we find no great difficulty here in ascertaining the true theory of the complaint. The gist of the action is the alleged negligence in delivering to appellant the wrong ticket. Her allegations of her defective eyesight, and her freedom from contributory negligence, are sufficient to excuse her for failure to read her ticket, if, indeed, it would be negligence, in any case, for a passenger to fail to read his ticket. But the appellant is slow to say whether the complaint rests on the theory of the wrong in carrying her beyond her destination, and rudely expelling her, in the night, at an unsuitable place, or for the wrong in delivering to her the wrong ticket. But let us inquire whether either paragraph is good on the latter theory, or whether either states facts sufficient to make the appellee liable for her carriage beyond Greencastle, and her final expulsion. If such carriage and expulsion form the gist of the action, then appellee's liability therefor cannot be aided or supplemented by the delivery of the wrong ticket. If such carriage and expulsion form the ground of the action, it was for the trespass, and not for negligence, which is the theory outlined in the complaint. At all events, she became a passenger on appellee's train, though she got there through a mistake of somebody. When she delivered her ticket to the conductor, she had paid her fare to Greencastle, and no further. By mistake she remained on the train, and on the way from Greencastle to Terre Haute she learned of the mistake. She was still a passenger, and entitled to be treated as such, though she was on the train beyond Greencastle by mistake. *Cincinnati, H. & I. R. Co.* v. *Carper*, 112 Ind. 26; *Columbus, C. & I. C. R. Co.* v. *Powell*, 40 Ind. 37. But while the appellee owed her the duty of treating her as a passenger, so as to entitle her to protection against the negligence of the company, she also owed the duty to the company of treating it as a common carrier. If there was no other relation created by the circumstances, as we shall see when coming to consider the sale of the ticket, than that of passenger and

carrier, then the appellee, as a carrier, was entitled to compensation for carrying appellant beyond Greencastle, the failure to pay which, on demand, would justify the company in putting her off the train at any reasonable place. *Chicago, St. L. & P. R. Co.* v. *Bills*, 104 Ind. 13; *White* v. *Evansville & T. H. R. Co.* 133 Ind. 480, and authorities cited; *Sage* v. *Evansville & T. H. R. Co.* 134 Ind. 100. A passenger who fails and refuses to pay his fare has no right to demand to be carried to a station before the company may rightfully put him off or eject him from the train. *White* v. *Evansville & T. H. R. Co. supra.* The averment that the conductor negligently and carelessly mistreated appellant in carrying her to Terre Haute, and stopped a half mile from the depot and roughly ordered her from said train, and hurridly removed her therefrom, and forced her to get off, etc., does not put the conductor in the wrong, unless his company was liable for the delivery of the wrong ticket, because it is nowhere alleged that she had conformed to the rules of the company, or that she had paid her fare, or offered to do so, without which the conductor had the right to put her off. *Chicago, St. L. & P. R. Co.* v. *Bills* and *White* v. *Evansville & T. H. R. Co. supra.* That she was forced to get off may have been rendered necessary by her refusal to pay fare, or get off voluntarily on request, or otherwise failing to comply with the regulations of the appellee. If so, the conductor was justified. The presumption is against misconduct, and that presumption prevails, in favor of the conductor, until it is overcome by such allegations as put him in the wrong. *Chicago, St. L. & P. R. Co.* v. *Bills* and *White* v. *Evansville & T. H. R. Co. supra.* So that it appears that the true theory of both paragraphs of the complaint is that the gist of the action is the negligence in delivering the wrong ticket. Nor is this conclusion obviated by the averment "that after she purchased said ticket, and the same was delivered to her, the defendant's . . . servants . . . carelessly and negligently ordered, directed, and caused . . . plaintiff . . . to enter one of defendant's passenger trains," because there is no averment that such servants had any knowledge that she did not desire to take passage on the train indicated by the ticket she held. So these averments, like those as to her carriage beyond Greencastle, and expulsion, have no force in showing a liability on the part of appellee, unless they derive such force from the allegations of negligence in the delivery of the wrong ticket. And even then they will derive no force from those allegations, as against appellee, unless such allegations connect the appellee with the alleged negligence in the sale of the ticket. Such connection must depend upon the question whether the appellee, in such sale, owed the appellant any duty, and whether the facts alleged show that the appellee was guilty of a breach of that duty. That there is negligence shown by both paragraphs, in the delivery of the wrong ticket, may be conceded, and that the appellant is shown therein to be free from contributory neligence in relation thereto may also be conceded. But the question remains, Whose negligence was it? It is settled law, as was said in *Faris* v. *Hoberg*, 134 Ind., at page 274, that "in every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant." Both paragraphs show that appellant applied to the ticket agent to purchase a ticket over the Vandalia to Greencastle. They both show that he was duly authorized by the Vandalia, as its agent, to sell such tickets. Therefore, on such application and request, and on payment of the regular ticket fare, as shown in both paragraphs, a duty arose on the part of the agent of the Vandalia, and the Vandalia itself, to deliver to appellant a ticket over its road to Greencastle. It failed to do so, and therefore was guilty of a breach of the only duty that was created by the circumstances. It was as an agent of the Vandalia that he was applied to for a ticket over that road; it was as the agent of the Vandalia that he negligently failed to deliver such a ticket; and therefore the breach of duty shown was a breach of the duty that the Vandalia owed to the appellant. The application and request, accompanied by payment, for a ticket over the Vandalia, created or laid no duty on the appellee, of any kind whatsoever; and therefore, if the agent, in issuing the ticket over appellee's road, was acting within the scope of his authority as the agent of appellee,—which may admit of doubt, under the circumstances,—yet it was no breach of duty owed by appellee to appellant, because appellee owed her no duty, and had no power to perform the duty for the breach of which she complains, namely, the failure to issue to her a ticket over the Vandalia. See *Atchison, T. & S. F. R. Co.* v. *Cochran*, 43 Kan. 225, 7 L. R. A. 414; *Isaacson* v. *New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142.

It follows from what we have said that the facts alleged concerning the sale of the ticket have no influence on the facts occurring afterwards, and that all of the facts stated as occurring thereafter create no other relation between the parties to this action, and impose no other duties, than those reciprocal obligations ordinarily existing between carrier and passenger. For the reasons given, both paragraphs of the complaint are bad, and the circuit court correctly sustained the demurrer thereto.

Judgment affirmed.

MISSOURI SUPREME COURT.

LAMAR WATER & ELECTRIC LIGHT COMPANY, *Appt.*,
v.
City of LAMAR, *Resp't.*

(128 Mo. 188.)

1. **A provision of a constitution limiting the rate of taxation** for municipal purposes to a certain rate "which shall apply to taxes of every kind and description, whether general or special," is not a limitation upon a subsequent provision prohibiting indebtedness to an amount exceeding the annual income "without the assent of two thirds of the voters" and requiring provisions for the collection of an annual tax to pay interest on any debt created when it falls due, and to provide a sinking fund to pay the principal.

2. **The aggregate amount involved in a municipal contract** the performance of which will extend over a series of years but payments upon which are to be made annually is immaterial in determining whether or not the constitutional prohibition of indebtedness exceeding revenues is infringed. It is sufficient if the revenues equal the sums falling due each year.

3. **"The income and revenue provided for each year"** which municipal indebtedness is forbidden by Constitution to exceed includes income from license fees and all other sources.

(April 30, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Barten County in favor of defendant in an action brought to recover the hydrant rents alleged to be due and unpaid under a contract between plaintiff and defendant. *Reversed.*

Statement by **Barclay, J.:**

The facts of the case appear in the opinion filed in the first division, May 28, 1894, upon the first hearing. After that ruling, a motion for rehearing was made, which was overruled, one of the judges dissenting. On that dissent, the cause was transferred to the court in banc, and there reargued.

The decision of the court in banc refers for a statement of facts to the divisional opinion, which was as follows:

BLACK, Ch. J.:

This is a suit to collect a balance of $900 due on hydrant rents for the last half of 1891, and $3,000 for the year 1892. The petition declares upon a written contract alleged to have been executed on December 31, 1890. There is the further averment that the defendant executed the contract by and through its mayor and clerk, they being duly authorized so to do, which averment is denied. The answer also raises several constitutional questions as affirmative defenses.

The record discloses the following facts: The defendant is a city of the fourth class, having 3,000 inhabitants. The board of aldermen passed an ordinance on April 21, 1890, setting forth the terms of a contract between the city on the one part and Messrs Snyder and Guinney and their assigns of the other part, for the construction and operation of waterworks by the latter. The ordinance was approved by the mayor on the 22d of the same month. The ordinance provides that it shall take effect from the date of its approval; that the contract therein contemplated shall be signed by the mayor and attested by the clerk, and signed by Snyder and Guinney; and that the contract shall take effect when the ordinance is ratified by a two-thirds vote of the voters. An election was held on May 20, 1890, at which more than two thirds of the voters voted for the contract. Snyder and Guinney then accepted in writing the terms of the ordinance. Snyder assigned his interest in the contract to Guinney, who assigned the contract to the Lamar Water Company. That corporation and the Lamar Electric Light & Power Company were duly consolidated under the name of the present plaintiff. The works were constructed, and accepted by the city, and thereupon the mayor and clerk, pursuant to a resolution of the board of aldermen, and the plaintiff, signed a contract, which is dated December 31, 1890. This contract is simply a copy of the ordinance, with a statement thereto added that the ordinance is now in full force and effect. By the 7th section of the ordinance the city agrees to and does rent 60 hydrants for twenty years, to be used for the purpose of extinguishing fires and flushing gutters and sewers, and to pay therefor $50 per annum for each hydrant, payable semiannually. The plaintiff agrees to furnish the hydrants, and keep them supplied with water, and to supply the inhabitants with water at specified rates. Section 10 secures to the city the right to purchase the works ten years after their completion at their equitable value. The company has the right to mortgage the works; and, in case they are mortgaged, the hydrant rents, or so much as may be necessary, are to be set apart as net earnings, to be paid to the holders of the interest coupons on the bonds so secured. Section 19 provides: "That for the purpose of meeting and paying the annual rental to the said A. H. Snyder and J. Guinney, their associates or assigns, by the city of Lamar, as provided in § 7 of this ordinance, there shall be levied and collected annually during the continuance of this ordinance a tax, not exceeding 40 cents on the $100 valuation on all taxable property in the city, sufficient to pay said rental if necessary. Said tax shall be levied and collected at the same time and in the same manner as are taxes for general purposes, and, when collected, the same shall be set apart for the specific purpose of paying said instalments of rental as they become due, as provided in this ordinance and shall not be appropriated to any other purpose or purposes."

The works were mortgaged for $45,000. The value of the taxable property in the city was $745,000 for 1888, $747,015 for 1889, $716,613 for 1890, and $890,160 for the year 1891.

NOTE.—On the question, What contracts will create an indebtedness within the meaning of a constitutional limitation of municipal debt, see 32 L. R. A. also *note* to Beard v. Hopkinsville (Ky.) 23 L. R. A. 402, also Saleno v. Neosho (Mo.) 27 L. R. A. 769.

See also 33 L. R. A. 474; 35 L. R. A. 686; 36 L. R. A. 228.

The city levied a general tax of 50 cents on the $100 valuation for the years 1886 to and including 1892, and for the years 1891 and 1892 it levied, in addition thereto, the water tax of 40 cents. The receipts from both taxes and from licenses and all other sources, and the expenditures, were as follows: For 1890 the receipts were $8,033 and expenditures $7,903, for 1891 the receipts were $6,550 and expenditures $7,369, and for 1892 the receipts were $7,761 and the expenditures $8,339. The evidence tends to show that at the date of this contract the city had a bonded debt of $2,300. It clearly appears that in 1889 the city made a contract with the Lamar Electric Light & Power Company, whereby it agreed to pay that company annually the sum of $1,524 for a period of twenty years for electric lights.

1. It is first objected that the ordinance is void because it was passed and approved before the proposed contract had been approved by a two-thirds vote. In other words, the claim is that an election was a condition precedent to the passage of a valid ordinance. Section 1589, Rev. Stat. 1889, provides that the mayor and board of aldermen shall have power, by ordinance, upon a vote of two thirds of the qualified voters, to contract with any person or company, granting to such person or company the exclusive right to furnish gas, electricity, or water for the city and the inhabitants for a time not exceeding twenty years. We find nothing in this section which gives any support to the objection. The ordinance could not take effect as a contract until ratified by the requisite vote, but it was competent, and perfectly proper, to pass the ordinance to take effect when ratified. Indeed, an ordinance setting forth the terms of the contract, and then approved by the necessary vote, and accepted in writing by the persons proposing to build the works, was all that was necessary to make a perfect and complete contract. Section 20 of the ordinance, however, seems to contemplate a more formal contract, to be signed by the mayor for the city and by the other contracting parties. Such further formal contract was duly signed on December 31, 1890. We see no merit whatever in the objection.

2. The further objection that the contract is void because the ordinance was not referred to the city treasurer, and the second reading, for his statement, to be indorsed thereon, that a sufficient sum of money stood to the credit of the treasury, and unappropriated, to meet the requirements of the ordinance, was also properly overruled. Rev. Stat. 1889, §§ 1623, 1629, have no application to ordinances like the one in question. They apply to ordinances which direct warrants to be issued on the treasury, or operate as warrants; but they do not apply to ordinances which are contracts, or direct contracts, to be made for the performance of work or furnishing supplies in the future. When the work is done, or the supplies furnished, then an ordinance directing payment for the work or supplies should be referred to the treasurer for his certificate.

3. It is next objected that the ordinance is void because it is in several respects in conflict with §§ 11, 12, art. 10, of the Constitution. For the present we shall assume that the ordinance contemplates and requires the levy of a special tax of 40 cents on the $100 valuation over and above a general tax of 50 cents on the $100, to pay the hydrant rents. With this assumption the question is whether this special levy is prohibited by said sections of the Constitution. They are set out in full in the case of *State, Robinson,* v. *Columbia*, 111 Mo. 365, and need not be copied here.

In that case, the town proposed, pursuant to a two thirds vote, to issue bonds for the purpose of building waterworks and an electric-light plant, and to levy and collect annually a special tax over and above the general tax of 50 cents on the $100 valuation to pay the interest on the bonds, and to create a sinking fund to pay the principal. Our conclusion in that case was that 50 cents on the $100 valuation is the highest rate that can be levied by cities and towns of more than 1,000 and less than 10,000 inhabitants for any and all purposes, except for the purpose of erecting public buildings, and except for the purpose of paying indebtedness which existed at the date of the adoption of the Constitution; that is to say, in 1875. It was therefore held that the proposed additional tax would be illegal, because in excess of the constitutional rate limit.

That case disposes of the exact question which we now have in hand. According to the ruling then made, the ordinance in this case and the contract sued upon are utterly void in so far as they provide for the levy and collection of this special water tax of 40 cents on the $100 valuation. But it is earnestly argued in behalf of the plaintiff here that in reaching that conclusion due consideration was not given to the last clauses of § 12 The claim now made and urged in many forms of expression is that under § 12, a city may, by a two-thirds vote, go in debt for any purpose whatever, within its charter powers, up to 5 per centum of the taxable value of the property in such city; and, as the city has the right to create a debt, it has the right to levy a special tax in excess of the rates specified in § 11 to pay the debt so created. This line of reasoning is far-reaching in its consequences, for, if correct as to cities, it is correct as to counties, school districts, and townships.

That a city may levy a special annual tax, in excess of the annual rates specified in § 11, for public building purposes, and to pay debts existing at the adoption of the Constitution, is perfectly clear; and this for the plain and simple reason that § 11 excepts from the annual rates taxes levied for such purposes. But can a city exceed the fixed highest annual rates for any purpose other than for public building and to pay indebtedness existing in 1875? In answering this question it must be remembered and kept constantly before the mind that we are now dealing with annual rates of taxation. Section 11 treats of maximum annual rates, and it treats of nothing else. It enters into details, and in doing so it uses plain language. This section, it will be seen, provides that the annual rates of taxation shall not exceed the stated amounts for county purposes; that they shall not exceed the stated amounts for school purposes; and that they shall not exceed the stated amounts for city and town purposes. Cities and towns having 1,000 and less than

10,000 inhabitants are limited to 50 cents on the $100 valuation of the taxable property therein. Then follows the exception as to taxes levied to pay for public buildings? The section concludes with these words: "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing on bonds which may be issued in renewal of such indebtedness." It is therefore perfectly clear that the maximum rates specified in this section are the highest rates that cities can levy for any and all purposes, save for the two excepted purposes, as to which no rate limit is fixed.

It is sought to break the force of this conclusion by a reference to some cases in which this court has held that local assessments, such as assessments against abutting property to pay for grading and paving streets and the like, are not special taxes within the meaning of this clause of § 11. There is a vast difference between such local assessments and a tax levied on all property for a particular purpose. The former is not a tax within the meaning of this and other clauses of the Constitution, while the latter is a special tax. The distinction between the two has been so often pointed out that we do not feel called upon to open the question. According to the plain, specific, and emphatic language of § 11, a city cannot levy an annual tax in excess of 50 cents on the $100 valuation. This is the limit of its power for any and all purposes, save in the two excepted cases, and this water tax is not within either exception.

We now go to § 12, and the first observation to be made is that it does not deal with maximum annual rates. It deals with and places a limit upon the debt-creating power of municipal and quasi municipal corporations. It first provides that "no county, city, . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters." Thus far this section is in perfect accord with § 11. Of this there can be no doubt. Section 12 provides further: "Nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein; . . . and provided further, that any county, city, town, . . . incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same."

Now, the question is, Do the clauses just quoted disturb the conclusion before stated as to maximum rates? What we are asked to do is to give to these clauses the force and effect of a proviso or third exception to the limits upon annual rates as those limits are set forth in § 11. Such a reading makes the exception concerning public buildings in § 11 meaningless. It cuts up by the roots and utterly eliminates the part of that section which says: "Such restrictions as to rates shall apply to taxes of every kind and description, whether general or special."

A further and complete answer to such a reading is that these clauses of § 12 do not profess or undertake to modify or disturb the limit to rates as laid down in § 11. It should be remembered that § 11 does not require counties, cities, and school districts to levy the rates therein specified. It only specifies annual rates beyond which they cannot go. As we said in the *Columbia Case*, § 11 fixes annual rates beyond which cities cannot go for any purpose, except to pay for public buildings and to pay indebtedness existing when the Constitution was adopted; and § 12 places a limit upon the debt creating power of municipal corporations. There is no conflict between the two sections; for how can it be said there is a conflict in these two propositions, namely: The city of Lamar shall not levy an annual tax beyond 50 cents on the $100, and this restriction includes taxes of every kind and description, whether general or special; nor shall it go in debt, even with a two-thirds vote, to an amount exceeding 5 per centum of the value of the taxable property therein. One restriction is as binding as the other, and we have no right to dispense with either. Full force and effect must be given to each section. We have no right to build up a supposed conflict when effect can be given to both sections, and on that supposed conflict resort to construction. The purpose and meaning of the two sections are clear, and, this being so, we have nothing to do but to give to each full force and effect. *Lake County Comrs.* v. *Rollins*, 130 U. S. 662, 32 L. ed. 1060; *Barnard* v. *Knox County*, 105 Mo. 382, 13 L. R. A. 244.

It is said the ruling made in the *Columbia Case*, and now made in this case, places it out of the power of many cities to obtain waterworks. If the inhabitants actually need such works, and are willing to become private customers, and pay their proper share of the expense, so that the city government will only be obliged to shoulder a fair part of the cost of furnishing water, we apprehend there will be no trouble in getting such works. But a complete answer to all arguments based on grounds of convenience and necessity is that, if some cities cannot have waterworks, save by violating the law of the land, they must go without them. We need not repeat here what has been said on other occasions as to the general object and purpose of these constitutional restrictions, nor need we speak of the causes that led to their adoption. These are matters of common information. We adhere to the rulings made in the *Columbia Case*.

We have thus far proceeded on the assumption that § 19 of the ordinance contemplates and requires the levy of a special tax in excess of the general tax of 50 cents on the $100. That the ordinance is open to this reading seems to be conceded by the plaintiff. But it is said the ordinance should be construed to mean a special tax of 40 cents on the $100 that can be lawfully levied; in other words, the claim is that the 40-cent special tax should be deemed and taken to be a part of the 50-cent tax.

It was said in *Sheffield* v. *Balmer*, 52 Mo.

474, 477, 14 Am. Rep. 430: "If the contract can be performed without any violation of law, then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed." Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former construction should be adopted. *Hobbs* v. *McLean*, 117 U. S. 567, 29 L. ed. 940; *Archibald* v. *Thomas*, 3 Cow. 284. But when the language imports illegality, the courts should not construe it in a different sense, for that would be to make a contract for the parties which they have not made themselves. 2 Parsons, Cont. 7th ed. 505.

The 19th section of the ordinance provides, as we have seen, "that for the purpose of meeting and paying the annual rental" there shall "be levied and collected annually during the continuance of this ordinance, a tax, not exceeding 40 cents on the $100 valuation, sufficient to pay said rental, if necessary. Said tax shall be levied and collected at the same time and in the same manner as are taxes for general purposes, and, when collected, the same shall be set apart for the specific purpose of paying said instalments of rental, as they become due, as provided in the ordinance and shall not be appropriated to any other purpose or purposes." The ordinance passed and approved on the same day, calling an election, provides that the ballots used in such elections shall be in the following form: "In favor of ratifying the waterworks contract, and levying the tax thereby provided for. Yes—No." The city has levied a general tax of 50 cents on the $100—the full constitutional limit—when the contract was made for that year, and for each of the four years prior thereto. After the execution of the contract it levied the general tax of 50 cents on the $100 for each of the years 1891 and 1892, and, in addition thereto, this special tax of 40 cents on the $100 valuation. This annual water contract debt and the annual electric-light debt would consume the entire general levy of 50 cents.

Now, it seems utterly unreasonable that the board of aldermen should set apart four fifths of the general tax for a period of twenty years for waterworks purposes, leaving the city nothing with which to carry on the city government, after paying the annual electric-light debt, save the income from licenses and such sources. If it had been intended to pay this waterworks contract debt out of the general tax, there was no occasion for making any mention of a special tax in the ballots; and we have seen that the board of aldermen did, in point of fact, for two years levy a special tax of 40 cents in addition to the general 50 cent tax. It is perfectly clear that the city officials and the voters also understood this special 40-cent tax to be a tax over and above the general tax of 50 cents. Turning now to the ordinance itself, we find it provides that the special tax shall be collected and set apart for the purpose of paying the hydrant rents, and to be used for no other purpose. Said tax shall be levied and collected at the same time and in the same manner as are taxes for general purposes. This language shows clearly enough that the special tax was to be a tax over and above any general tax which the city had the right and power to levy, and it excludes the idea that the special tax was to be a part of the general tax. We think this contract calls for and means a special tax of 40 per cent in addition to any general tax which the city had or has the power to levy and collect. We cannot fairly or justly give to it any other construction. It follows from what has been said that the agreement to levy and collect this special tax is unconstitutional, and therefore void.

It is next insisted that, if the agreement to levy the special tax is illegal, still the agreement to pay the specified rents is valid; in other words the contention is that the manner of paying may be separated from the agreement to pay, and the agreement to pay be held valid. Much reliance is placed upon the case of *Hitchcock* v. *Galveston*, 96 U. S. 342, 24 L. ed. 659.

In that case the plaintiff agreed to grade, curb, and pave certain sidewalks, and the defendant agreed to pay therefor specified prices, the work to be paid for in city bonds at par. The city compelled the plaintiffs to abandon the work after they had performed a large part of it. The plaintiff then sued to recover damages for breach of the contract. Though the city had the right to make a contract for the work, and thus bind itself for the payment of the work it was insisted as a defense that it had no power to issue the bonds. The court held that it made no difference that the promise was to pay in a manner not authorized by law; that it was not a case in which payment in bonds was prohibited; that at most the issue of bonds was unauthorized because there was a defect of power, and the corporation could be held on the contract, the suit not being on the bonds. It is there conceded that the case might be different if the corporation had been expressly prohibited from doing the act by its charter or some other law, and we think the concession distinguishes that case from the one in hand, though that case differs from this in other respects.

There is no doubt but illegal parts of a contract or statute may be disregarded when the illegal parts are severable from the other parts. But here the plaintiff agrees to furnish the hydrants with water. To pay the rents the defendants agreed to levy and collect the special tax, and set it apart for that and no other purpose. The agreement to pay by a special tax is a vital and essential part of the contract so far as the contract deals with hydrant rents. It has been held that, where a town has the power to contract for a supply of water for a period not exceeding ten years, a contract for twenty years cannot be separated so as to be good for ten years and set aside as to the excess. *State, Davis*, v. *Harrison*, 46 N. J. L. 80. That case was approved and followed by the same court in *State* v. *Bayonne*, 55 N. J. L. 241. This method of raising the money by a special tax to pay the rents was and is an important feature of this contract, and we do not see how it can be separated from the agreement to pay. To make a serverance is, in effect, to make a new contract for the parties; for the effect is to charge the general revenues of the city with the payment of this debt, which the parties agreed should be paid out of a different

fund. We are of the opinion the agreement to levy and collect the prohibited tax cannot be separated from the agreement to pay. The contract is therefore, so far as it relates to the hydrant rents, void, and no action can be founded upon it.

4. In answer to some arguments made in the briefs and on the hearing of this case, we may say that the words "income and revenue provided for such year," found in the 1st clause of § 12, art. 10, of the Constitution, do not mean simply the revenue raised by a levy of tax on real and personal property. They include also the income derived from licenses and from all other sources.

In view of the conclusion before reached, it is not necessary to discuss the other objections to the ordinance, for it follows from what has been said that the judgment should be affirmed.

All concur.

Messrs. **Thurman & Wray, T. K. Skinker,** and **R. T. Railey,** for appellant:

A contract to pay for a commodity to be furnished or a service to be performed is not a debt in the common and general acceptation of the word.

Wentworth v. *Whittemore*, 1 Mass. 471; *Wood* v. *Partridge*, 11 Mass. 488; *Weston* v. *Syracuse*, 17 N. Y. 112; *Garrison* v. *Howe*, Id. 465; *Smith* v. *Dedham*, 144 Mass. 179; *Laycock* v. *Baton Rouge*, 35 La. Ann. 479; *Corpus Christi* v. *Woessner*, 58 Tex. 468.

Words used in the Constitution will be presumed to have been used in their general and accepted sense.

Cooley, Const. Lim. 68; *State, Harris*, v. *Laughlin*, 75 Mo. 154; *State, Chouteau*, v. *Leffingwell*, 54 Mo. 471.

The courts will not construe the provisions of the Constitution so as to impair the usefulness of municipalities organized under it, unless the language is so clear that no other construction can be intelligently placed upon it.

Valparaiso v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Central Ohio R. Co.* v. *Columbus*, 23 Ohio L. J. 3.

The word "indebted" as used in § 12, art. 10, of the Constitution of Missouri, was never understood or intended to prevent cities and towns from contracting for a supply of water for the use of a municipality or inhabitants thereof for a term of years at a fixed price per annum, and such a contract does not create a debt, within the meaning of said section, for the amount which may ultimately become due.

Dively v. *Cedar Falls*, 27 Iowa, 227; *Grant* v. *Davenport*, 36 Iowa, 401; *Territory, Woods*, v. *Oklahoma*, 2 Okla. 158; *State* v. *McCauley*, 15 Cal. 454; *Koppikus* v. *State Capital Comrs.* 16 Cal. 252; *People, McCullough*, v. *Pacheco*, 27 Cal. 207; *East St. Louis* v. *East St. Louis Gaslight & C. Co.* 98 Ill. 429, 38 Am. Rep. 97; *Carlyle Water, Light & P. Co.* v. *Carlyle*, 31 Ill. App. 339.

The provision in § 12, art. 10, of the Constitution of 1875, limiting the indebtedness of municipalities to 5 per cent of the assessed valuation, is taken from the Constitution of Iowa In adopting that provision in our Constitution, we adopted the construction placed upon it by the Iowa courts.

Cooley, Const. Lim. 4th ed. p. 64, note 2; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Atty. Gen., Schantz*, v. *Brunst*, 3 Wis. 790; *Skrainka* v. *Allen*, 76 Mo. 389; *Skouten* v. *Wood*, 57 Mo. 382; *Lucas Bank* v. *King*, 73 Mo. 591; *Low* v. *Blanchard*, 116 Mass. 273; *Com.* v. *Hartnett*, 3 Gray, 450; *State, Missouri & M. R. Co.*, v. *Macon County Ct.* 41 Mo. 458.

The words "income and revenue" in § 12, art. 10, of the Constitution, comprehend all sources from which a city may lawfully collect funds for the purpose of defraying expenses of the city government.

Sheidley v. *Lynch*, 95 Mo. 489; *Weston* v. *Syracuse*, 17 N. Y. 112; *Lewis* v. *Denver City Waterworks Co.* 19 Colo. 236.

Parties to a contract are presumed to intend that which can be done lawfully, unless by clear and unequivocal language the contrary intention is made manifest.

2 Parsons, Cont. 497, 500, 505; Bishop, Cont. §§ 391, 392; *Ormes* v. *Dauchy*, 82 N. Y. 448, 37 Am. Rep. 583; *Curtis* v. *Gokey*, 68 N. Y. 304; *State, Circuit Atty.*, v. *Finn*, 8 Mo. App. 350; *Lowrey* v. *Rainwater*, 3 Mo. App. 562; *Sheffield* v. *Balmer*, 52 Mo. 474, 14 Am. Rep. 430.

If the manner provided by the contract for raising the money is unlawful then it became the duty of the respondent to provide it lawfully. This would not authorize the city to repudiate the contract, otherwise valid, especially after receiving its benefits.

Carroll v. *Campbell*, 108 Mo. 550; *Hitchcock* v. *Galveston*, 96 U. S. 344, 24 L. ed. 659; *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. ed. 187; 2 Parsons, Cont. 800; Bishop, Cont. 392; Field, Corp. § 273; 1 Dill. Mun. Corp. 3d ed. §§ 421, 422, and note 1; Cooley, Const. Lim. 4th ed. 215; *State* v. *Clarke*, 54 Mo. 36, 14 Am. Rep. 471; *St. Louis* v. *St. Louis R. Co.* 89 Mo. 44, 58 Am. Rep. 82, 14 Mo. App. 221; *Daviess County* v. *Dickinson*, 117 U. S. 657, 29 L. ed. 1026; *Keokuk N. L. Packet Co.* v. *Keokuk*, 95 U. S. 80, 24 L. ed. 377; *McPherson* v. *Foster*, 43 Iowa, 72, 22 Am. Rep. 215; *United States, Johnston*, v. *Clark County Ct.* 96 U. S. 211, 24 L. ed. 628; *United States* v. *Bradley*, 35 U. S. 10 Pet. 362, 9 L. ed. 455; *Baker* v. *United States, Davis*, 109 U. S. 229, 27 L. ed. 915; *Howell* v. *McAden*, 94 U. S. 463, 24 L. ed. 254; *Williamson* v. *New Jersey*, 130 U. S. 189, 32 L. ed. 915; *Cole* v. *Shreveport*, 41 La. Ann. 845; *Oubre* v. *Donaldsonville*, 33 La. Ann. 389; *Corcoran* v. *Lehigh & F. Coal Co.* 138 Ill. 390; 1 Beach, Pub. Corp. 707.

The people of the city of Lamar had a right, by a vote of two-thirds majority, to authorize a levy of 40 cents on the $100 under § 12, in excess of the 50 cents provided for in § 11, art. 10, of the Constitution of 1875.

State, Robinson, v. *Columbia*, 111 Mo. 365, 35 Cent. L. J. 227, 342.

The limitation in § 11, art. 10, of the Constitution does not apply to all special taxes authorized to be collected by cities and towns under the Constitution and statutes of Missouri.

Farrar v. *St. Louis*, 80 Mo. 386; *Thomas* v. *Hooker-Colville Steam Pump Co.* 22 Mo. App. 8.

Messrs. **John B. Cole** and **H. C. Timmonds,** for respondent:

No valid contract in writing was entered into between plaintiff and defendant.

Rev. Stat. 1889, § 3157; *Heidelberg* v. *St. Francois County*, 100 Mo. 70; *Crutchfield* v. *Warrensburg*, 30 Mo. App. 456; *Globe Furniture Co.* v. *District No. 7*, 51 Mo. App. 549; Dill. Mun. Corp. §§ 371–373.

The contract, if there is one, provides for a special water tax in addition to the tax of 50 cents for general city purposes and in excess of the constitutional limit of the tax for city purposes.

Const. art. 10, § 11; *State, Robinson*, v. *Columbia*, 111 Mo. 365; *Barnard* v. *Knox County*, 105 Mo. 382, 13 L. R. A. 244; *Black* v. *McGonigle*, 103 Mo. 193; *Arnold* v. *Hawkins*, 95 Mo. 569; *Book* v. *Earl*, 87 Mo. 246; *Texas Water & G. Co.* v. *Cleburne*, 1 Tex. Civ. App. 580.

By the contract, if there is one, the city became indebted in the year 1890 for the year 1891, and for each of the nineteen years next succeeding, to an amount exceeding the income and revenue provided for that year, or for any succeeding year, and to any amount exceeding any income and revenue which might lawfully be provided. It is therefore void.

Const. art. 10, § 12; *Book* v. *Earl*, *supra*; *Barnard* v. *Knox County*, 105 Mo. 383, 13 L. R. A. 245; *Black* v. *McGonigle*, 103 Mo. 192; *San Francisco Gas Co.* v. *Brickwedel*, 62 Cal. 642; *Dively* v. *Cedar Falls*, 27 Iowa, 233; *Niles Waterworks* v. *Niles*, 59 Mich. 311; *Putnam* v. *Grand Rapids*, 58 Mich. 416; *Merrill Railway & L. Co.* v. *Merrill*, 80 Wis. 358; *Davenport* v. *Kleinschmidt*, 6 Mont. 502.

The contract sued on was in violation of both the prohibitory clauses of § 12 of the Constitution, the one limiting the annual indebtedness to the income and revenue provided for such year, and the other limiting the aggregate amount of indebtedness to 5 per cent of the taxable property in the city.

Const. art. 10, § 12; *Burlington Water Co.* v. *Woodward*, 49 Iowa, 62; *Prince* v. *Quincy*, 128 Ill. 433, 105 Ill. 138, 44 Am. Rep. 785; *Lake County Comrs.* v. *Rollins*, 130 U. S. 662, 32 L. ed. 1060; 2 Beach, Pub. Corp. § 810; *French* v. *Burlington*, 42 Iowa, 614.

A void part of a municipal contract cannot be regarded as a separate part, for no one can say that it was not an influential factor in causing the execution of the contract.

State, Board of Finance, v. *Street & Water Comrs.* 55 N.J. L. 230; *State* v. *Bayonne*, Id. 241; *State, Davis*, v. *Harrison*, 46 N. J. L. 79; *Hamilton* v. *Thrall*, 7 Neb. 210; *Reineman* v. *Covington, C. & B. H. R. Co.* Id. 310; *Gould* v. *Paris*, 68 Tex. 511.

The contract being void the plaintiff cannot recover on a *quantum meruit*, and there is no estoppel or ratification nor any liability for damages.

Wolcott v. *Lawrence County*, 26 Mo. 276; *Johnson* v. *School District No. 1*, 67 Mo. 319; *Rumsey Mfg. Co.* v. *Schell City*, 21 Mo. App. 175; *Sturgeon* v. *Hampton*, 88 Mo. 203; *Prince* v. *Quincy*, 128 Ill. 457; *Dixon County* v. *Field*, 111 U. S. 90, 28 L. ed. 362; *Austin* v. *Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

Barclay, J., delivered the opinion of the court:

It becomes necessary for the court in banc to decide for the first time whether the limitations to taxation imposed by § 11, art. 10, of the Missouri Constitution apply to a tax levied under § 12 of that article, in a city of the fourth class, for the purpose of supplying the city with water.

It will not be needful to recite the facts out of which the case arose. They have been already given in the opinion filed while the cause was in the first division (26 S. W. 1025), which will be published in the official report of the case.

1. The annual tax was held void in that opinion because adjudged by the court to be in excess of the rate permitted by § 11.

That ruling presents the first point for determination. Its importance is great; and the effect of any action upon it will be far reaching. The whole court must attempt to solve the same problem which was discussed before the first division in the *Columbia Case* (1892), 111 Mo. 365; and later before the court in banc in *State, Tarkio*, v. *Seibert* (1893), 116 Mo. 415. But in the latter case it was found that a decision could be reached without meeting the difficulties which now confront us.

We have given the subject patient consideration. The writer has become convinced that an endeavor to practically apply the rule announced in the *Columbia Case* will produce results which cannot have been intended by the Constitution, or by its authors. Hence he has felt obliged to recede from the position which his concurrence in the Columbia judgment indicated. In that case (111 Mo. 374, 376) the provisions of §§ 11 and 12 of article 10 are copied at length.* So they need not be repeated here.

The real difficulty in the way of that construction is developed by an attempt to keep those sections in harmony when so construed.

Each of the sections is entitled to receive the same respect and obedience. Neither can be wiped out for the sake of enforcing a supposed wiser policy embodied in the other.

Our duty is only to construe the law, and all parts of the Constitution are of equal moment and are equally binding upon us, as upon all other citizens of the state.

Before attempting to define our views as to the bearing of these sections on each other, let us, as briefly as possible, examine the practical consequences of attempting to maintain the construction put upon them in the Columbia litigation.

*"Sec. 11. Taxes for county, city, town, and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city, or school district for state and county purposes. For county purposes the annual rate on property in counties having $6,000,000 or less shall not, in the aggregate, exceed 50 cents on the $100 valuation; in counties having $6,000,000 and under $10,000,000 said rate shall not exceed 40 cents on the $100; in counties having $10,000,000 and under $30,000,000, said rate shall not exceed 50 cents on the $100 valuation; and in counties having $30,000,000 or more said rate shall not exceed 35 cents on the $100 valuation. For city and town purposes the annual rate on property in cities and towns having 30,000 inhabitants or more shall not, in the aggregate, exceed 100 cents on the $100 valuation; in cities and towns having less than 30,000 and over 10,000 inhabitants said rate shall not exceed 60 cents on the $100 valuation; in cities and towns having less than 10,000 and more than 1,000 inhabitants, said rate shall not exceed 50 cents on the $100 valuation; in towns having 1,000 inhabitants or less said rate shall not exceed 25 cents on the $100 valuation. For school purposes in districts the

In endeavoring to arrive at the probable intention of a public enactment, whether it be organic or of lesser rank, it is always permissible to consider the consequences of any construction proposed to be given to it. Such consequences have a most important bearing in aid of the interpretation of any law. For it is not to be supposed that any unjust or unreasonable results were intended to flow from the law. Hence a construction which permits such results will not be accepted by judicial interpreters, where the language is susceptible of a more beneficial reading. Rutherforth, Inst. 2d Am. ed. p. 414.

The inevitable implication in the ruling in the *Columbia Case* is that the provisions of § 12 for the levy of an annual tax (in the instances therein permitted) are intended to be operative within the limitations of § 11, and not otherwise. It is not, and could not be, denied that a tax may be imposed under § 12. The terms of that section are too clear on that subject to admit of question. The only doubt, or point of controversy, is whether the true intent of the Constitution should be held to sanction such a tax in excess of the rate prescribed in § 11, or whether that tax must be levied within the range of rates stated in § 11.

In seeking to discern the intent of these provisions, let us begin by examining the workings of the legal machinery along the lines defined in the Columbia suit.

Section 11 prescribes a limitation of the maximum annual tax rate (as to cities of the size of Lamar) at 50 cents on the $100 valuation of taxable property.

So that the imposition of an annual tax under § 12 (if only capable of enforcement within the restrictions of § 11) might be held (under the Columbia ruling) to produce either one of two possible results. These we shall, for convenience of treatment, designate as alternatives *a* and *b*. We will consider each of them, separately.

a. The annual tax, levied under § 12, might be held to be a fixed charge upon the local revenue, raised by the annual levy of 50 cents on the 100 dollars. So that the fund available for ordinary governmental purposes would be reduced accordingly, and would then be merely what remained after applying the tax under § 12 to its designated purpose

If that theory prevailed, an annual tax of that sort, to the limit of 50 cents on the $100, could be imposed by vote in some cities (without going beyond the 5 per centum of taxable value), leaving nothing for the usual and necessary expenses of the local government. And a corresponding reduction of annual revenue, available for the ordinary wants of the city, would follow any and every vote of indebtedness under § 12. In other words, taxes might be levied under the latter section, to meet, for example, a valid bonded indebtedness, to such an amount as to render the remainder of the annual rate (allowed by § 11) wholly inadequate to the needs of the city government.

The same thing could occur in a similar way in a county under these sections.

Yet these municipalities are agencies of the state government, and their maintenance is needed for the performance of many other functions besides the payment of debts.

The serious question which arises, upon this view of the rule in the Columbia case, is whether it is a reasonable construction of these constitutional provisions to hold that the people of these localities are authorized, by a vote under § 12, to divert to some special object for a period of twenty years, all, or such part as they please, of the general revenue raised under the rates in § 11, and imperatively needed for the support of the local autonomy.

Yet that consequence would be possible under the ruling that an annual tax under § 12 is a specific charge against the general revenue, within the limitations of § 11.

If that view, however, seems unreasonable, let us turn to the other alternative.

b. The second alternative under the Columbia ruling, would be to hold that, as § 11 plainly contemplates the imposition of the taxes (mentioned therein) to meet the vital needs of government, the annual revenue must first be devoted to those needs, leaving any residue that might remain from the prescribed annual levy, to be applied to the purpose designated by any tax levied by authority of § 12.

Of course, such a holding would reduce the supposed annual tax under § 12 to the consistency of a shadow. There would be nothing

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annual rate on property shall not exceed 40 cents on the $100 valuation; provided the aforesaid annual rate for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed $1 on the $100 valuation, and in other districts to an amount not to exceed 65 cents on the $100 valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities, or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people and two thirds of the qualified voters of such county, city, or school district, voting at such election, shall vote therefor. The rate herein allowed to such county shall be ascertained by the amount of taxable property therein according to the last assessment for state and county purposes, and the rate allowed to each city or town by the number of inhabitants according to the last census taken under the authority of the state or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.

"Sec. 12. No county, city, town, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose, nor in any cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness in the aggregate exceeding 5 per cent on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; provided that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail. And, provided further that any county, city, town, township, school district, or other political corporation or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same."

of substance in it. The local authorities could, at any time, by a slight enlargement of the ordinary allowances for the support of their government, cut down to zero the residuum of the annual rates of § 11. Even if they always acted in entire good faith, the probability of increasing demands upon the local revenue, during the changes of conditions in a period of twenty years, would render any dependence upon a surplus from the annual rates highly illusory.

Certainly no bonded indebtedness in these days could be founded on such a shifting sand of credit as a tax would be under § 12, so construed. What creditor could be found who would loan funds to a municipality on such a basis?

That construction of the organic law would practically eliminate the grant of power to incur an indebtedness (except for public buildings), under the provisions of § 12. Its adoption would, in effect, give the latter section another proviso, namely, "provided such annual tax shall only be payable from any surplus of the annual rates, prescribed in § 11, that may remain after the ordinary demands of the local government are met, each year."

How such a reading of the fundamental law would depart from its reasonable and natural purport, as it is now written, can be seen at a glance by any reader who will compare the closing lines of § 12 with the supposed proviso above, which attempts to express the second alternative construction possible under the *Columbia Case*.

After the best consideration we have been able to give to that decision, we cannot escape the impression that one of two results must necessarily follow from it: Either the general revenue of the locality may be, in great part, or wholly, absorbed for twenty years, and diverted from the maintenance of the government by the effect of an annual tax under § 12; or, on the other hand, if the absolute needs of the local government are entitled to priority of payment from the authorized revenue under § 11, then any so-called "tax" imposed under § 12 must depend wholly on the flimsy contingency whether or not any surplus remains from the regular rates after the ordinary expenses of the city, etc., have been satisfied.

Such a "tax" would be in reality no tax. It certainly would not be a "tax sufficient to pay" the indebtedness incurred, as § 12 demands. It would be a mere contingent charge against the unexpended portion of the general revenue of each year. It might never "pay" the indebtedness; and its struggle for any sort of existence would be against great odds.

So far, we have attempted to estimate the practical effects of giving § 12 play within the limitations of § 11, as required by the *Columbia Case*. We now ask whether either of the alternative constructions above indicated can be accepted as a reasonable and true interpretation of the meaning of the Constitution?

2. Or may not another alternative construction have been intended, one not sanctioned by the judgment in the *Columbia Case*, however? That is to say, may it not have been intended that the "annual tax," authorized to be imposed upon a vote, under § 12, should be levied and collected (within the limitations of that section), in addition to the annual rates for local purposes permitted (without any vote) by § 11.

If that view were taken, no such consequences as have been pointed out could follow; there would be no clash between the sections, no struggle to be settled as to which of them is of paramount authority.

Section 12 could then be regarded as a proviso to § 11, and any tax duly levied to meet a voted indebtedness would have a solid foundation on the taxable resources of the locality. Yet, on the other side, the possibility of depriving the municipality of means to sustain its government would disappear.

By that construction alone, it seems to us, can both of these sections be given full force.

The apparent obstacle to this construction is that part of § 11 which declares that "said restrictions as to rates shall apply to taxes of every kind and description, whether general or special," with certain exceptions as to existing indebtedness and renewals thereof.

That provision has created the difficulty in dealing with these sections. The argument in favor of the Columbia ruling is based upon it. That argument is that a tax under § 12 is a "special" tax, within the meaning of § 11, and hence within the restrictions.

The tax authorized by § 12 is not therein called a "special" tax, but an 'annual tax." Mere names, however, are of slight weight in such an investigation. The real inquiry should be whether a tax imposed under § 12 can, upon due consideration of the practical ends in view in these sections, be held to be included by the term "special" tax in § 11, within the intent of the Constitution.

We think not; first of all, because of the singularly unreasonable consequences (already indicated) which would then be possible.

3. Furthermore, the general design and aim of §§ 11 and 12 support the assumption that the restrictions of the former as to "special" taxes were not intended to nullify the grant of power as to annual taxes authorized by § 12 to be imposed after a vote of the people.

The two sections are component parts of a system of financeering which experience pointed out as furnishing a safer course than had been previ usly followed.

Two great objects were in view, and each of the sections treated of one of them.

One object was to limit the rates of taxation for raising the annual revenue required for local purposes; the other, to limit the power to incur indebtedness beyond the annual income and revenue provided for any one year.

Section 11 deals with rates of taxation for annual revenue which may be applied by the local authorities to meet "the ordinary and current expenses" of the local government. *Book* v. *Earl* (1885) 87 Mo. 252 (Compare Const 1875, art. 9, § 10).

Section 12 deals with the subject of indebtedness, its limitations, and the ways and means to meet it when assumed.

All through § 11 "annual rates" of taxation are mentioned, and the limitations are upon those rates. In the opening lines of § 12 appears a prohibition of indebtedness "for any purpose, to an amount exceeding in any year the income and revenue provided for such

year" without the assent of two thirds of the voters, etc.

The rates of annual taxes sanctioned by § 11 are the chief source of the revenue thus mentioned. If it had been the intention that the restrictions of § 11 as to rates of taxation should apply also to taxes to meet indebtedness, then § 12 should certainly have ended at the word "jail."

To authorize the creation of indebtedness would then have been quite enough.

If the only resource for payment of such indebtedness is the revenue already allowed by the rates prescribed in § 11, what need was there to go further and authorize by the last lines of § 12 another tax levy which could only be operative within the limits of § 11. Taxes up to those limits could be levied annually under § 11, without the ceremony—rather say, farce—of levying an annual tax under the power given by § 12, which, we are told, conferred in reality no more power than already existed under § 11.

If the municipality was authorized to, and did, incur an indebtedness under the power contained in the first half of § 12, the obligation would necessarily be a charge against its revenues. Then why give further power, as is done by the second proviso of § 12, to levy any annual tax to meet such indebtedness if all the tax that could be levied was already sanctioned by § 11?

If the view expressed in the *Columbia Case* is sound, all of the latter proviso in § 12 (except, perhaps, as to the limit of twenty years to terms of indebtedness) could be absolutely stricken out without affecting the meaning of the Constitution in the slightest particular. Certainly all that part of it which authorizes, or rather commands, the levy of an "annual tax" would be wholly worthless and null.

But we are not authorized to adopt a construction which substantially discards a clause of such a document, if another reasonable interpretation can be stated which will give effect to that clause.

The principle of interpretation on that point is familiar, and we state it in the words of Judge Cooley:

"The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict the court must harmonize them if practicable, and must lean in favor of a construction which will render every word operative rather than one which may make some words idle and nugatory." Cooley, Const. Lim. 6th ed. 1890, p. 72.

If the word "special," near the close of § 11, be held to apply to any special taxes that might be levied for use under the "cash system" which the Constitution establishes, but not to apply to taxes expressly authorized, by the very next section, to meet indebtedness beyond the revenue, available on the cash basis for each year, then the last proviso of § 12, permitting an annual tax to pay a voted indebtedness, would have full vigor and effect; otherwise it cannot have any force whatever.

It is therefore our duty to construe the word in that manner, under the rule defined by Judge Cooley, to save that proviso of § 12 from annihilation by construction.

4. The supreme court has definitely held that the term "special taxes," used in § 11, does not include special assessments for street improvements, although the ruling concedes that those assessments are sustainable only as an exercise of the taxing power. *Farrar* v. *St. Louis* (1883) 80 Mo. 379.

That decision tends to sustain the opinion that the special taxes referred to in § 11 are only such as come within the general purview of that section.

The context must always be kept in view in determining the meaning of any one word of an enactment. That is a general and very useful canon of interpretation.

We should not, moreover, lose sight of the fact that, at the time the Constitution was framed, certain special taxes were leviable in the counties in addition to the general levies allowed. We recall, at this time, the road tax (2 Wagner, Stat. 1872, p. 1225, § 38), and the poor house tax (2 Wagner, Stat. 1872, p. 998, §§ 8–12). There may have been others.

These taxes might have been imposed at any time by the county authorities along with the general levies.

The limit of taxation for ordinary county purposes (except in St. Louis) was 50 cents on the $100 valuation, when the Constitution was in preparation. 2 Wagner, Stat. 1872, p. 1193, § 165. Under the statute of 1865 that limit was 80 cents (Gen. Stat. 1865, p. 121, § 76), and the laws of 1855 fixed it at 40 cents (Rev. Stat. 1855, p. 1349, § 1). It was well known to the people of the state that the limit of 50 cents, in force in 1875, was barely sufficient in many counties to meet the annual requirements.

Bearing these facts in mind, what should be held to be the fair and intended scope of the term "general and special" taxes, with reference to the restrictions of § 11? Were they not intended to include all taxes for raising current revenue in the specified municipalities, as distinguished from taxes expressly authorized (by the next section) to meet indebtedness.

5. Section 11 in no manner deals with future indebtedness, or (in express terms) with taxes to meet it. It refers to taxes to pay existing indebtedness, but only in order to declare that they are not within the scope of the section or of its restrictions. That remark as to existing indebtedness is in the nature of an exception to the limitations of § 11. And how much more clearly is such an exception expressed by the plain language of § 12 (which immediately follows) as to taxes imposed thereafter upon a vote of the people on incurring new indebtedness authorized by the Constitution itself?

The provisions of § 12 on that point are designed to regulate a particular topic, namely, the laying of a "sufficient" annual tax to meet indebtedness duly incurred for certain governmental purposes upon the requisite vote. These definite and special provisions treat of one phase only of the general subject of taxation, and their situation in the organic law indicates the intent to take them out of the general declarations as to rates in § 11. Otherwise, as we have shown, those provisions of § 12 had better in fact be stricken out of the fundamental law, for they will have utterly perished by construction.

6. View the subject as we may, the restrictions on rates in § 11 cannot be applied to an annual tax authorized by § 12, without reaching results which will cancel from the organic law the second proviso of the latter section.

That must be the inevitable effect of following, and attempting to apply, the Columbia ruling.

It appears impossible to give that ruling of fact without becoming involved in difficulties the solution of which will require the interpreter to discard some part of one or the other of these sections of the organic law to reach any sort of consistent construction.

It seems first of all necessary that the funds, permitted by § 11 to be raised for the legitimate ordinary purposes of the government, should be preserved from invasion or diminution by any tax levied under § 12. Experience demonstrates that the limitations of § 11 are narrow enough, even as applied to the general needs of the municipalities which that section governs. The provisions of § 12 were not designed to cut down the annual revenue intended for the ordinary wants of the local governments. But such a cutting down would be imperative, if the first alternative ruling, already discussed, were adopted.

On the other hand, the terms of § 12 are not so drawn as to permit the conclusion that the tax levied under them was intended to be any such myth as it would be, if it depended only on a surplus remaining, each year, from the rates levied under § 11.

The only escape from these results is in the reading of those sections which we have above attempted to justify, namely, that the tax expressly authorized in the last lines of § 12 may be imposed in excess of the rates named in § 11, if the other limitations in § 12 are observed.

7. We believe also that a due consideration of the exceptions to the rate limitations of § 11 and of the exceptions in § 12 will tend to show that § 12 was never designed to be operative merely within the limits as to rates defined in § 11.

But we do not regard that point as requiring further development at this time, and in view of the other reasons that support our conclusion.

8. We believe that conclusion gives proper and full effect to the views on this topic announced by many of the learned members of the constitutional convention of 1875 during its sessions, and it is in accord with the construction which the members of the general assembly appear to have adopted in various enactments in regard to revenue.

The learned trial judge, who decided the *Columbia Case* on the circuit, felt bound, no doubt, to give much weight to some remarks in *Barnard* v. *Knox County* (1891) 105 Mo. 382, 13 L. R. A. 245, which seemed to point toward the result reached in the Columbia judgment. But in the Knox county case those remarks were unnecessary, and cannot be considered to have authoritative force.

Our judgment is that the ruling in the *Columbia Case* should no longer be followed, and that we should adopt a position which will recognize the force of all parts of §§ 11 and 12.

No doubt the Columbia ruling might better express the constitutional commands as we would wish they were written, and the learned judge who delivered it has given the best reason that can be assigned to sustain it; but we think the ruling appears faulty when practically applied, and that it will not bear the tests of time and trial.

9. If the case is to be governed by the terms of § 12, the question then arises whether the limitations of that section have been exceeded.

On that point there is some conflict in the precedents from other states; but the correct rule we think has been well stated by Judge Dillon in the latest edition of his work on Municipal Corporations, *viz.:*

"Under the constitutional provisions in Iowa, Illinois, Indiana, and Pennsylvania, referred to, it is held that a corporation may make a contract (at least for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished; and in such case, the whole amount which may ultimately become due does not constitute a debt within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition." 1 Dill. Mun. Corp. 4th ed. 1890, § 136*a*.

The term "indebtedness" is a wide one, and must be construed in every case in accord with its context.

It has been very recently considered, in its application to the subject in hand, by the court in banc, and the conclusion was announced that such an obligation to pay an agreed sum, year by year, for the furnishing of certain necessary supplies during a term of twenty years, was not an immediate indebtedness for the entire amount that might ultimately become due by instalments during that term.

There is no occasion to enter into an original discussion of the reasons for that conclusion, since they have been already given in the opinion of the court in banc in *Saleno* v. *Neosho* (1895) 127 Mo. 627, 27 L. R. A. 769.

Following that decision we hold that the indebtedness created by the Lamar ordinance did not pass beyond the limits as to amount prescribed by § 12.

10. On the remaining point, as to the meaning of "income and revenue provided for such year," in § 12, we coincide with the view indicated in the divisional opinion in the present case.

It follows that the judgment should be reversed and the cause remanded. It is so ordered.

Gantt, Sherwood, and **Robinson, JJ.,** concur in this opinion.

Brace, Ch. J., and **McFarlane** and **Burgess, JJ.,** dissent from the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th paragraphs, and concur in the views expressed in the opinion delivered in this cause by Chief Justice Black in the first division.

MISSOURI SUPREME COURT (Division 2).

Josephine SULLIVAN, *Appt.*,
v.
JEFFERSON AVENUE RAILWAY COMPANY, *Respt.*

(.....Mo.....)

1. A sworn statement by a witness is not inadmissible for the purpose of impeachment, when its accuracy is denied by the witness merely because it was procured by the agent of the party offering it without notice to the other party.

2. A lady passenger whose light gauzy summer dress is ignited on an open street car by a match carelessly thrown by another passenger after lighting a cigarette cannot hold the street railway company liable for her injuries, where the servant in charge of the car was not chargeable with any negligence.

(March 3, 1896.)

APPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendant in an action brought to recover damages for personal injuries inflicted by fire communicated to plaintiff's clothing while in defendant's car which defendant negligently failed to extinguish. *Affirmed.*

The facts are stated in the opinion.

Messrs. **F. Gottschalk** and **Ed. L. Gottschalk** for appellant.

Mr. **Edward S. Robert,** for respondent:

If a witness says he does not remember making a statement contrary to his testimony, it may be shown that he did. Nothing but a direct admission will deprive the party of the right to contradict him.

Peck v. *Ritchey*, 66 Mo. 114.

Where a witness admits that he made and signed an affidavit it may be read in evidence without examining him in regard to it.

Spoonemore v. *Cables*, 66 Mo. 579.

When a witness admits having written a letter it may be read in evidence without examining him as to its contents.

State v. *Stein*, 79 Mo. 330.

A common carrier is not an insurer of the passenger's safety.

Jackson v. *Grand Ave. R. Co.* 118 Mo. 199.

If the judgment is for the right party the supreme court will not reverse the cause for errors in the instruction or in the admission of testimony.

Finley v. *St. Louis Refrigerator & W. G. Co.* 99 Mo. 562; *Walsh* v. *St. Louis Exposition & M. H. Asso.* 101 Mo. 544; *Huse & L. Ice & Transp. Co.* v. *Heinze*, 102 Mo. 245; *Fortune* v. *Fife*, 105 Mo. 433; *Bushey* v. *Glenn*, 107 Mo. 331; *Wolff* v. *Campbell*, 110 Mo. 120; *Norton* v. *Paxton*, 110 Mo. 456; *Williams* v. *Mitchell*, 112 Mo. 300.

Gantt, J., delivered the opinion of the court:

The defendant is a street-car company operating its cars on Jefferson avenue in the city of St. Louis. On the 9th of August, 1891, the plaintiff, a young lady, with a companion, another young lady, Miss Barrett, was a passenger on one of defendant's cars in charge of Henry Reid, the driver. The car was what is known as a "bob-tail" horse summer car, and the driver fills the place of both conductor and driver. The plaintiff and her friend were sitting on the back seat, and the car was moving north. As the car reached a point near the northern line of Washington avenue, which it crosses almost at right angles, Henry Voss, another passenger, sitting opposite plaintiff, lit a cigarette, and attempted to throw the match out of the back door. Plaintiff was dressed in a light gauzy summer dress, and in a moment after Voss threw the match plaintiff's dress was discovered on fire. She screamed, as did the other ladies, four or five in number, and ran to the front door, and told the driver she was afire. He immediately stopped his car. In the meantime the passengers had all left the car, and plaintiff ran off screaming. Mr. J. F. Robinson, living at No. 700 Jefferson avenue, happened to be looking out of his window, and saw plaintiff's dress burning, and with great presence of mind took a quilt, and ran to her rescue, and smothered the flames as she ran up the steps of a hospital near by. Her hands and arms and side were severely burned, so much so that her left hand was crippled and rendered useless. She sues the company for the negligence of its driver, the gravamen of her complaint being contained in this allegation of her petition: "That said defendant's car was under the charge and control of its agent. That while this plaintiff was sitting in said car, to be carried to the point of destination on Jefferson avenue between Washington and Lucas avenue, her dress was set on fire on said car, and, the same threatening to burn her to death, she, being then on fire, applied to said agent and driver in charge of and managing said car for protection and assistance, which protection and assistance said defendant was by law and by its undertaking bound and obliged to render and extend to her; but that said defendant, by its said agent and driver, refused to protect or assist her, but, on the contrary, said agent and driver rudely, wrongfully, and unlawfully pushed her away, and compelled her to jump from the car, all on fire, as she then was. That the flame could easily have been extinguished at the time she applied to said driver for such protection and assistance, but by his refusal to do so, and his acts in the premises, she was awfully burned, all about her body," etc. The case was tried to a jury, and a verdict returned for the defendant, and judgment rendered accordingly. To reverse the judgment plaintiff assigns two errors: First, in admitting in evidence an affidavit made by Miss Barrett, a witness for plaintiff, to contradict her evidence on trial; second, error in the instructions. Of these, in their order.

NOTE.—As to the duty of a carrier to protect a passenger from assault by a fellow passenger, see *note* to Illinois C. R. Co. v. Minor (Miss.) 16 L. R. A. 627.

See also 47 L. R. A. 120.

1. When this affidavit was offered, counsel waived all objections to it save that "the affidavit was taken by an agent of defendant without notice to plaintiff." *Russell* v. *Glasser*, 93 Mo. 353. The witness did not admit she had made the statement shown her in her affidavit. She intimated very plainly that her statement had not been written down as she gave it. Nothing less than an unequivocal admission that the witness made the very statement attributed to him or her will deprive the other party of proving the statement. *Peck* v. *Ritchie*, 66 Mo. 114. That a witness may be impeached by contradictory statements made out of court will not certainly be controverted at this late day. It is elemental, and surely the fact that the contradictory statement is under the solemnity of an oath does not lessen its value for impeachment. The mere fact that the sworn statement was procured by an agent of the party offering it does not affect its competency. If it be claimed that any fraud was perpetrated in suppressing a part of the statement, or that a statement is inserted which the witness insists he did not make, he is entitled to explain it, and the whole matter is left to the trier of fact, whether court or jury, to weigh the credibility of the witness, but it does not affect the admissibility of the statement. There is no merit in this assignment. *Bogie* v. *Nolan*, 96 Mo. 85. Overruling *Priest* v. *Way*, 87 Mo. 16.

2. That the court erred in not instructing the jury as to the proper degree of care required of a carrier of passengers we think is true. While not insurers, street-car companies are carriers of passengers, and are held to that high degree of care that is demanded of other railways in carrying passengers; that is to say, the highest degree of practicable care and diligence which prudent men would observe in a like business, and under similar circumstances. *Jackson* v. *Grand Ave. R. Co.* 118 Mo. 199; *Clark* v. *Chicago & A. R. Co.* 127 Mo. 197; *Waller* v. *Hannibal & St. J. R. Co.* 83 Mo. 608; *Furnish* v. *Missouri P. R. Co.* 102 Mo. 438. But, conceding this, how could the jury have reached a different conclusion? Plaintiff's counsel admit that the starting of the fire was in no manner attributable to any negligence on part of defendant. A fellow passenger threw a lighted match into plaintiff's dress in an open summer car. Her dress was of the lightest material, and, before defendant's driver knew anything of it, or by the exercise of the highest degree of care could have anticipated such a misfortune, the unfortunate lady was enveloped in fire. What did prudence of the highest character demand? Evidently the first step was to stop the car. This Miss Barrett, plaintiff's own witness, says the driver did immediately, and she is corroborated by all the other witnesses as to this. What next? Plainly, to aid the unfortunate young lady by assisting in using any and all appropriate means at hand to extinguish the fire. There is not a scintilla of evidence that the driver had any appliance suitable for such a purpose. Nor could it be expected that the proprietor of this horse car on a summer day would have anticipated that one of its passengers would be burned in this way. The most prudent man would never have thought of such an accident, nor have furnished such a car in such weather with fire extinguishers. The car was only 12 feet long, and the moment the plaintiff found she could not escape through the front door she ran out the rear door. The evidence of the driver, who had died in the meantime, was preserved in a deposition, and he testified he burnt his hands in the effort to assist plaintiff; that he called to Voss, who dropped the match, "to pull her dress off of her." Considering the rapidity with which her dress burned, the circumstances under which it was ignited, the promptness of the driver in stopping the car, and the escape of plaintiff from the car by the rear door before the driver could possibly reach her after halting his team, it must be ruled that this deplorable accident was in no manner the result of any negligence or wrong on the part of defendant or its servant, but was wholly attributable to the party who carelessly threw the match into the inflammable material of which plaintiff's dress was made; and there is no evidence showing that the driver could have averted the damage had he reached her before Mr. Robinson did. It is due to the driver to say that the allegations that he forced her off the car and treated plaintiff brutally were not supported by the evidence nor credited by the jury, and plaintiff's evidence of his swearing at her or pushing her can well be attributed to her very great excitement at the time. The verdict of the jury was for the right party, notwithstanding the errors in the instructions, and the judgment will not be reversed under such circumstances.

Judgment affirmed.

Sherwood and **Burgess, JJ.**, concur.

Sherwood, J., concurring:

I would have thought the foregoing case correctly decided but for the recent decision in *Fuchs* v. *St. Louis* (Mo.) 31 S. W. 115, where it is said: "All the facts which made the sewer dangerous might fairly have been found to be within the knowledge of the city officials after the lapse of time following the fire. . . . Carefully managed sewers do not, according to the common experience of men, usually blow up, and scatter destruction and death. Such a performance is of itself entitled to consideration, on the issue of care in respect of such property; or, as some jurists have said, 'The thing itself speaks.' Had the cover of the large opening west of the saloon been removed, so as to allow the direct escape of the gas at that point, it may be that the disaster would have been avoided. It was not removed; nor do any other steps appear to have been taken in regard to the care of the sewer by the city authorities after the flow of the oil into it on the 22d of July. It is not always consistent with common prudence to await a catastrophe before taking precautions against it. Nor is it conclusive of careful managment that a particular disaster has never before occurred. . . . To what extent such foresight is de-

manded by the duty to use ordinary care it would be very difficult to say. We shall not attempt to generalize on that topic now." And so the action of the trial court in that case in granting a demurrer to plaintiff's evidence was reversed, and the cause remanded. Adopting the language just quoted as peculiarly applicable to the case at bar, wherein (like *Fuchs' Case*) no such accident, it seems, had ever occurred in a street car before, let me apply to the case in hand the principles so succinctly and lucidly announced and luminously expounded in *Fuchs' Case*. And in making such application I find that this case is far stronger in its facts for warranting a recovery than that case, for the reason that matches, since their invention, and when in careless hands, have frequently set fire to dresses and other things, thereby causing extensive conflagrations. And it is a well-known fact (a fact so well known that judicial notice may be taken of it) that men ride in these "open summer cars," that while thus riding it is quite a common occurrence for them to light and smoke cigarettes. And it is also a common and well-known fact that ladies, in warm weather, frequently wear dresses of a light, gauzy, and tinder-like material, as that worn by plaintiff. So that on that 9th day of August, 1891, in that "open summer car," you have assembled in close juxtaposition all of the constituent elements and conditions necessary to cause the injury which actually did occur. True, it does not appear that a lady's dress ever took fire from the careless dropping of a match in an "open summer car," but that such and similar occurrences have taken place from that and similar causes in other localities is a matter of common knowledge and common observation; while, on the other hand, such an accident as that of a sewer exploding has never (according to the evidence in *Fuchs' Case*) occurred before since this terrene first swung her green disk into her ceaseless orbit around the sun. So that in the case at bar you have present the conditions and the possibility of plaintiff's dress taking fire, coupled with the probability that it would do so from the fact that dresses and similar materials had done so in other instances and in other localities, where were assembled together gauzy dresses, careless fingers, matches, and a motive for the latter's ignition. Besides, it is not to be overlooked that in this case there was due to plaintiff from the defendant company the "highest degree of care," while from the defendant city, in *Fuchs' Case*, there was due (if, indeed, any degree of care at all in respect to an unexpected explosion of gases) only ordinary care. Nor is it to be forgotten that in the latter case the city was engaged in the performance of a public and governmental duty, promotive of the public health, in the discharge of which duty a municipality is never held liable, while the defendant company in this instance was pursuing its own private business as a common carrier, for its own private gain. When I thus contrast the facts in *Fuchs' Case* with those in the present action, when I consider the higher degree of care due in the latter case, when I consider also that accidents of ladies' dresses catching fire are of frequent occurrence and of public notoriety, but that explosions from gases in sewers never had occurred before the Fuchs incident, and yet that in the *Fuchs' Case* the city was held prima facie liable, though no means or causes were pointed out, either in the petition or in the opinion, whereby the city could have anticipated or prevented the accident,—I feel constrained to say, while following the lines laid down in that case, that if it was the duty of the city (required only to exercise ordinary care) to anticipate and to provide against the unexpected, and to formulate means and measures to prevent the occurrence of something which it had never entered into the heart of man to conceive of as possible, that then in this case "all the facts which made the open summer car dangerous might fairly have been found to be within the knowledge of the defendant's officials after the lapse of time following the fire," catching ladies' dresses for so many years, and in so many various ways and localities, prior to the building of defendant's road, that, therefore, it cannot be logically or lawfully said, as is said in this case (if *Fuchs' Case* contains either logic or law): "Nor could it be expected that the proprietor of this horse car, on a summer day, would have anticipated that one of the passengers would have been burned in this way. The most prudent man would never have thought of such an accident, nor have furnished such a car with fire extingishers." And, coupling together by quotation and paraphrase the forceful thoughts of my two distinguished associates within the narrow confines of a single page, I may, using as few as possible of my own poor words, by way of comment, observe further that, had such fire extinguishers, or a tank of water on top of the car, with suitable hose attached, extending down into the car, been provided, "so as to allow the direct escape" of water at that point onto the burning dress, "it may be that the disaster would have been avoided." But neither extinguishers nor tank, etc., were provided, "nor do any other steps appear to have been taken in regard to the care of the car by the defendant's authorities." On "carefully managed" horse cars, "according to the common experience of men," cigarette smokers do not usually cast burning matches on ladies' dresses, and thereby scatter flames and danger of a burning death. "It is not always consistent with common prudence to await a catastrophe before taking precautions against it." No matter whether you have any reason to anticipate such a catastrophe or not, or whether, anticipating it, you could have done anything to prevent it. "Nor is it conclusive of careful management that a particular disaster has never before occurred." "To what extent such foresight is demanded by the duty to use ordinary care it would be very difficult to say." It would seem so, and it would further seem that if this court, with all the facts before it which constituted and caused the unexpected and litigated injury, declares it "very difficult to say" "to what extent such foresight is demanded by the duty to use ordinary care," that assuredly a

defendant should not be required to more clearly perceive by its "foresight" the extent of its precautionary duty than this court with all the light of surrounding circumstances is able to perceive after looking through its "hindsight." But I "shall not attempt to generalize (or particularize) on that topic now." In conclusion, I am forced to say that it will require something more penetrating and powerful than a cathode ray to discover and discern the why and the wherefore that the plaintiff in *Fuchs' Case* should win and the plaintiff in this case lose.

NEW JERSEY SUPREME COURT.

STATE of New Jersey, CONSOLIDATED TRACTION COMPANY, Prosecutor,
v.
The City of ELIZABETH.

[(.....N. J.....)

1. The presumption is that an ordinance within the powers granted to a municipality in its charter is reasonable, unless from its inherent character or from evidence it is demonstrated to be unreasonable.

2. An ordinance prohibiting the use of salt on a street railway track except on curves at street corners is not invalid as an impairment of the franchise of a street railway company, or a restriction of the operation of its road, merely because it will occasion inconvenience, or involve expense, or prevent the company from operating its road so successfully.

3. Evidence that the use of salt is necessary to make it possible to run street cars at a low place in which the water gathers during the day and freezes at night is not sufficient to show that an ordinance prohibiting the use of salt is unreasonable, where it does not appear that at reasonable expense the water cannot be diverted from the tracks.

(March 20, 1896.)

CERTIORARI to test the validity of an ordinance of the City of Elizabeth prohibiting the use of salt upon street-car tracks. *Dismissed.*

The material provisions of the ordinance were "that hereafter no person or persons, corporation or corporations shall put, throw, or place salt, rock salt, saltpetre, or any other kind of salt, or cause the same to be put, thrown, or placed on any street railway track or other part of the street or streets within the city of Elizabeth, under a penalty of $10 for each offense, provided that any street railway company may use salt, rock salt, or saltpetre on all curves of their railways leading from one street or avenue into another street or avenue running at right angles therewith."

Mr. **Frank Bergen,** for prosecutor:

A right granted by statute cannot be taken away by an ordinance.

Allen v. *Jersey City,* 53 N. J. L. 522; *State, North Hudson County R. Co.,* v. *Hoboken,* 41 N. J. L. 71; *State, Hudson Teleph. Co.,* v. *Jersey City,* 49 N. J. L. 303; Dill. Mun. Corp. 4th ed. §§ 319-327, 374; Cooley, Const. Lim. 5th ed. 240.

The prosecutor, by virtue of the act under which it was organized, has express authority to enter upon any street on which a street railway is or may be constructed with the consent of its owners and operate the same without the consent of the municipality, and, in so far as the ordinance in question interferes with the operation of the street railroads of the prosecutor in Elizabeth without reasonable cause, it is in conflict with the traction act of 1893, and with the rights of the prosecutor.

State, North Hudson County R. Co., v. *Hoboken, supra; Com.* v. *Temple,* 14 Gray, 69.

Mr. **James C. Connolly,** for defendant:

The city is bound to keep its streets in a clean and healthy condition, and may prohibit the depositing of anything on the street which may prove injurious to the public or add to the accumulations which are removed, from time to time, at the expense of the public.

Dry Dock, E. B. & B. R. Co. v. *New York,* 47 Hun, 221.

The city has full control over its streets, and may forbid the removal of snow in any manner.

Union R. Co. v. *Cambridge,* 11 Allen, 287; *Broadway & S. Ave. R. Co.* v. *New York,* 49 Hun, 126; Dill. Mun. Corp. 4th ed. § 713, 714; Elliott, Roads & Streets, 573-581.

The city may enforce whatever reasonable regulations may be necessary to prevent injury to the public or to private persons.

Pennsylvania R. Co. v. *Jersey City,* 47 N. J. L. 286; Tiedeman, Pol. Powers, § 593; *State, Delaware, L. & W. R. Co.,* v. *East Orange,* 41 N. J. L. 127; Elliott, Roads & Streets, 564; 23 Am. & Eng. Enc. Law, 998-1001, and notes; Booth, Street Railway Law, § 239, p. 256, § 230, p. 313; *Broadway & S. Ave. R. Co.* v. *New York, supra.*

Where a municipality legislates on a matter clearly within it power, its regulations will not be regarded as unreasonable. The party who attacks such regulations must show that they are unreasonable.

State, Trenton Horse R. Co., v. *Trenton,* 53 N. J. L. 132, 11 L. R. A. 410; *Haynes* v. *Cape May,* 50 N. J. L. 55; Booth, Street Railway Law, §§ 223, 224; Elliott, Roads & Streets, 333, 573-581; Tiedeman, Pol. Powers, 593; *State, Delaware, L. & W. R. Co.,* v. *East Orange, supra.*

Depue, J., delivered the opinion of the court:

The ordinance under review was passed in virtue of § 31, subd. 7, and § 32, of the city charter (Pub. Laws 1863, pp. 118–123). It is contended by the prosecutor that the ordinance is invalid for two reasons: First, that it is unreasonable; and, second, that it is an invasion of the legal rights of the prosecutor in respect of the company's exercise of its franchises within city limits.

NOTE.—As to the use of salt on railway tracks to prevent freezing, see also Kirk v. Norfolk & W. R. Co. (W. Va.) *post,* —.

The power of the municipality, by ordinance, to make reasonable regulations controlling the operations of street-railway companies within the city is undoubted. The franchise granted to those companies, to use the streets of the city for railroad purposes, affords no immunity from any police control to which a citizen could be subjected. *State, Trenton Horse R. Co.*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410. The ordinance set aside in the *North Hudson County R. Case* was an ordinance requiring the company to pay an annual license fee for each of its cars, the amount of which fee was such as to show that the ordinance was intended for the purposes of revenue, and the city had not the requisite power to exercise the licensing power to provide revenue. The court distinctly affirmed the validity of ordinances of the character of the ordinance in question, if they were reasonable, and held that the legislature, when it authorized the use of the public streets for such purposes, is presumed to have intended that the grantee of the franchises should hold its privileges subject to such regulations as are reasonably necessary for the common use of the street for a street railway and for ordinary travel. *State, North Hudson County R. Co.*, v. *Hoboken*, 41 N. J. L. 71. The subject of municipal regulation of street railroads is fully discussed in Booth, Street Railway Law, §§ 223–239, inclusive. The liability of this company to municipal regulation by the city of Elizabeth is also affirmed by the terms of the law under which it holds and exercises its franchises. The main branch of its street railway system was constructed by the Elizabeth & Newark Horse-Railroad Company,—a company incorporated by a special act passed March 25, 1864. The 15th section of that company's charter enacts "that the said company shall within the limits of the city of Elizabeth in all things be subject to the provisions of the charter and ordinances of said city, now or hereafter to be in force." Pub. Laws 1864, p. 504. The rest of its tracks in the city were laid by the Union County Street Railway Company, which was incorporated under the general railroad act of 1886, the 19th section of which empowered the municipal authorities to establish such reasonable regulations as to the mode of use of the tracks, and the removal of snow and ice therefrom, as the interest and convenience of the public may require. Pub. Laws 1886, pp. 185–193. Subsequently, by consolidations and leases, the property and franchises of these two companies becamed vested in the Consolidated Traction Company, the prosecutor in this case. That consolidation did not enlarge the franchises, powers, or privileges of the original companies in the city of Elizabeth, and the new company took the rights and franchises it acquired by the consolidation subject to the original conditions and limitations. *State, Wilbur*, v. *Trenton Pass. R. Co.* 57 N. J. L. 212. The contention of the prosecutor is that the use of salt in removing ice from its tracks is not attended with any inconvenience, discomfort, or injurious consequences to the public, and the ordinance therefore is an arbitrary and unreasonable interference with the company in the management of its property and the conduct of its business. Much evidence on both sides of this controversy, consisting of the testimony of experts taken under the rule, and pamphlets and official reports on the subject, has been laid before the court. Where an ordinance is within the powers granted to the municipality in its charter, the presumption is that it is reasonable. The judicial power to declare it void can be exerted only when, from the inherent character of the ordinance, or from evidence taken showing its operation, it is demonstrated to be unreasonable. *State, Trenton Horse R. Co.*, v. *Trenton*, 53 N. J. L. 132–140, 11 L. R. A. 410; *Paxson* v. *Sweet*, 13 N. J. L. 196; Booth, Street Railway Law, §§ 224–230. The ordinance was passed by the unanimous vote of the city council and was signed by the mayor. The testimony with respect to the injurious effects of the use of salt in removing snow and ice from railroad tracks is conflicting, and is not of such force and effect in favor of the prosecutor's contention as would justify us in condemning the official action of the city authorities.

The second ground on which the ordinance is assailed is that it impairs the company's franchises to such a degree as to be unlawful. These companies possess franchises acquired under the authority of the state legislature. The argument was that the prosecutor, having complied in all respects with the conditions upon which its use of the streets became entirely lawful, to the full extent of its grant of franchises, was therefore entitled to have such use of the streets as would enable the company to exercise its franchises therein as fully as authorized by the legislative grant, unimpaired by municipal interference. The power granted to municipal bodies to legislate by ordinance is undoubtedly a grant to a subordinate body, and its legislative acts, when counter to the acts of the state legislature, must therefore give way; but these companies nevertheless hold their franchises subject to such municipal regulations as do not unreasonably or unnecessarily interfere with the exercise of the franchises conferred by the legislature. *Allen* v. *Jersey City*, 53 N. J. L. 522. In considering this ground of objection, the status of these companies in their use of the streets must be borne in mind. A street-railroad company uses as its roadbed public streets, provided and improved at public expense, and acquired and held for the benefit and advantage of the public at large. In this respect such a company occupies a position different from that of a railroad company, exercising its franchises and transacting its business upon a roadbed provided at its own cost and for its exclusive use, except at crossings over streets and highways. The legislature, in authorizing a street-railway company to make use of the public streets, intended that the grantee of such privileges should be subject to municipal regulations of a greater scope than would be allowable in the case of companies occupying and using their own roadbed. To justify the vacation by the court of an ordinance regulating a street-railroad company's use of the street, which otherwise would be legal, on the ground that it impaired the company's franchises, or restricted the operation of its railroad, the proof should amount to a demonstration that the enforcement of the ordinance will necessarily have

that effect. That the company cannot so successfully operate its road under the restrictions prescribed by the ordinance, which would occasion inconvenience or involve expense, will not be sufficient to justify such judicial action. Within the limits here indicated, the subject must be left to the judgment and discretion of the municipal authorities. In the *Allen Case* the company whose rights were involved was a steam railroad company, operating its railroad exclusively under legislative authority, upon its own roadbed, and making no use of the streets except at the crossings of their tracks over them. The effect of the ordinance which the court held inoperative as against the company in making a crossing over streets, if enforceable against the company or its workmen, would necessarily have been to make the franchises of the company exercisible only by the consent of the board of aldermen, and to subject its right to exercise its franchises under its charter to the will of the legislative department of the city government. In *Union R. Co.* v. *Cambridge*, 11 Allen, 287, a city ordinance which absolutely forbade the removal of snow and ice from the tracks of a street railroad was sustained. The ordinance in question was passed under a statute identical in language with the 19th section of the general railroad act of 1886, quoted above. The contention on behalf of the company in that case, as it has been on this argument, was that the company, having the franchise to lay down a railway in the streets and run cars upon it, had, as incident to such franchise, a right to do whatever was necessary to make the use available, and therefore the right to remove obstructions of snow and ice which might impede or wholly stop the running of its cars. The ordinance nevertheless was sustained, and, upon this contention of the company, the reasoning of the court was that the use of the street was granted to the company only in common with others; that the snow and ice which it might be desirable or necessary for the company's purposes to remove might be very important for the convenience of other travelers to retain, and that the preponderance of public convenience should govern; that the power and duty of deciding which course was advisable were vested by law in the city authorities, and it was not to be supposed that their decision was made without good reason. And in *Dry Dock, E. B. & B. R. Co.* v. *New York*, 47 Hun, 221, an ordinance prohibiting the use of sand on a street railway was held to be valid, although it was alleged by the company that the pavement, by use, had become so worn and slippery that otherwise it could not run its cars with safety to its horses. It is not necessary, under the proofs in this case, to affirm or deny a power in the city government over street railroads as extensive and far-reaching as was held in the opinion of the court in the *Cambridge Case*. The evidence produced by the prosecutor touching the necessity for the use of salt to remove snow and ice from its tracks consisted of the testimony of its superintendent. He testified that in places where the tracks are low and the pavement high as in Elizabeth avenue, salt is needed to remove the snow; that, when the snow gets frozen on the rail, it cannot be got off with a snowplow and sweeper; that the only remedy is to use salt; and that the grades on which salt is required extend only a couple of hundred feet on either side of the Central Railroad. He also testified that in the middle of the day the water from the tracks would run to the low places, and freeze at night, and in the morning it would be impossible to run the cars unless salt is used on these low places, and that the removal of ice from the track by the use of salt was more necessary when the cars are propelled by electricity than with horse cars. The import of this testimony is that the situation in which the use of salt is required is limited, and it in no wise appears that the company could not provide for the diversion of water from this part of its tracks in some manner at a reasonable expense. This testimony falls short of that measure of proof which would justify the vacation by the court of this ordinance.

The writ should be dismissed.

TENNESSEE SUPREME COURT.

L. D. HICKERSON & COMPANY
v.
GERMAN-AMERICAN INSURANCE COMPANY, *Appt.*

SAME
v.
ROYAL INSURANCE COMPANY, *Appt.*

SAME
v.
EQUITABLE INSURANCE COMPANY, *Appt.*

(.....Tenn.....)

1. **The existence of a real difference** arising out of an honest effort between insurer and insured is necessary to make operative a provision in a policy for arbitration of differences.
2. **A mere general objection to a statement of loss,** without pointing out in detail the items excepted to, will not constitute such a failure to agree as makes a case for arbitration under an insurance policy.
3. **Appraisers in an insurance case** act in a quasi-judicial capacity, and must be free from bias in favor of either party.
4. **An insurer cannot demand an appraisal** and arbitration of the amount of loss while denying all liability under the policy.
5. **An appraiser chosen by an insurer** cannot demand that an umpire be selected who does not live in the vicinity of the property.
6. **An unreasonable demand of an appraiser** for the insurer that an umpire be chosen who does not live in the vicinity amounts to a waiver of arbitration.
7. **The market value of property destroyed,** so far as it is covered by insurance policies, is the amount to be recovered.

(February 13, 1896.)

NOTE.—For effect of unreasonable rejection by insurer of umpire from locality of fire, see also Brock v. Dwelling House Ins. Co. (Mich.) 26 L. R. A. 623, and Chapman v. Rockford Ins. Co. (Wis.) 28 L. R. A. 405.

APPEALS by defendants from judgments of the Circuit Court for Coffee County in favor of plaintiffs in actions brought to recover the amounts alleged to be due on certain policies of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Lellyett & Barr,** for appellants:

The condition of the policy that the amount of loss or damage of the property insured shall be submitted to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss and damage only, and shall not determine the question of the liability of the company, and that until such an appraisal shall have been permitted and such an award obtained the loss shall not be payable and no action shall lie against the company, the appraisal being made a condition precedent to the payment of any loss and to the maintenance of any action, is valid and binding.

Hamilton v. *Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419; *Scott* v. *Avery*, 5 H. L. Cas. 811; *Viney* v. *Bignold*, L. R. 20 Q. B. Div. 172; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 250; *Reed* v. *Washington F. & M. Ins. Co.* 138 Mass. 572; *Wolff* v. *Liverpool & L. & G. Ins. Co.* 50 N. J. L. 453; *Hall* v. *Norwalk F. Ins. Co.* 57 Conn. 105; *Hamilton* v. *Home Ins. Co.* 137 U. S. 370, 34 L. ed. 708; *Cole Mfg. Co.* v. *Collier*, 91 Tenn. 529.

An agreement in a policy of insurance that if any difference arises with respect to the amount of the claim for loss or damage by fire, such difference shall be submitted to arbitrators indifferently chosen, whose award or that of the umpire shall be conclusive, etc., and that no suit or action on this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, is not void as against public policy and such submission and award are a condition precedent to any action on the policy, unless performance has been refused or waived by the company.

Gauche v. *London & L. Ins. Co.* 10 Fed. Rep. 347.

Contracts making the rendering of an award a condition precedent to the right of action growing out of a transaction, or to any right of action arising at all, are good.

Pollock, Cont. p. 294; *Smith* v. *Boston, C. & M. Railroad*, 36 N. H. 458; *Stephenson* v. *Piscataqua F. & M. Ins. Co.* 54 Me. 55; *Rowe* v. *Williams*, 97 Mass. 163.

Where an award is made a condition precedent to the right to bring an action, no suit or action can be brought upon the transaction until the rendering of such an award.

Fox v. *Hempfield Railroad*, 3 Wall. Jr. 243, 2 Myer's Fed. Dec. 1298; *Elliott* v. *Royal Exch. Assur. Co.* L. R. 2 Exch. 245; *Dawson* v. *Lord Fitzgerald*, L. R. 1 Exch. 260, 2 Myer's Fed. Dec. 1306, note; *Trott* v. *City Ins. Co.* 1 Cliff. 439; *Lutz* v. *Linthicum*, 33 U. S. 8 Pet. 165, 8 L. ed. 904; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 250; *Stephenson* v. *Piscataqua F. & M. Ins. Co.* and *Rowe* v. *Williams*, *supra.*

Where the condition is so worded as to become a condition precedent, before the party on whom the condition rested can recover he must show performance or a readiness to perform.

Morse, Arbitration, 556; *Tinney* v. *Ashley*, 15 Pick. 546, 26 Am. Dec. 620.

Where the parties have stipulated that a submission and award shall precede the right to sue upon the policy, it is a condition precedent, performance of which or a waiver thereof must be shown.

2 Wood, Ins. p. 1013; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 258, 16 Alb. L. J. 464; *United States* v. *Robeson*, 34 U. S. 9 Pet. 327, 9 L. ed. 144; *Davenport* v. *Long Island Ins. Co.* 15 N. Y. Week. Dig. 62; *Yeomans* v. *Girard F. & M. Ins. Co.* 5 Ins. L. J. 858; *Mentz* v. *Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 82.

The plaintiff can only be relieved of the provision in question when a condition precedent by defendant's express waiver or refusal, or such misconduct as would amount to a fraudulent evasion.

Scott v. *Liverpool*, 3 DeG. & J. 334; 2 Story, Eq. Jur. 1457*a*; *Smith* v. *Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Herrick* v. *Belknap's Estate*, 27 Vt. 673.

The burden is upon the assured to establish all waivers.

Wood, Ins. p. 870.

Appraiser's authority to waive must be proved.

Bush v. *Westchester F. Ins. Co.* 63 N. Y. 531.

To constitute waiver the rule seems to be, Was the assured induced to believe he had fulfilled all the requirements?

Wood, Ins. p. 979; *Franklin F. Ins. Co.* v. *Updegraff*, 43 Pa. 350; *Enterprise Ins Co.* v. *Parisot*, 35 Ohio St. 35, 35 Am. Rep. 389; *Findeisen* v. *Metropole F. Ins. Co.* 57 Vt. 520.

The submission being the voluntary agreement of the parties, the words of it must be so understood as to give a reasonable construction to their meaning, and make their intention prevail.

Cooley v. *Dill*, 1 Swan, 317; *Halliburton* v. *Flowers*, 12 Heisk. 25.

If the contract provides for arbitration, and the appraisers severally appointed by the company and the insured fail to agree on a third, this does not justify suit.

2 May, Ins. 3d ed. p. 1140; *Davenport* v. *Long Island Ins Co.* 10 Daly, 535.

Messrs. **C. A. Sheafe** and **George W. Cross** for appellees.

Wilkes, J., delivered the opinion of the court:

Plaintiffs, L. D. Hickerson & Co., were insured against loss by fire in the three companies above named, the property insured being lumber, in a yard owned by them at Tullahoma, Tenn. The property having been destroyed by fire, suit was brought upon the policies. The causes were consolidated, and heard before the court and a jury, and a verdict was rendered against the companies separately, to wit: Against the German American Insurance Company for $1,834.94; the Royal Insurance Company, $1,834.94; and the Equitable for $918.57,—or a total of $4,588.45. The plaintiff remitted $34 94 each as against the first named companies, so as to reduce the judgment against them to $1,800 each, the amount sued for in the summons, leaving the

aggregate amounts of the judgments rendered $4,508.57.

It is insisted that the suits cannot be maintained under the provisions of what is termed the "arbitration" or "appraisement" clauses in the several policies. These clauses are substantially the same in each of the policies, and are the usual clauses found in the great majority of fire policies. We quote from the policy of the Royal Insurance Company, the others being in substance and effect the same: "The amount of sound value and of the damage shall be determined by mutual agreement between the company and the assured, or, failing thus to agree, the same shall then be immediately ascertained by a detailed appraisal by competent persons, etc., one to be appointed by the assured, and one by the company (which two persons shall, in case of a disagreement, appoint a third); and their report, rendered in detail in writing, and made under oath, shall be binding on the company and the assured as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy." And again: "Until such notice as aforesaid is given, particular account and certificate produced, examinations and appraisals permitted by the assured, the loss shall not be payable." Again: "It is hereby expressly provided that no suit or action against this company for the recovery of any claim under or by virtue of this policy shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner heretofore provided," etc. Similar clauses and provisions in fire policies have been upheld in the courts, the leading case being *Hamilton* v. *Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, where other authorities are collated. In some courts such provisions have been declared invalid, and in others they have been much limited and circumscribed. See Biddle, Ins. § 1153. In no tribunal have they been allowed to oust the courts of their jurisdiction (Biddle, Ins. § 1153); and they must be so construed as, upon the one hand, to protect the companies from fraudulent claims, and, at the same time, to secure the insured in the collection of his honest dues. It is evident that the object of such provisions is to furnish an easy court of appraisal and arbitration to settle real differences of estimate and opinion, without the delay and cost of a suit for that purpose. Until such real difference has arisen out of an honest effort between the insurer and insured, there is neither occasion nor authority for an appraisal and arbitration. In Beach, on Insurance (§ 1244) it is said, quoting from *Vangindertaelen* v. *Phœnix Ins. Co.* 82 Wis. 112, "the arbitration was only provided for in case the parties failed to agree." And again: "The provision making such award a condition precedent to the commencement of a suit upon that policy presupposes such failure to agree and consequent arbitration." Again, in § 1310, it is said: "An allegation that the insured furnished such proof, and offered in writing to arbitrate the amount of the loss, but that the company refused such arbitration, and refused to pay the insurance or any part of it, but not averring a failure to agree upon the amount, was held not to show a right to resort to arbitration," on the part of the insured. In *Boyle* v. *Hamburg-Bremen F. Ins. Co.* 169 Pa. 349, it is held, in substance, that there is no authority for the appointment of appraisers when the insurers and the insured have made no effort to agree and settle between themselves. See also *Chapman* v. *Rockford Ins. Co.* 89 Wis. 572, 28 L. R. A. 405; *Fanum* v. *Phœnix Ins. Co.* 83 Cal. 246; Biddle, Ins. § 1157.

It appears in this case that Curry, an adjuster, went to the complainant's books, and compared the original approximate statement of loss made by them with the books, and found what he claimed were discrepancies. To these he objected, and a revised statement was more carefully prepared from the books by the plaintiffs and submitted to the companies; but this does not appear to have been examined by the companies, and no counter statement was made to show the real account, as the companies understood it, but an appraisement was demanded, without further effort to arrive at the loss. These provisions in insurance policies are not intended to introduce or establish any new system for the adjustment of losses by fire that does not obtain in other business settlements and transactions. It was never intended that an appraisal should be demanded by either party before any occasion for it had arisen; otherwise, they would both prove instruments to delay the settlement of losses, instead of aiding in their settlement. Upon the happening of a fire loss, the insured is required to give notice and furnish a detailed statement of his loss. When this is received by the company it is incumbent on the company to examine the same; and if not agreed to, specific objections must be pointed out by the company and an honest effort must then be made to adjust the difference. A mere general objection to the proofs without pointing out in detail the items excepted to, will not be sufficient, but the objection must be so specific, with detail of items, as to enable the assured to see upon what points differences exist; and a counter statement, if necessary, should be furnished, showing the contention of the companies in such way that the difference, if practicable, may be adjusted and settled. If this shall fail after an honest effort is made, an appraisal may be demanded by either party, and only in such event. In the selection of appraisers, it is not contemplated that either party shall select a person with a view to sustain his own views or further his own interest, but the appraisers are to act in a quasi judicial capacity, and as a court selected by the parties, free from all partiality and bias in favor of either party and so as to do equal justice between them. This tribunal, selected to act instead of the court and in place of the court must be, like a court, impartial, and not partisan; and, if these provisions are not carried out in the spirit and for this purpose, neither party is precluded from going into the courts to reach his just deserts, notwithstanding the provisions In many courts it has been held that such demand for appraisal is a waiver of other defenses upon the part of the insurer, notwithstanding the policy may provide that the award shall be binding only as to the amount of loss, and shall not decide the liability of the company under the policy. Upon reason it would seem that this result should follow, as it would only be a farce to adjust the amount of loss when the company

denied liability for any amount. In such case the company has nothing to arbitrate, and the amount of damage is a matter to determine only after the preliminary questions of liability have been conceded or adjudged.

We are of opinion, therefore, that the insurer cannot demand an appraisal and arbitration of the amount of loss while at the same time it denies all liability under its policy; and a demand for appraisal by the insurer is a waiver of other defenses going to the question of liability. *Lasher* v. *North-Western Nat. Ins. Co.* 18 Hun, 98; *Rosenwald* v. *Phœnix Ins. Co.* 50 Hun, 172; 11 Am. & Eng. Enc Law, p. 354; Beach, Ins. § 1244; *Boyle* v. *Hamburg Bremen F. Ins. Co. supra; Western Horse & C. Ins. Co.* v. *Putnam*, 20 Neb. 331; *Bailey* v. *Ætna Ins. Co.* 77 Wis. 336; *German American Ins. Co.* v. *Etherton*, 25 Neb. 505; *Wainer* v. *Milford Mut. F. Ins. Co.* (Mass.) 11 L. R. A. 599, and *note; Farnum* v. *Phœnix Ins. Co.* 83 Cal 246, cited in *Savage* v. *Phœnix Ins. Co.* (Mont) 33 Am. St. Rep. 591, and note p. 599. In Biddle on Insurance (§ 1175) it is said: "When the insurer declines to recognize any liability to pay, this does not constitute a dispute, and the arbitration provisions are waived by such refusal." Beach says (§ 1244): "If the company denies its liability for the loss, there would be nothing, from its standpoint, to arbitrate. Hence the rule that such a provision is a condition precedent to a right to bring action on the policy does not apply when the company denies its liability."

In the case at bar an appraisement was demanded by the insurance company, and the selection of arbitrators required by them, without any real occasion therefor, so far as we can see from this record, and without any proper effort to otherwise adjust the loss, such as the policy contemplates, and before any differences had arisen, and the insured need not have consented thereto. It was, however, submitted to by the insured, and submission papers were drawn up by the companies, and handed to the insured and they were requested and required to name a party to act as their appraiser, which they did, and an appraiser was afterwards named by the companies. The appraiser selected by the insured was a resident of the vicinity of the fire. The appraiser selected by the companies was a resident of Nashville, Tennessee. Why a resident of another locality than that where the loss occurred was selected does not appear. It appears that the two appraisers attempted to select an umpire before they made any effort to agree between themselves upon the amount of loss, and before any difference had arisen between them. It appears to have been treated as one of the legal requirements of the policy and terms of submission, and tacitly assented to. In their efforts to agree upon an umpire, the appraiser of the companies submitted to the appraiser of the insured the names of the nine persons, none of whom lived in the locality of the fire. One lived at Murfreesboro, the others, at Nashville, Knoxville, Cincinnati, and Louisville. None of them were personally known to the appraiser of the insured. The appraiser of the insured submitted some eight or ten names of persons living in the vicinity, but none of them were acceptable to the companies' appraiser, and but one of them was known to him, though they could have been easily inquired about in the community. The companies' appraiser states that he insisted that, in fairness to all parties, some one should be selected who did not live in the vicinity; while the insured appraiser insisted that the umpire should be selected from the same locality as the fire, from persons who were conversant with prices, and he suggested every mill and business man whom he deemed competent, but the companies' appraiser would accept none of them. The appraiser of the insured states, further, that he suggested the name of a Louisville man, who happened at that time to be in the locality, and without having conferred with him. The appraiser for the companies assented, but afterwards asked the privilege of talking to him, and, after this was done, he declined to accept him. Thereupon the appraiser of the insured notified the appraiser of the companies that, having spent two days in an unsuccessful attempt to agree upon an umpire, there was nothing left for him to do. In his deposition he states that he made an honest effort to agree upon an umpire, and could not, and that he was not directed in what he did by the plaintiffs.

This is a short statement of what is apparent from the record as a tedious and unjustifiable wrangle over the selection of an umpire, before the necessity or occasion for one had arisen. It appears from the record that, while the insurance companies were thus insisting upon an appraisal, they were at the same time demanding further proof of loss, and a compliance with other provisions of the policy, and warning the insured that the adjudication of the amount of loss by appraisers would not be conclusive as to their liability under the policies. In this connection the case of *Brock* v. *Dwelling House Ins. Co.* 102 Mich. 583, 26 L. R. A. 623, is in point. It is there said: "The term 'disinterested'" as applied to appraisers, "does not mean simply lack of pecuniary interest, but requires the appraiser to be one not biased or prejudiced. The defendant selected as the appraiser an insurance adjuster residing at Grand Rapids, a point 135 miles distant from the place where the fire occurred. The two disagreed as to the selection of an umpire. Defendant's appraiser then suggested the names of three persons, one of whom resided in Grand Rapids, one in Lansing, and the third at Saginaw. The agreement does not contemplate that the umpire shall be selected at random, or without some knowledge on the part of both appraisers as to his competency and fitness. Parties living in the locality would naturally be best qualified to pass upon the question of values, and an appraiser would not be under obligation to make trips to other localities than that of the fire to ascertain as to the propriety of appointing the person suggested as an umpire. . . . Strangers to the locality are not usually selected as appraisers and, in case of the inability of the appraisers to agree, a third party known to both, and in whom both have confidence, is supposed to be selected. . . . Defendant's appraiser insisted upon the appointment of a person with whom he was personally acquainted, who was a stranger to the locality and to plaintiff's appraiser. The latter offered the names of twelve residents of the

locality from which the jury, in case of suit, would be drawn. No valid reason is assigned for a refusal to accept one of the twelve, and the only reason given is that he did not care to take the chances of getting one that would be partial. The requirement that plaintiff's appraiser should go into other portions of the state to make inquiry as to the fitness of the persons named was not a reasonable one. The suggestion that some one be selected from the locality of the fire was not unreasonable. It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire, is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit was brought will not bar an action on the policy. *McCullough* v. *Phœnix Ins. Co.* 113 Mo. 606; *Bishop* v. *Agricultural Ins. Co.* 130 N. Y. 488; *Uhrig* v. *Williamsburgh City F. Ins. Co.* 101 N. Y. 362; *Bradshaw* v. *Agricultural Ins. Co.* 137 N. Y. 137."

In the *McCullough Case*, above cited, the court says: "The appraisers could not agree as to the value of the property destroyed or the amount of damages sustained, nor could they agree on the third man. McGraw (the appraiser for the insured) then suggested the names of four or five persons, some of whom resided in the county, some at Boonville, and some at other points not far distant. White (appraiser of the company) would not agree to either of them, and suggested the names of some others living in St. Joseph, Kansas City, and St. Louis, at least 200 miles distant from where the fire occurred. McGraw would not agree to any of the persons suggested, because of the remoteness from the place of the fire, and their want of knowledge of the value of the property in that locality, but White would not agree to any other person. His course, to say the least of it, was unreasonable, unjust, and tantamount to a refusal to proceed with the appraisement. Justice and fair dealing did not require the plaintiffs to wait longer than they did before instituting their suit." In *Niagara F. Ins. Co.* v. *Bishop*, 154 Ill. 9, it was held that where the appraiser of the company refuses to agree upon an umpire living in the vicinity of the fire, and insists upon a person of whom the other appraiser knows nothing, the insured is relieved from the necessity of an award before bringing suit. In *Braddy* v. *New York Bowers Ins. Co.* 115 N. C. 354, it was held that it was not unreasonable on the part of the appraiser of the insured to object to an umpire suggested by the insurer of the company, upon the ground that he was unknown to the former, and that he lived remote from the place of the fire. In *Chapman* v. *Rockford Ins. Co.* 89 Wis. 572, 28 L. R. A. 405, it was held that the insured is not required to enter into a new appraisement or name another appraiser when the appraiser of the company has shown perverse conduct or want of utmost good faith in attempting to obtain an appraisement. In this case the court said, further, that it was not permissible for the insurers to arbitrarily or capriciously demand an appraisal (before an effort to settle and an honest difference has arisen) simply to suspend a claim for loss, and then select an appraiser who will perversely refuse to concur in an umpire unless he comes from Chicago or is the kind of a man the insurers want. Such a course, if tolerated, places the assured very largely at the mercy of the insurer. Any attempt on the part of either party to misuse or pervert the provisions of the policy as to an appraisal, so as to unreasonably delay an adjustment, or to secure an unjust abatement of an honest loss, is a breach of good faith, and should be treated as a waiver of the condition, and dispensing with the necessity of an appraisal, or warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong. The arbitration having failed in consequence of the perverse conduct and want of good faith of the insurance companies represented by their adjuster and appraiser, the plaintiff was not bound to enter into a new one, or name another appraiser, even if the companies were willing to name a new one on their part. Citing, also, *Uhrig* v. *Williamsburgh City F. Ins. Co.* 101 N. Y. 362; *Davenport* v. *Lond Island Ins. Co.* 10 Daly, 538, 539. See also 2 Biddle on Insurance, § 1162, where it is said: "Where each side duly selects an arbitrator, but the umpire fails of selection, it is said there need not be a new arbitration proceeding;" citing the case in 101 N. Y. 362.

We are satisfied that the action of the appraiser for the companies in this case was arbitrary, and his demands unreasonable, and the appraiser of the insured was not bound to submit to them; nor, under the facts disclosed in this record, was the insured bound to submit, in the first instance, to an arbitration, or proceed further in an attempt at appraisal after the effort made; and they were justified in bringing their suit when they did.

The only other question which we think it material to consider is whether the verdict or judgment in this case is excessive or not supported by the evidence. The matter was submitted to a jury, and they have passed upon this question as best they could, and there is certainly evidence to support their finding. It is said that there is a discrepancy between the amounts stated in the proof of loss and the evidence given by the same parties. This is explained by the assured with a statement that the proofs of loss were intended to be only approximate, and to show actual cost of the material in the yard, while the evidence showed its actual market value at the same place, which latter statement shows the actual loss estimated by market value, while the proof of loss shows the same estimated by actual cost made out as suggested by the companies. The plaintiffs are, we think, entitled to the market value of their property destroyed so far as covered by their policies. The three-fourth value clauses in the policies sued on in this cause have been held to be inoperative under our statute (*Dugger* v. *Mechanics & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796), and the plaintiff is not restricted to that amount of recovery.

We see no error in the judgment of the court below, and it is *affirmed* with costs.

LOUISIANA SUPREME COURT.

SUCCESSION OF Amelie RIXNER
On Opposition of
THE CHARITY HOSPITAL, *Appt.*

(48 La. Ann. 552.)

1. A citizen and subject of Italy is exempt from the payment of the 10 per centum tax levied against foreign heirs, on property situated in this state, under act 130 of 1894, the title to which is derived by testamentary disposition of his mother's will, she having likewise been a citizen of Italy at the date of her death.

2. The "most favored nation" clause of the treaty between Italy and the United States entitles citizens and subjects of the former to the same tax exemptions as the citizens and subjects of the latter are, and the same right to acquire and dispose of personal and real property within the territory of the latter, by donation, testament, or otherwise, from or to aliens and subjects of the former.

3. It is both wise and conservative for courts to adhere to what has been repeatedly adjudged; and, when the intent and meaning of a law have been settled by the uniform and consistent course of judicial construction, the construction becomes, in so far as contract and treaty rights acquired thereunder are concerned, as much a part of the law as the text itself.

*Headnotes by WATKINS, J.

(February 10, 1896.)

APPEAL by opponent from a judgment of the Civil District Court for the Parish of Orleans, Division C., dismissing its claim to a tax on money in the hands of the executors of the estate of Amelie Rixner, deceased, on the ground that the property was left to foreign legatees. *Affirmed.*

The facts are stated in the opinion.

Mr. **Branch K. Miller** for appellant.

Mr. **Charles F. Claiborne,** for appellee:

In enacting or re-enacting without change a statute which has been the subject of judicial interpretation, the legislature, it is to be presumed, intended it to continue to receive the same interpretation and produce the same effect.

La Selle v. *Whitfield,* 12 La. Ann. 81; *King*

NOTE.—*Effect of treaties upon an alien's right to inherit.*

I. *General doctrine respecting treaties.*
II. *Great Britain.*
III. *France.*
IV. *Bremen.*
V. *Germany.*
VI. *Grand Duchy of Hesse.*
VII. *Guadalupe Hidalgo.*
VIII. *Hanover.*
IX. *Hanseatic.*
X. *The Netherlands.*
XI. *Spain.*
XII. *Sweden.*
XIII. *Prussia.*
XIV. *Switzerland.*
XV. *Würtemberg.*

Upon the general question of an alien's right to inherit, see *note* to Easton v. Huott (Iowa) 31 L. R. A. 177.

Upon the question of the effect of state Constitutions and statutes upon inheritance through an alien, see *note* to De Wolf v. Middleton (R. I.) 31 L. R. A. 146.

As to the effect of state Constitutions and statutes upon the question of inheritance by or from an alien, see *note* to Beavan v. Went (Ill.) 31 L. R. A. 85.

As to the effect generally of treaty guaranties to aliens, see *note* to Gandolfo v. Hartman (C. C. S. D. Cal.) 16 L. R. A. 277.

Upon the question of the disability of aliens and the escheat of property, see *note* to American Mortg. Co. v. Tennille (Ga.) 12 L. R. A. 529, and brief in Toole v. Toole (N. Y.) 2 L. R. A. 465.

I. *General doctrine respecting treaties.*

There are numerous decisions regarding the construction of treaties, but, restricting them to cases wherein the rights of aliens to inherit have arisen, the following general principles are deducible therefrom.

The United States has power to make treaties removing the disability of aliens to inherit, and such treaties are a valid exercise of and within the powers conferred by the Constitution of the United States. People v. Gerke, 5 Cal. 381.

In Droit d' Aubaine, 8 Ops. Atty. Gen. 411, it was stated that the United States government had the constitutional power to enter into treaty stipulations with foreign governments, for the purpose of restricting or abolishing the property disabilities of aliens or their heirs in the several states of the Union.

In the United States a treaty is something more than a contract, for the reason that the Federal Constitution declares it to be the law of the land, and therefore, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it; but they are not required to adopt it or reject it as a whole, but may modify or amend it. Jecker v. Magee, 76 U. S. 9 Wall. 32, 19 L. ed. 571.

Article 6 of the Federal Constitution provides: "All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding." Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84.

When a treaty made by the proper Federal authorities has been ratified, it becomes the law of the land, and the courts have no power to question it, or in any manner to look into the powers or rights of the nation or tribe with which it is made, the action of the treaty-making power being exclusive upon such inquiry. Maiden v. Ingersoll, 6 Mich. 373; Rabasse's Succession, 47 La. Ann. 1452.

And if such a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter must be preferred. Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628.

Every treaty made by the authority of the United States is superior to the Constitution and laws of any individual state, and if the law of the state is contrary thereto, it is void. *Ibid.*; Watson v. Donnelly, 28 Barb. 653.

And the state law must yield. Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530, 534.

But when a state law is deemed unconstitutional because opposed to the Constitution, laws, and treaties of the Federal government, it is only void so far as it contravenes the Constitution, laws, and treaties. *Ibid.*

See also 37 L. R. A. 583.

v. *Lastrapes*, 13 La. Ann. 582; *Armant's Succession*, 43 La. Ann. 310; *State, Da Ponte*, v. *Board of Assessors*, 35 La. Ann. 651; Blackwell, Tax Titles, 702; *Whitcomb* v. *Rood*, 20 Vt. 49; *State* v. *Garthwaite*, 23 N. J. L. 143; *Grace* v. *M'Elroy*, 1 Allen, 563; *Cronan* v. *Cotting*, 104 Mass. 245, 6 Am. Rep. 232; *Low* v. *Blanchard*, 116 Mass. 272; Cooley, Const. Lim. 64, note; 23 Am. & Eng. Enc. Law, *Statutes*, p. 370; 9 Am. & Eng. Enc. Law, p. 432; *Greaves* v. *Tofield*, L. R. 14 Ch. Div. 571; *Clark* v. *Wallond*, 52 L. J. Q. B. 323; *Ex parte Roundtree*, 51 Ala. 42; 18 Merlin, Rep. Jur. p. 446; *Beck* v. *Brady*, 7 La. Ann. 1; *Hubgh* v. *New Orleans & C. R. Co.* 6 La. Ann. 496, 54 Am. Dec. 565; *Waldo* v. *Bell*, 13 La. Ann. 329; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 264, 36 L. ed. 699, 4 Inters. Com. Rep. 92.

It is important to adhere to what has already been decided. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for the most urgent reasons.

State v. *Thompson*, 10 La. Ann. 122; *Swann* v. *Moore*, 14 La. Ann. 853; *Hawkins* v. *Beer*, 37 La. Ann. 55; *Levy* v. *Hitsche*, 40 La. Ann. 500; *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 603, 17 L. ed. 262; *Ohio Life Ins. & T. Co* v. *Debolt*, 57 U. S. 16 How. 432, 14 L. ed. 1003; *Gelpeke* v. *Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Mitchell* v. *Burlington*, 71 U. S. 4 Wall. 270, 18 L. ed. 350; *Kenosha* v. *Lamson*, 76 U. S. 9 Wall. 477, 19 L. ed. 725; *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 678, 22 L. ed. 233; *Louisiana, Southern Bank*, v. *Pilsbury*, 105 U. S. 294, 26 L ed. 1096; *Douglass* v. *Pike County*, 101 U. S. 677, 25 L. ed. 968; *Anderson* v. *Santa Anna Twp.* 116 U. S. 361, 29 L. ed. 634; *Green County* v. *Conness*, 109 U. S. 105, 27 L. ed. 872; *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 684, 21 L. ed. 382; Cooley, Const. Lim. p. 62.

By virtue of the treaties existing between the United States and France and Bavaria, citizens of the latter countries are exempt from the payment of the tax imposed on foreign heirs and legatees by act 154 of 1842, p. 430.

Dufour's Succession, 10 La. Ann. 391; *Prevost's Succession*, 12 La. Ann. 577; *Amat's Succession*, 18 La. Ann. 403; *Crusius's Succession*, 19 La. Ann. 369; *Foucher's Succession*, Manning, Unreported Cases, p. 412.

Upon the construction of the Constitution

The termination of a treaty by war does not devest the right of property already vested under it. Fiott v. Com. 12 Gratt. 564. Society for Prop. of Gospel v. New Haven, 21 U. S. 8 Wheat. 464, 5 L. ed. 662, and Fox v. Southack, 12 Mass. 143, to the same effect.

In construing the 6th article of the Federal Constitution it has been held that provisions in regard to the transfer, devise, or inheritance of property are fitting subjects of negotiation and regulation of the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it diverts from them, and for that reason, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property. Wunderle v. Wunderle, *supra*.

In United States v. Lariviere, 93 U. S. 198, 23 L. ed. 848, it was stated that if a treaty to which the United States was a party removed the disability of an alien, and secured to him the right to take and hold real estate by descent or devise, as if he were a native of this country, it might contravene the statutes of a state, but in that event the courts would disregard them and give to the alien the further protection conferred by the provisions of the treaty.

But it has been doubted whether the Federal government has authority, in virtue of the treaty-making power, and therefore whether it could have intended to interfere with the laws of descent in relation to real property in the several states, in making a treaty with any foreign government involving the right of nonresident aliens to acquire and hold lands by descent. Jost v. Jost, 1 Mackey, 487.

In that case, however, the court stated that, with respect to the power of the Federal government on that subject, it was sufficient to say that whatever might be thought of it as affecting property in the states, there was no question about it in the District of Columbia; and it was therefore held that by virtue of the Maryland act of descent, in force in the District of Columbia, and the treaty with Switzerland, the nonresident alien heirs, brothers and sisters of the deceased, took equally with his brother who was a resident of the United States. *Ibid.*

The treaty, however, which will suspend or override the state statute, must be a treaty between the United States and the government of the particular country of which the alien claiming to be relieved of the disability imposed by the state law is a citizen or subject; therefore, a treaty with some other country of which such alien is not a citizen or a subject cannot have the effect of removing the disability complained of. Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84.

As the individual citizen, on whose right of property a treaty may operate, has no means of knowing anything of it while before the Senate, he cannot in principle be held bound by it as a law of the land, until it is ratified and proclaimed. And to construe the law so as to make the ratification of the treaty relate back to its signing, thereby devesting a title already vested, would be manifestly unjust. Jecker v. Magee, 76 U. S. 9 Wall. 32, 19 L. ed. 571.

In order to ascertain whether a title is within the protection afforded by the treaty, there must be an inquiry into the existence and structure of the title, before the court can construe the treaty in reference to the title. Martin v. Hunter, 14 U. S. 1 Wheat. 304, 358, 4 L. ed. 97, 110.

But in Hughes v. Edwards, 22 U. S. 9 Wheat. 489, 6 L. ed. 142, decided under the treaty with Great Britain of 1794, it was held not to be necessary for an alien to show that he was in actual possession or seisin at the date of the treaty, which applied to the title whatever that might be, and gave it the same legal validity as if the parties were citizens.

It is a principle of international law that, as respects the rights of either government under it, a treaty is considered as concluding and binding from the date of its signature, and in this regard the exchange of ratification has a retroactive effect confirming the treaty from its date; but a different rule prevails when the treaty operates on individual rights. The principles of relation not applying to rights of this character, which were vested before the treaty was ratified, and in so far as it affects them, it is not considered as concluded until there is an exchange of ratification. Jecker v. Magee,

and laws of a state the Supreme Court of the United States as a general rule follows the decisions of her highest court unless they conflict with or impair the efficacy of some provision of the Federal Constitution or of a Federal statute or a rule of general commercial law.

Stutsman County v. *Wallace*, 142 U. S. 306, 35 L. ed. 1022; *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Gormley* v. *Clark*, 134 U. S 338, 33 L. ed. 909; *Thatcher* v. *Powell*, 19 U. S. 6 Wheat. 119, 5 L. ed. 221; *McCutchen* v. *Marshall*, 33 U. S. 8 Pet. 220, 8 L. ed. 923; *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87, 3 L. ed. 665; *M'Keen* v. *Delancy*, 9 U. S. 5 Cranch, 22, 3 L. ed. 25; *Harpending* v. *Reformed Prot. Dutch Church*, 41 U. S. 16 Pet. 455, 10 L. ed. 1029; *Nesmith* v. *Sheldon*, 48 U. S. 7 How. 812, 12 L. ed. 925; *Cucullu* v. *Louisiana Ins. Co.* 5 Mart. N. S. 472, 16 Am. Dec 199; *Belouguet* v. *Lanata*, 13 La. Ann. 4.

Mr. **Henry Denis,** *amicus curiæ.*

Watkins, J., delivered the opinion of the court:

The opponent claims 10 per centum on whatever amount shall be due on decedent's account to Ignazio Vincanzo de Sarzana, the heir instituted under a will; said heir being domiciliated in Marcella, and a citizen and subject of the Kingdom of Italy, and the succession of the testatrix being administered in the parish of Orleans, La. The opposition was, after due proceedings and trial, dismissed, and the executor's account approved and homologated, and the opponent has appealed.

In the lower court the case was tried and decided upon an agreed statement of facts, the purport of which is as follows, *viz.:*

(1) That the universal legatee under the will of Amelie Rixner, Ignazio de Sarzana, is a minor, and not domiciliated in, or a citizen of, the state of Louisiana, or of the United States of America.

(2) That he is a citizen and subject of the Kingdom of Italy, wherein he now resides, and where he has always resided and has his domicil.

(3) That the property proposed for distribution on the account that is opposed consists of the following, *viz.:*

Immovables valued at	$70,100 00
Movables valued at	574 23
	$70,674 23

supra; Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530, 534.

Where a treaty gives foreigners three years in which to claim real estate by devise or descent, and to dispose thereof, the right must be exercised within such period, for the reason that the state legislature is not forbidden to deny the right after such period, such a state law being so far affected by the treaty as to become inoperative for that period, but no further. Yeaker v. Yeaker, *supra.*

Under § 1998 of the Tennessee Code, an alien may take and hold real estate in that state by purchase, inheritance, or in any other way which may be agreed upon by treaty between the United States and the country of which he is a citizen or subject. The court held, in considering the above section of the Code, that if the law contravened the treaty the latter must prevail, the treaty being the supreme law on the subject, and that when a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the state, and whoever has this right is to be protected. Baker v. Shy, 9 Heisk. 85, 89.

II. *Great Britain.*

The capacity of private individuals, British subjects, or of corporations created by the Crown, in the United States or in Great Britain, to hold lands or other property in the United States, was not affected by the Revolution. Society for Prop. of Gospel v. New Haven, 21 U. S. 8 Wheat. 464, 5 L. ed. 662.

In Shanks v. Dupont, 28 U. S. 3 Pet. 242, 7 L. ed. 666, it was held that the treaty of peace between the United States and Great Britain of 1783, acted upon the state of things as it existed at that time and took the actual state of things as its basis, and all those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British Crown; and all those who then adhered to the British Crown were deemed and held subjects of that Crown, the treaty being a treaty operating between states and the inhabitants thereof, the court reversing the decision in the court below in the case of *Ex parte* Dupont, 1 Harp. Eq. 5.

Upon the above holding, therefore, all British-born subjects, whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the treaty of 1794. Shanks v. Dupont, *supra.*

The 6th article of the treaty of peace of 1783 between the United States and Great Britain protects the property of British corporations and of natural persons; and their title is confirmed by the 9th article of the treaty of 1794, between the same governments, so that it cannot be forfeited by any intermediate legislative act, or other proceeding for the defect of alienage. Society for Prop. of Gospel v. New Haven, *supra.*

And the treaty of 1794, which enabled the subjects of either power to hold land within the territory of the other, was not annulled by a posterior war between the contracting parties. Fox v. Southack, 12 Mass. 143.

So, the stipulations contained in the treaty of 1794, for the protection of the rights of property, imposed no new obligation upon the government of the United States, but only affirmed the law of nations. May v. Specht, 1 Mich. 187.

And the 9th article of such treaty applies to vested remainders as well as to estates in possession. Fox v. Southack, *supra.*

A person born a British subject, who in 1772, became a resident of the United States, and remained such until after the treaty of 1794, was held to be protected in his right to hold lands. Trimble v. Harrison, 1 B. Mon. 140.

But the treaty secures no privilege to the alien heirs of American citizens, and therefore lands of citizens of the United States do not descend to an alien child. *Ibid.*

And this is so for the reason that such treaties had for their object the security of British subjects in the disposition of their real estate, and had not in view any privilege of aliens to succeed as heirs to the estates of American citizens. Love v. Hadden, 3 Brev. 1; Ennas v. Franklin, 2 Brev. 398.

So, the treaty of November, 1794, relates only to lands then held by British subjects, and not to any after-acquired lands. Jackson, Johnston, v. Decker, 11 Johns. 418, 422.

And it only protects titles held by British subjects at the date thereof. Trimble v. Harrison, 1 B. Mon. 140; Marshall v. Conrad, 5 Call (Va.) 364.

For this reason, therefore, as to such lands and the legal remedies incident thereto, neither such

Less debts stated on the account, the total is..... $67,848.38

(4) That Joseph de Sarzana is the father and tutor of said minor, and Jules Andrieu, of the city of New Orleans, La., is the agent and attorney in fact of the said tutor.

(5) That the treaties between Italy and other nations and the United States are contained in the volume which is entitled "Treaties and Conventions between the United States and Other Powers," and same is to be used in the original for all the purposes of this case. The volume referred to is produced in the original as constituting part of the transcript.

Opponent propounds its claim under and in pursuance of the terms and provisions of act 130 of the general assembly of the state of Louisiana, approved on the 11th of July, 1894; and it claims that under said act "every person not domiciled in this state, and not being a citizen of any state or territory of the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a tax for the benefit of the Charity Hospital of 10 per cent on all sums due, on the value of all property which may have actually been received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the said succession;" that it is made the duty of the executor, curator, etc., having charge of the administration of the succession property belonging to a person residing out of the state, "to retain in his hands the amount of the tax imposed, and pay the same over to the treasurer of the Charity Hospital," etc. He demands that the executor of the estate of the deceased comply with the law, and pay over to the said administrators 10 per centum of the net value thereof. The executor resists opponent's demand, and says that he is protected from making the payment demanded, and against the provisions of said law, "by the clauses of the treaty between Italy and the United States concluded, ratified, and proclaimed in the year 1871, and especially by article 22 thereof, which provides: 'The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their personal goods,

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subjects nor their heirs are to be regarded as aliens, the treaty protecting the title giving it the same validity as if in the hands of a citizen. Trimble v. Harrison, *supra*.

And for the further reason that such treaty of peace does not give title. Blight v. Rochester, 20 U. S. 7 Wheat. 535, 5 L. ed. 516.

So that no claim to lands can be established in virtue of either of the treaties of 1783 or 1794 where the claimant is unable to show a title in himself or his ancestor at the time the treaty was made. Orser v. Hoag, 3 Hill, 79; Harden v. Fisher, 14 U. S. 1 Wheat. 300, 4 L. ed. 96; Orr v. Hodgson, 17 U. S. 4 Wheat. 453, 4 L. ed. 613; Blight v. Rochester, *supra*.

Thus, where an alien British subject came to the United States subsequent to the treaty of 1783, and before the signing of the treaty of 1794 died seised of real estate, it was held that his title was not protected in favor of the heirs by such treaties. Blight v. Rochester, *supra*.

The effect of the 6th article of the treaty of peace of 1783 was not only to bar the escheat of lands held by British subjects, but to give them a capacity to transmit the same by descent; but such descent must be, as in ordinary cases, to a citizen not an alien, although there might be an exception where the land was owned by a subject of the British Crown at the commencement of the Revolutionary war, and the alien, claiming to take as heir, was then in life. Brown v. Sprague, 5 Denio, 545.

In that case title to real estate was acquired in 1769, by a subject of the British Crown who died in 1788 or 1789, intestate leaving nonresident aliens, a nephew and a niece, his only heirs. And the court held that such nephew and niece were incapable of acquiring title on account of their alienage, and therefore had no right to pass such title on the decease of their uncle by deed, the treaty of 1794 having no possible bearing on the case, inasmuch as the title to the land was not then vested in any British subject.

With regard to the effect of the treaty between the United States and Great Britain, in the case of Jackson v. Burns, 3 Binn. 75, 82, where a British *antenatus* sought to inherit lands in Pennsylvania in 1810, the court followed the decision of the United States Supreme Court in Dawson v. Godfrey, 8 U. S. 4 Cranch, 321, 2 L. ed. 634, wherein a nonresident alien, who was never in the United States, was held incapable of inheriting from a citizen of the United States.

The 6th article of the treaty of the year 1783 merely provides against future confiscations and prosecutions for the conduct of those who took part in the war, and the 9th article of the treaty of 1794 secured to British subjects then holding lands in the United States the right to hold and enjoy the same, and the right to dispose thereof by sale or devise, and extended to their heirs and assigns the same legal remedies which would be incident to such lands if the same were held and claimed by American citizens; but such treaty could not be considered to intend "a restoration of all individuals to the same condition they were in before the war as far as existing circumstances would permit," and therefore they could not restore inheritable blood, nor allow aliens to succeed as heirs, to the estate of an American citizen. Trezevant v. Osborn, 3 Brev. 29. Dawson v. Godfrey, *supra*, followed.

And it has been held that such article completely protects the title of British subjects to lands in the United States, which would have been liable to forfeiture by escheat for the defect of alienage, and was not meant to be confined to confiscations *jure belli*. Orr v. Hodgson, 17 U. S. 4 Wheat. 453, 4 L. ed. 613.

The 9th article of the treaty of 1794 applies to the title of the parties, and gives it the same legal validity as if the parties were citizens; and it is not necessary that they should show actual possession or seisin, but only that the title should be in them at the time the treaty was made, the treaty not meaning to include any other persons than such as were British subjects or citizens of the United States. *Ibid.*

In Craig v. Radford, 16 U. S. 3 Wheat. 594, 4 L. ed. 467, it was held that a defeasible title, which vested during the Revolutionary war in a British subject who was never a citizen of the United States, was completely protected and confirmed by the 9th article of the treaty of 1794.

Two nonresident alien brothers of a British subject who had become a naturalized citizen of the United States, and died intestate in 1805, leaving no kindred who were citizens, were held inca-

whether by testament, or *ab intestato*, and they may take possession thereof, either by themselves, or others acting for them, and dispose of the same at their will, paying such duties only as the inhabitants of the country wherein such goods are, shall be subject to pay in like cases. As for the case of real estate the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation.'" His averment is that this court, in placing an interpretation upon similar rights of French citizens and the subjects of Bavaria, held that they were protected against the operation and effect of similar statutes under and by virtue of treaties existing between the United States and France and Bavaria, respectively, and that the legatee of Mrs. Amelie Rixner ought to be afforded like protection by the treaty above cited and relied upon; that, in so far as the statute upon which opponent relies is opposed to, or comes in conflict with, said treaty stipulation, same is null and inoperative, as in contravention of § 2 of art. 6 of the Constitution of the United States, *viz.*: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding."

Counsel for opponent has employed substantially the language of the legislative act which is relied upon for the enforcement of the tax demanded (act 130 of 1894). It purports to be a revival of the provisions of §§ 1221-1223 of the Revised Civil Code, relative to the tax due by foreign heirs, which was repealed by act 86 of 1877, and also to amend the same. The act of 1877 merely repealed, in terms, the sections of the Civil Code referred to, and corresponding provisions of the Revised Statutes. A careful comparison instituted between the provisions of the articles of the Civil Code and the statute of 1894, above referred to, discloses that the institution of the Charity Hospital as the beneficiary, in lieu of the state, is the only difference between them. These articles have no counterpart in the Code Napoleon, and were for the first time introduced into our own Code in its revision in 1870, being the codification of § 7 of act 315 of 1855.

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pable of taking by descent. Trezevant v. Osborn, *supra*.

And where the right of a nonresident alien widow was not vested either at the time of the Revolution, nor at the date of either of those treaties, it was held to be independent of them and therefore her right to dower was barred except as to those lands of which her husband was seised before the American Revolution. Kelly v. Harrison, 2 Johns. Cas. 29.

But in Den, Fisher, v. Harnden, 1 Paine, C. C. 55, it was held that the alienage of the plaintiff in an ejectment action could not be set up to defeat a recovery, where the ancestor held the land at the time of the treaty between Great Britain and the United States, of 1794.

Alien heirs may take by inheritance from alien ancestors, who hold lands under the protection of the treaty between the United States and Great Britain. Munro v. Merchant, 28 N. Y. 9, 39. Jackson, Folliard, v. Wright, 4 Johns. 75, to the same effect.

And the same principle was assumed in the action of Orser v. Hoag, 3 Hill, 79, although in that case the title of the alien heir did not prevail, because the ancestor died before the treaty was signed, and therefore he was not within its influence.

But the treaty of peace between the United States and Great Britain of 1783 did not revest estates which had been forfeited to the state by acts of attainder passed prior to the treaty, and therefore such estates were not devested from the state. McGregor v. Comstock, 16 Barb. 427, 434.

And this, for the reason that the treaty of peace between the United States and Great Britain of 1783 referred only to future confiscations, and had no reference to attainders and forfeitures which had already become complete and absolute. *Ibid.*

So, the treaty entered into in the year 1846 between the United States and Great Britain in no way disposed of the soil or embarrassed the right of eminent domain. Cowenia v. Hannah, 3 Or. 465.

But the provisions of the treaty between Great Britain and the United States in the year 1794 did not affect the disability of a British subject who was an alien enemy. Hutchinson v. Brock, 11 Mass. 119.

A person born in America before the Declaration of Independence would have a right to hold lands in England, for the reason that he once owed allegiance to that government, and although a severance of the United States from England might release him from his allegiance, yet it could not deprive him of his rights; but a person born in England before that period could have no pretense to citizenship in the United States on that account, his situation being totally different, as he never owed allegiance to the United States government, and never was a citizen thereof. Hebron v. Colchester, 5 Day, 169, 171.

Therefore, a British subject born before the Revolution could not inherit lands under the terms of the treaty of 1794. Read v. Read, 5 Call (Va.) 160.

In Fiott v. Com. 12 Gratt. 564, where the ancestor acquired the estate by purchase in 1793, it was held that an alien could take by purchase, and that the conveyance clothed him with the title, and that, no inquest or office found having devested him of the title before his death, such title thus vested in him was confirmed by the 9th article of 1794, and therefore upon his death in 1818, such lands descended to his children and heirs, the war of 1812 not having devested his rights.

Where, in the year 1782, a testator devised real estate to his two alien daughters, it was held that they took subject to the will, but even if bound to take by descent they were protected by the treaty of 1794, article 9 of which declares that British subjects should hold as before the war. Duncan v. Beard, 2 Nott & McC. 400.

A British subject was held entitled to real estate of which her daughter died seised without husband, or children, or father, under the treaty of 1794, and the South Carolina act of 1791, in Megrath v. Robertson, 1 Desauss. Eq. 445, 449.

Where one residing in Pennsylvania before the Declaration of Independence had a son born there before such period, and in 1783 went to England to recover compensation for losses as an American loyalist, and returned to Pennsylvania in 1785, where he died, the son never having been in England, it was held they were both to be taken as American subjects, and therefore could only claim lands in England under the statute 37 Geo. III., chap. 97, § 24. Doe, Stansbury, v. Arkwright, 5 Car. & P. 575.

Where a British subject entitled to citizenship

Counsel for the executor has accurately quoted the language of the treaty of the United States with Italy. Treaties and Conventions between the United States and Other Powers, pp. 581-587, art. 22. As it appears from the agreed statement of facts that the decedent's succession exclusively consists of real estate, it is manifest that the executor chiefly relies on that clause of the treaty with Italy which declares that "as for real estate the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation." Therefore an examination of the provisions of some of the treaties which the United States have made is important.

The following is an extract from the treaty which was concluded between the President of the United States and the Emperor of the French, and proclaimed on the 12th of August, 1853, *viz.*: "Art. 7. In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed." Treaties and Conventions, p. 352. The first sentence has exclusive reference to the right of Frenchmen to "enjoy the right of possessing personal and real property by the same title, and in the same manner as the citizens of the United States;" and the second declares that "Frenchmen shall be free to dispose of their property as they may please," and "in no case shall they be subjected to taxes on transfer, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed." It is with the latter that we are alone concerned, as no question has been raised with reference to the right of Frenchmen to acquire and hold property in any of the states of the Union, and to that alone does the language of the treaty refer.

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by virtue of the treaty of 1794, had a child also a British subject, who removed to England and there, when of full age married a British subject and permanently settled there, it was held upon the death of the father that such child could not take lands by descent from the father in Kentucky, as it had elected to adhere to Britain, and was therefore an alien, and that no title passed by the deed of an alien claiming by descent through a father who was a citizen, to lands in Kentucky. Trimble v. Harrison, 1 B. Mon. 140.

In Jackson, Folliard, v. Wright, 4 Johns. 75, a native of Ireland emigrated to the United States in 1778, purchased real estate in 1784, and died in 1798 without issue, leaving a brother and three sisters, nonresident aliens, him surviving. The real estate was, by the act of the legislature of 1804, vested in one of the sisters, who had married an alien, in like manner as if she had been a citizen at the time of the death of the deceased. Subsequently an action of ejectment was brought by one claiming a moiety pursuant to an award of the county commissioners. It was held that the deceased, having emigrated to the United States after the Declaration of Independence, was to be considered as an alien, and that the land so held by him was by the 9th article of the treaty of 1794 vested in him and his heirs, although they were aliens, and that the act of the legislature of 1804, which gave the whole of such estate to the sister, one of his four heirs, to the exclusion of the rest, was contrary to the treaty and inoperative, but that the heirs, having entered no dissent to the award of the commissioners within the time limited by the act, were barred and concluded thereby, except one of the sisters who was a married woman and therefore within the saving clause of the act.

In Forsyth v. Reynolds, 56 U. S. 15 How. 358, 14 L. ed. 729, it was held that lands granted to settlers in Michigan prior to the surrender of the western coast by the British government, which grants were made to carry out the treaty between the United States and Great Britain of 1794, were not donations so as to exclude the settler in Peoria from the benefit of the two acts of Congress passed in the year 1820 and 1823, by which acts Congress granted a lot in the village of Peoria, Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States."

In the above case the plaintiff claimed one portion of the estate as heir to his father, and the other portion by purchase from the other heirs of his father.

In Shanks v. Dupont, 28 U. S. 3 Pet. 242, 7 L. ed. 666, a native of South Carolina died intestate in the year 1782, seised of land on St. James' Island, leaving two daughters both born in the states before the Declaration of Independence. One daughter married a citizen of South Carolina and died in 1802, entitled to one half the estate. In the year 1780, the British took possession of the island; and the other daughter of the intestate married an officer in the British army, and in 1782, went to England where she died in 1801, leaving five children, all born in England, who claimed the other moiety of the estate in right of their mother under the 9th article of the treaty of peace between the United States and Great Britain of November, 1794, and it was held they were entitled to recover and hold the same.

In Apthorp v. Backus, Kirby (Conn.) 407, 1 Am. Dec. 26, a minor sued by her guardian and next friend, to recover possession of property derived by her by inheritance from her father an alien who purchased in the year 1768, and died in the year 1773, seised in his own right in fee, and the court held that, her title to the land having accrued while she was not an alien, such title could not be affected by the disability of an alien, as she was as much a citizen of the state as any person then within it, her descent being cast under its law; and further that her title was secured by the treaty of peace between the United States and Great Britain, the case not being affected by the subsequent statutes of that state declaring aliens incapable of purchasing or holding lands therein, the proviso to the statute declaring "that the act shall not be construed to work a forfeiture of any lands which belong to any subjects of the King of Great Britain before the late war, or prevent proprietors of such lands from selling and disposing of the same to any inhabitant of any of the United States."

Under the treaty between Great Britain and the United States in 1794, and the English statute of 37 Geo. III., chap. 97, American citizens holding lands in Great Britain on the 29th of October, 1795, and their heirs and assigns, are to be considered, so far as regards such lands, not as aliens, but as native subjects of Great Britain. Sutton v. Sutton, 1 Russ. & M. 633.

In Sutton v. Sutton, *supra*, it was held that under

The treaty of Bavaria is as follows (Treaties and Conventions, p. 46): "Art. 3. The citizens or subjects of each of the contracting parties shall have power to dispose of their real and personal property within the states of the other by testament, donation, or otherwise; and their heirs, legatees, and donees being citizens or subjects of the other contracting party shall succeed to their said [real and] personal property, and may take possession thereof either by themselves or others acting for them, and dispose of the same at their pleasure, paying such duty only as the inhabitants of the country where the said property lies shall be liable to pay in like cases." The foregoing is an extract from the treaty which was concluded between the United States and the King of Bavaria, and proclaimed on August 16, 1846. Treaties and Conventions, p. 46.

The Spanish treaty provides as follows, *viz.*: "Art. 2. The citizens and subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives being subjects or citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases." The foregoing is an extract from the treaty which was concluded between His Catholic Majesty and the United States, and proclaimed on August 2, 1796. Treaties and Conventions, p. 1009.

The German treaty provides as follows, *viz.*: "Art. 10, § 3. In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised." The foregoing is an extract from the treaty which was concluded between the United States and the German Empire, and proclaimed June 1, 1872. Treaties and Conventions, p. 366.

The treaty with Great Britain provides as follows, *viz.*: "Art. 9. It is agreed that British

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the treaty of 1794, and the statute 37 Geo. II., chap. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, were at all times to be considered, so far as regarded those lands, not as aliens, but as native subjects of Great Britain.

In Countess Conway's Case, 2 Knapp, P. C. 364, it was held that the foreign wife of a British subject was not entitled to compensation for the loss of her separate property, under a treaty providing such a compensation for British subjects, unless she had herself acquired a domicil in Great Britain at the time of her loss; and further that a foreigner domiciled in Great Britain was, under such a treaty, entitled to claim compensation for his losses.

In Doe, Thomas, v. Acklam, 4 Dowl. & R. 394, 2 Barn. & C. 779, it was held that a person born in the United States since the treaty of 1783, by which those states were acknowledged to be free, sovereign, and independent, was an alien and could not take lands by descent in England.

Persons born in the United States of America since the treaty of 1783 are aliens, and cannot take lands by descent or inherit them in England. *Ibid.*

III. *France.*

In Rabasse's Succession, 47 La. Ann. 1452, the question was the right of French subjects to be represented in the United States by the consul of their country, and the court held that upon that subject the treaty between the United States and France was plain in its provisions, and by the organic law it was the supreme law of the land, and binding upon all courts whether state or Federal under art. 6, ¶ 2, of the Constitution of the United States, and therefore the consul, and not an attorney appointed by the court, was the proper party to represent the absent heirs.

In Schaffer's Succession, 13 La. Ann. 113, the treaty between the United States and France suspending the state law imposing a tax of 10 per cent on successions falling to foreign heirs, stipulated that "from the day of the exchange of the ratification, which shall be made in conformity with the respective Constitutions of the two countries and exchanged at Washington within the period of six months or sooner if possible," was held not to take effect until after its ratification, and that such ratification had no retrospective effect, and therefore did not relate back to, or affect, a succession prior to the date of such ratification, and therefore the heirs were subjected to the tax.

In Amat's Succession, 18 La. Ann. 403, it was held that the laws of Louisiana permitted Frenchmen to enjoy the rights of possessing and owning property in that state; and further that under the treaty of 1853, they could not be subjected to taxes on transfers, inheritance, or any others, different from those paid by the citizens of the state, or to taxes which were not equally imposed.

The provision in the French treaty referred to in the above case was article 7, which provides: "In all the states of the Union whose laws permit it, so long and to the same extent, as the said law shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as though citizens themselves, and in no case shall they be subjected to taxes on transfers, inheritance, or any others, different from those paid by the latter, or taxes which shall not be equally imposed."

But in Prevost's Succession, 12 La. Ann. 577, Affirmed 60 U.S. 19 How. 1, 15 L. ed. 572, it was held that under the above treaty the succession of a French citizen who died prior thereto would not exempt his heirs residing in France from the operation of the Louisiana act of 1842, which imposed a tax of 10 per cent on successions falling to foreigners, even though the words of the treaty imported such an intention.

The stipulation as to property in the treaty of cession of Louisiana by France to the United States embraces all titles to land whether legal or equitable, perfect, or imperfect. Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321.

The term "property," in the treaty by which the United States acquired Louisiana, comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract executory as well as executed. Bryan v. Kennett, 113 U. S. 179, 28 L. ed. 908.

In Carneal v. Banks, 23 U. S. 10 Wheat. 181, 6 L. ed. 297, it was held that the treaty between the United States and France, passed in the year 1778

subjects who now hold lands in the territories of the United States; and American citizens who now hold lands in the dominion of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." The foregoing is an extract from the treaty which was concluded between the United States and his Britannic majesty, and proclaimed on the 29th of February, 1796. Treaties and Conventions, p. 385.

It will be interesting and instructive to examine and consider the legislation of this state on this subject, and the course of our jurisprudence under it, as auxiliary to our investigation and decision of the question at issue. The first enactment on the subject is act 95 of 1828, § 1 of which declares "that any person who is not a citizen of the United States, or is not domiciliated in any part of said states, shall be subject to pay to this state 10 per cent of all sums which may be due to him as heir, legatee, or donee, by any succession which may be opened in this state." This act was repealed in 1830, and was again re-enacted in 1842; being incorporated in the general revenue law of that year in slightly a tered language. Act 154 of 1842, § 4. The terms employed are "that each and every person not being domiciliated in this state, and not being a citizen of any state or territory in the Union, who shall be entitled," etc. It is again reproduced in the general revenue law of 1850, in the following terms, *viz.*: "Every executor, curator, tutor, or administrator having charge or administration of succession property, belonging in whole or in part to a person residing out of this state, and not being a citizen of any other state or territory of the United States, shall be bound to retain in his hands the amount of the tax imposed by law," etc. Act 194 of 1850, § 76. As this statute did not repeal former laws, except those on "the subject treated in this act," the language of the section quoted may be regarded as a legislative interpretation of former laws on the subject mentioned. But the identical language which is employed in the statute of 1842 is reproduced, *in totidem verbis*, in the law of 1855 (§ 7 of act 315 of 1855). In this

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allowed the citizens of either country to hold lands in the other, and that a title, once vested in a French subject, to hold lands from the United States, was not devested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800.

The stipulations of the treaty ceding Louisiana to the United States, affording that protection or security to claims under the French or Spanish government to which the act of Congress of May 25, 1824, referred, are contained in the 1st, 2d, and 3d articles of the treaty and extended to all property until Louisiana became a member of the Union, into which the inhabitants were to be incorporated as soon as possible, "and admitted to all the rights, advantages, and immunities of citizens of the United States" the perfect inviolability and security of property being among those rights; therefore the right of property is protected and secured by the treaty, and no principle is better settled than that an inchoate title to lands is property. Delassus v. United States, 34 U. S. 9 Pet. 117, 9 L. ed. 71.

In the above case it was stated that the right would have been sacred, independent of the treaty, inasmuch as the sovereign who acquires an inhabited country acquires full dominion over it; but such dominion is never supposed to devest the vested rights of individuals; the language of the treaty ceding Louisiana, excluding any idea of interfering with private property.

In that case the heirs claimed under a grant made to their father and the action was brought under the act May 25, 1824, enabling the claimant of lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims.

The convention of 1800, between the United States and France, enabling the people of one country, holding lands in the other, to dispose of the same by testament or otherwise, and to inherit lands in the respective countries without being obliged to obtain letters of naturalization, was held to render the performance of the condition a useless formality, and that the conventional rule applied equally to the acts of those who took by descent under the act, as to those who acquired by purchase without its aid. Chirac v. Chirac, 15 U. S. 2 Wheat. 259, 4 L. ed. 234.

Where the deceased's heirs were French subjects, and claimed at the time the French treaty of 1778 was abrogated, the case turning upon the construction of the Maryland act of 1789, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin being unnaturalized Frenchmen, with a proviso, vesting the land in the state if the French heirs should not, within ten years, become resident citizens of the state, or convey the lands to a citizen, it was held that, the time of the performance of the condition having expired before action brought, the estate was terminated unless supported in some other way by the Maryland act. *Ibid.*

In Chirac v. Chirac, *supra*, a Frenchman migrated into the United States in 1793, took the oath of citizenship according to the Maryland act passed in 1779, in September, 1795, and before he became naturalized owned real estate, and died intestate leaving no legitimate relations other than the plaintiffs who were natives and residents of France, as against whom the state, supposing that the lands had escheated, conveyed the same to the natural son of the deceased reserving the rights of all persons claiming by devise or descent from the intestate. The nonresident heirs bringing action in ejectment, it was held that the power of naturalization was exclusively in Congress, but that the treaty of amity and commerce between the United States and France of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States, and therefore the plaintiffs were entitled to recover.

With respect to the 7th article of the French treaty of the year 1853, it has been held that the disability of Frenchmen from alienage in disposing of and inheriting real and personal estate was removed; the article declaring that in all the states of the Union by whose laws aliens were permitted to hold real estate, so long as such laws remained in force, Frenchmen were to enjoy the right of possessing personal and real property, by the same title, and in the same manner, as citizens of the United States, and should be free to dispose thereof as they might please, by donation, testament, or

condition the law remained until the revision of the Civil Code in 1870. *Vide, supra.* The same language is preserved in Rev. Civ. Code, art. 1221; but, in defining the duties of succession representatives with regard to this tax, the language employed is, "a person residing out of the state, and not being a citizen of any other state or territory." Rev. Civ. Code, art. 1222. And in the next section the language is, "persons who are neither residents of this state, nor citizens of any other state or territory." Rev. Civ. Code, art. 1223. These articles of the Code, and their corresponding provisions in the Revised Statutes, were repealed in 1877, and there was no law on the subject until the statute of 1894 was enacted. *Vide, supra.* This act follows the language of the articles of the Code very closely, and it declares the legislative purpose to be to revive the same. Act 130 of 1894. It thus appears that the phraseology of the legislation on the subject has remained practically unaltered since 1842, and that the statute of that year continued uninterruptedly in force until 1877, and there has been no law on the subject since, until 1894.

Taken chronologically, the treaties referred to were proclaimed in the following order of dates, *viz.*: That of Great Britain on February 29, 1796. That of Spain on August 7, 1796. That of Bavaria on August 16, 1846. That of France on August 12, 1853. That of Italy on November 23, 1871. That of Germany on June 1, 1872. It is readily observable that in the last two there is a change of phraseology, different from the language of our statutes and that of some of the previous treaties; for, in the "most favored nation" clause of the Italian treaty the language employed is, "the citizens and subjects of the two countries," and in the German treaty it is, "citizens of each of the contracting parties." And the language of the Spanish treaty is, "the citizens and subjects of each party," but that of the British treaty is, "British subjects" and "American citizens." The Bavarian treaty employs the phrase, "the citizens or subjects of the contracting parties," while the French treaty says, "Frenchmen shall enjoy the same rights as citizens of the United States."

To relieve our minds of any complexity in the matter, the decisions of this court have come to the rescue in determining the true meaning of "the most favored nation" clause of the Italian treaty, in giving an interpreta-

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otherwise—just as those citizens themselves; but that as to the states by whose existing laws aliens were not permitted to hold real estate, the treaty engaged that the President should recommend to them the passage of such laws as might be necessary for the purpose of conferring that right. De Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 646.

And with regard to the treaty between the same powers, of the year 1800, the court held that under art. 7, during the continuance of the treaty citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but that after its expiration that right was limited as provided by the statute and the common law of Maryland, as adopted by Congress on the 27th of February, 1801, until the convention between the United States and France was concluded in February, 1853. *Ibid.*

The 7th article of the treaty of 1853, between the United States and France was further construed in a case where, at the time the real estate was acquired, the state of Tennessee was one of the states of the Union, "by whose existing laws aliens were permitted to hold real estate" on the terms prescribed in its own enactment; and it was therefore held that the treaty of 1853 had a direct application to the case, and that in construing the law in connection with the treaty, the subjects of France were invested, by the law and the treaty together, with the right to make an indefeasible title, by deed or otherwise, to lands owned by them in the state. Baker v. Shy, 9 Heisk. 85, 89.

IV. *Bremen.*

Under the treaty between the United States and the Hanseatic of Bremen of December 20, 1827, art. 7, nonresident alien heirs, who were citizens of such Republic, are entitled to sell lands in the United States, which they would inherit except for alienage, and to withdraw the proceeds at any time within three years from the death of the ancestor. Schultze v. Schultze, 144 Ill. 290, 19 L. R. A. 90.

See also IX., *infra*, *Hanseatic.*

V. *Germany.*

The treaty between the United States and the German Empire, made soon after the formation of the latter, merely recognizing existing treaties between the German states, and providing that duties on the succession to inheritances shall be only such as are required of citizens, does not give aliens any right to inherit. Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84.

In the above case it was claimed that the treaty with Germany, of which Baden forms a part, concluded in the year 1871, contained a stipulation which should be so construed as to remove the disability imposed by the Illinois act of 1887. The treaty in question stipulates (art. 10): "In all successions to an inheritance, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay if they were citizens of the country in which the property is situated, or the judicial administration of the same may be exercised." It was held that the treaty conferred no new rights so far as the power to take, hold, or dispose of lands was concerned, but merely recognized existing treaties theretofore made between the United States and certain German states which became part of the empire when it was formed, and did nothing more than stipulate in regard to the payment of duties in cases where treaties already in existence contained provisions upon the subject of successions to inheritances.

The disabilities imposed upon nonresident aliens in the 1st section of the Illinois act of 1887 were not removed by any existing treaty between the United States and the Grand Duchy of Baden, or between the United States and the German Empire; nor was the disqualification of such nonresident aliens as declared by the said act affected in any way by provisions and treaties between the United States and other governments than those of Baden and the German Empire. *Ibid.*

VI. *Grand Duchy of Hesse.*

Where in ejectment plaintiffs claimed as heirs at law and the facts showed that a naturalized citizen of the United States died intestate and seised in the year 1866, leaving no descendants, or father or mother, but two brothers and one sister all unnaturalized aliens; that one brother died in 1866, his right passing to the surviving brother and sister, that plaintiffs were the only relatives by blood; third cousins, all residents of the United States; that under the treaty between the United States and the Grand Duchy of Hesse of the year 1845, non-

tion to some other treaties, the effect of which is to subordinate our statutes thereto, and place the citizens and subjects of other countries upon the same plane as the citizens of our own state. As best calculated to present the controverted question in the clearest light, the case of *State* v. *Poydras*, 9 La. Ann. 165, which was decided in 1854, may be taken as the initial point in our jurisprudence, as the tax in controversy was laid under the act of 1850; and the court, in the course of its decision, took occasion to attract attention to the fact that the statute embraced "persons residing out of this state," and those, also, "not citizens of any other state or territory of the United States," and said: "From this view of the statute, we conclude that the tax attaches, not only to property falling to alien heirs who are nonresidents, but also to the property falling to citizens of our own state residing abroad. The successions falling to nonresident heirs who are citizens of any other state or territory of the United States than Louisiana are alone exempted from it, and this exemption was probably intended to satisfy the requirements of the 2d section of the 4th article of the Constitution of the United States." The effect of that decision was that the language of the law of 1850 rendered citizens of Louisiana residing abroad liable to the tax, while exempting therefrom citizens of "any other state" of the Union. At the date when that case arose the French treaty had not been concluded, but it was concluded in the following year. During the year 1855 *Dufour's Succession*, 19 La. Ann. 391, was decided (Mr. Chief Justice Slidell being the organ of the court, and having been the organ of the court in *State* v. *Poydras*, *supra*); the decedent in that instance having been a Frenchman by birth, while Julian Poydras was one by adoption, and the death of the latter occurred prior to the conclusion of the French trea y, and that of the former two days subsequent thereto,—the heirs in each case having the recognized status of French subjects when the successions were opened, respectively. In the course of their decision the court said "that, by a reasonable and just interpretation of the terms of the [French] treaty, the exemption from taxation for which

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resident alien heirs were entitled to two years in which to sell the property; that in the year 1868, the surviving brother and sister procured an act of the state legislature releasing all the state's interest to the heirs of such naturalized citizen who would inherit but for their alienage,—it was held that the deed from such brother and sister conveyed a good title and that the plaintiff could not recover. Bollermann v. Blake, 94 N. Y. 624, Affirming 24 Hun, 187.

VII. *Guadalupe Hidalgo.*

In People v. Folsom, 5 Cal. 375, a naturalized citizen of Mexico died seised of real estate twelve days before the ratification of the treaty of Guadalupe Hidalgo, and his mother and heir, through whom defendant claimed, was not, at the time of his death, a citizen of Mexico or of the United States, but was a subject of Denmark, and never a resident of the United States or Mexico, and it was held that the United States, after the treaty, did not become vested with authority to prosecute any claim for a forfeiture or escheat that had accrued in California to the Mexican government.

In McKinney v. Saviego, 59 U. S. 18 How. 235, 15 L. ed. 365, it was held that the 8th section of the treaty of Guadalupe Hidalgo and the United States of February, 1848, was inapplicable to persons who, before the Revolution in Texas, had been citizens of Mexico, and who, by that Revolution, had been separated from it, for the reason that the right of property for which such article of the treaty was designed to afford a guarantee was that which at its date belonged to Mexican citizens not established within the territories then seised through the United States.

VIII. *Hanover.*

In the case of Ford v. Husman, 7 Rich. L. 165, a naturalized citizen died intestate, leaving a widow who was an alien and three nonresident alien sisters. A portion of his estate being claimed by the escheator, it was contended that under a treaty between the United States and the King of Hanover, whose subjects such nonresident alien sisters were, the rights of the sisters of the intestate were protected, and that the shares which would have devolved upon them if they had been citizens were, for a reasonable time, liable to their disposition by sale, but the court did not decide the point for the reason that under the statutes of that state the widow was entitled to the whole, and for the further reason that there had been no escheat.

IX. *Hanseatic.*

In the case of Siemssen v. Bofer, 6 Cal. 250, a similar treaty to that which existed in the case of People v. Gerke, 5 Cal. 381, IV., *supra*, was involved and existed between the United States and the Hanseatic towns of Lubeck, Bremen, and Hamburg, and it was held that such treaty did not enlarge the rights of nonresident aliens in respect to the inheritance of real estate in that state, such treaty only giving them the right to dispose of it within a given time, they being prevented from inheriting such estate as aliens. See also IV., *supra*, *Bremen*.

X. *The Netherlands.*

Under the treaty between the United States and the Netherlands in the year 1782, the subjects of either country might dispose of their effects by will, and their heirs receive such succession *ab intestato*, even though not naturalized, the words of the treaty applying to both real and personal estate. University v. Miller, 3 Dev. L. 188.

XI. *Spain.*

In United States v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. ed. 547, it was held that the grant of the King of Spain of lands at Alachua in Florida gave a valid title to the claimants under the grant according to the stipulations of the treaty between the United States and Spain of 1819, the laws of nations, of the United States and of Spain.

By the 8th article of the treaty of cession of Spain to the United States, the same time is allowed to the owners of land granted under the authority of Spain, to fulfil the conditions of their grants after the date of the treaty, as was limited in the grants, the treaty as to native rights being considered as dated at its ratification. United States v. Sibbald, 35 U. S. 10 Pet. 313, 9 L. ed. 437.

The 8th article of the treaty of cession of Spain to the United States, relating to the performance of the conditions and grants, is not confined to owners of land by occupancy or residence, but extends to persons who have a legal seisin and possession, in land, by virtue of a grant; and in the situation of the province and the claimants to lands at the time of the cession it is enough that they should show a performance of the condition *cy près*. *Ibid.*, following United States v. Arredondo, 31 U. S. 6 Pet. 745, 749, 8 L. ed. 568, 569.

its 7th section provides applies to this case." And holding the provision of the treaty to have been within the constitutional prerogative of the President, they said it must be "obeyed as supreme; that consequently the statute of Louisiana [1842] has become, *pro tanto*, inoperative, during the continuance of said treaty." The judgment of the district court, enforcing the provisions of the French treaty, and relieving the French subjects from the payment of the tax, was affirmed. A forcible illustration of the view which was by this court entertained of the provisions of the French treaty is found in *Prevost's Succession*, 12 La. Ann. 577, which was decided in the year 1857. Referring to the decision in *Dufour's Succession*, *supra*, the court said: "The present case, however, differs from that of Dufour in the essential particular that Prevost died many years before the conclusion of the consular convention with France, and the right of the state of Louisiana to this tax consequently attached at a period when French citizens did not enjoy an exemption from the operation of the act of 1842." The court thus completely eliminated from consideration the act of 1850, and affirmed the principle of exemption which was announced in the *Dufour Case*. Subsequently the *Prevost Case* was considered by the supreme court, and their opinion will be hereafter considered by us. The principle of the *Dufour Case* was affirmed in *Amat's Succession*, 18 La. Ann. 403. In *Crusius's Succession*, 19 La. Ann. 369 (decided in 1867), the heirs of the resident succession, being citizens of Bavaria, were exempt from the payment of a tax which was levied under the act of 1855, by virtue of the stipulations of the Bavarian treaty of 1846, affirming the *Dufour* and *Amat Cases*. The question of the liability of Frenchmen to the payment of a tax levied under the act of 1855 arose in 1878, and was considered in *Marquis de Circe's Succession*, Manning, Unreported Cases, p. 412, decedent's death having occurred in 1869, in France. The court held that the act of 1855 was a revisory statute, which merely reiterated the provisions of the act of 1842, saying: "It formed a part of that general revisory legislation which has been had periodically in this state. . . . It was simply a

XII. *Sweden.*

In Thompson's Succession, 9 La. Ann. 96, the petitioner, as vice consul of Sweden and Norway, claimed the right to take the succession out of the hands of the defendant, who was administrator of the deceased, alleging that he had the right under the law of nations, the laws of the United States, and the treaties entered into between the United States and Sweden and Norway. It was held that the right claimed was incompatible with the sovereignty of the state, whose jurisdiction extended over the property of foreigners as well as citizens found within its limits, the disposition of the estates of foreigners having been made the subject of special legislation, and no treaty or law of the United States existed, which, as the paramount law, conferred any such right as claimed, nor was there any principle of the law of nations which entitled the petitioner to call in question the authority of the Louisiana laws on that subject.

XIII. *Prussia.*

Where the attorney general claimed the real estate of a citizen of Prussia on behalf of the state by way of escheat, as against his absent heirs and the purchaser from them, denying the power of the Federal government to make provision by treaty for the determination of such cases, it was held that such treaties were valid and within the provisions of the United States Constitution. People v. Gerke, 5 Cal. 381.

The treaty in question in the above case was that made between the United States and Prussia in the year 1828, art. 14 of which provides: "And when, on the death of any person holding real estate within the territory of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation."

The correctness of the above decision, however, was doubted by the court in the subsequent case of Siemssen v. Bofer, 6 Cal. 250, the court stating that it entertained great doubts of its correctness, for the reason that the treaty-making power could only be coeval with the express grant of power to the Federal government, and could never be extended by implication to the reserved powers of the states, or matters which belong to state sovereignty, or the right which appertains to each state to govern her own domestic concerns, and establish her own police regulations; neither could the exercise of this power on the part of the President and Senate be extended to matters which were the proper subject of congressional legislation, for the reason that it would be virtually transferring the power of legislation from the President, Senate, and House of Representatives, to the President, Senate, and Piamingo, and any other Indian Algerine or other chief, and the court further stated that in its opinion the true rule of interpretation was, that whenever the treaty embraced matters which were the subject of legislation by Congress, it required an act of legislature to carry the treaty into effect, otherwise the House of Representatives was a useless appendage to the political machinery of the government, and powers which were expressly prohibited to Congress or reserved to the states might be exercised through the instrumentality or omnipotence of the treaty-making power.

And in Norris v. Hoyt, 18 Cal. 217, it is stated that the language of the court in the prior case of Siemssen v. Bofer, *supra*, applied to nonresident aliens claiming by descent as heirs of an intestate.

In *Re* Beck's Estate, 31 N. Y. S. R. 965, the question involved the distribution of surplus moneys, arising from the sale of intestate's property under foreclosure proceedings. The intestate died in 1886, and letters of administration were granted to the public administrator in 1888, and such surplus was claimed by his brothers and sisters all of whom were citizens of the German Empire, and the contention was that by reason of their alienage they were not entitled to participate in the division of real estate or the surplus moneys arising from the sale thereof. The court held that under the treaty existing between the United States and Prussia, which gave such parties a reasonable time to sell the real estate of a decedent, and to withdraw the proceeds without molestation, and exempted it from all duties on the part of the government of the respective states, the parties were entitled to their shares of the surplus moneys in question.

XIV. *Switzerland.*

In Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628, it was held that a citizen of Switzerland, removing to Virginia, must be presumed to continue his original citizenship where there was no proof that he ceased to be a citizen of his national country, and that where such a citizen left real estate in

reproduction of the laws of previous years, which had existed long anterior to the date of the [French] treaty. It was not a new enactment," etc., but a reproduction of the statute of 1842. The French heirs were relieved from the payment of the tax on the authority of the Dufour and other cases cited. This was the condition of our law and jurisprudence when, in 1870, the Civil Code was revised, and the provisions of the act of 1842 were incorporated therein as articles 1221–1223. They each continued without alteration until 1877, when those articles were expressly repealed, and so remained until 1894, when the legislature revived them and re-enacted them in terms, and without change in phraseology,—this, notwithstanding no alteration has been made in the treaty rights of citizens of other countries; and no contrary decision of this court has been intermediately rendered.

Under "the most favored nation" clause of the Italian treaty, which was concluded in 1846, the instituted heir of the decedent is entitled to have as favorable a construction put upon his property rights in this state as has been accorded by this court to Frenchmen under the treaty with France, or to the subjects of Bavaria. The intimation of the court in the *Poydras Case* to the effect that the act of 1850 contemplated that property in this state coming to "citizens of our own state residing abroad" was liable to the tax, has not been followed in any subsequent decision of this court, and that act has not been considered in any subsequent decision of this court. Omitting from consideration the word "other," as it has been eliminated from all statutes since 1850, the citizens of Louisiana alone are dealt with in our law and the adjudications of this court; and they are put upon the same plane, in this regard, as the citizens of other states and countries are by the terms of the treaties. The British treaty employs the terms "British subjects" and "American citizens." That of the Spanish treaty is, "the citizens and subjects of each party." That of Germany is the citizens of "each of the contracting parties." That of Bavaria is same as that of Germany. That of France is, "Frenchmen shall enjoy" the rights enjoyed by "the citizens of the United States." *Frederickson* v. *Louisiana*, 64 U. S. 23 How. 447, 16 L. ed. 578. All of these treaties deal with the respective property rights of the citizens of the contracting parties, and not with those of inhabitants merely. Not only is this true of the treaty stipulations respecting French citizens, but the law of France provides that "every child born of a Frenchman in a foreign country is French." Code Nap. 10. "A foreigner shall enjoy in France the same civil rights as are or shall be accorded to Frenchmen by the treaties of that nation to which such foreigner shall belong." Code Nap. 11. The comity existing between the two countries, seems to be perfect and complete.

The petition of the opponent has closely fol-

Virginia, his heirs, who were citizens of Switzerland, had, by virtue of the treaty between the United States and the Swiss confederation of November, 1850, the right to sell such estate and to withdraw the proceeds as permitted by the Virginia laws.

In the above case the court reversed the decision of the court below (28 Gratt. 62) and followed the dissenting opinion by Justice Christian, in which he held that the claimants were the legal heirs of the decedent, and that they were entitled to the proceeds of the sale of the real estate, the treaty of 1855 giving the state the power, if it chose to exercise it, of fixing the period within which the right of removal of the proceeds of real estate might be exercised; holding further, that the mere failure of the state to fix the terms could not deprive the parties of rights vested under solemn treaties, which were the supreme law of the land.

By the Maryland act of 1791, "an act concerning the territory of Columbia and the city of Washington," it is provided that any foreigner may, by deed or will hereafter to be made, take and hold lands within that part of said territory which lies within this state, in the same manner as if he were a citizen of this state, and the same lands may be conveyed by him and transmitted to, and be inherited by, his heirs or relations as if he and they were citizens of this state. The court in Jost v. Jost, 1 Mackey, 487, held that the claimants who were nonresident aliens had a right, under the Maryland act and the Swiss treaty, to inherit equally with the heirs who were residents in that state.

The alien provisions in the treaty above referred to were the first and third clause of article 5 of the treaty of 1850, which provide: "The citizens of each of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other by sale, testament, donation, or in any other manner, and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof either by themselves, or by others acting for them: they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. The foregoing provision shall be applicable to real estate within the states of the American Union or within the cantons of the Swiss Confederation, in which foreigners are entitled to hold or inherit real estate.

In that case the court stated that the reason for its decision was that the treaty provided that the heirs in question might inherit or succeed, which was unnecessary if the property was in their own country, the clear intention of the treaty being that a citizen of the one country might dispose of his property in the other, and that at his death his heirs who might be citizens of the other should inherit his personal estate wherever it might be; and the term "said property" meant "said personal property" without the limitation of being within the jurisdiction of the other party, the third clause extending the provision to real estate in states of the Union in which aliens might be entitled to hold or inherit real estate.

A naturalized brother and several sisters, and the descendants of others who were resident citizens of Switzerland, claimed as heirs at law of a naturalized citizen, and the question was, whether the treaty between the United States and Switzerland of 1850, which if valid was as much a part of the law of the land as the common law or statutes, made any change in the rules of the common law. The court held that under such treaty the brothers and sisters and other nonresident alien heirs were entitled to inherit in the same manner as other citizens of the United States. *Ibid.*

Where the decedent died in 1853, and by the terms of the treaty then in force between the United States and the Swiss Confederation the time

lowed the phraseology of the act of 1894, and avers that "every person not domiciliated in this state, and not being a citizen of any state, or territory;" thus including, necessarily, the citizens of Louisiana. The phraseology of the act of 1894 was not accidentally employed by the legislature, but it was manifestly employed with the purpose of keeping our law in line with the provisions of previously existing treaties, and which are "the supreme law of the land." U. S. Const. art. 6, § 2. The act of 1894, reviving the articles of the Code which has been repealed fifteen years previously, could not, in any event, have the effect of breaking the force of the repeated decisions of this court giving an interpretation to the law of 1842, which had been kept uninterruptedly in force until its repeal by the legislature in 1877. The manner in which the treaty rights of all nations have been treated for so great a length of time by the legislature of the state and its highest court is not to be lightly considered.

However, some reference has been made to some decisions of the supreme court, as possessing some features which are antagonistic to this view. One of the cases cited and relied upon is *Prevost* v. *Greenaux*, 60 U. S. 19 How. 1, 15 L. ed. 572, in which *Prevost's Succession*, 12 La. Ann. 577, *supra*, was reviewed on a writ of error. The court held that the right to tax was completely vested in the state when Prevost died, and was not devested by the treaty subsequently concluded, and that the heirs of the deceased acquired their rights subject to the tax. But the court observed, in affirming the judgment of this court, "that the obligation of the treaty and its operation in the state, after it was made, depend upon the laws of Louisiana," and then added the further observation that the operation of the treaty is "expressly limited" to the states of the Union whose laws permit it, so long, and to the same extent, as those laws shall remain in force, and there is no act of the legislature of Louisiana repealing the law [the law of 1842, under which the tax in question had been levied] and accepting the provisions of the treaty, etc. The foregoing paragraph of that opinion was pressed upon our attention in the *De Circe Case*, and the court was, on its account, urged to reverse the ruling of their predecessors in the Dufour and other cases; but this insistence did not prevail, and the ruling in the *Dufour Case* was adhered to. But, independently of that consideration, it must be borne in mind that the act of 1842 was repealed in 1877, and was not again revived until 1894; and in the meanwhile, if not before the provisions of the French treaty were operative, and the subsequent revival of the law could not abrogate or defeat them. The next case cited is *Frederickson* v. *Louisiana*, 64 U. S. 23 How. 445, 16 L. ed. 577, which involved an interpretation of the Bavarian treaty, and a decision of this court also. In

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allowed to sell and withdraw the proceeds of the land, expired in 1856, and the contention was that before that time the treaty of 1850, which was ratified in 1855, came into operation and extended the term indefinitely, the court held that the claim to the realty was barred, and affirmed the decisions of the court of appeals of Kentucky allowing the foreign heirs their claim to the personalty, but holding that they had no interest in the realty, and that the widow of the decedent became invested with the title to all the lands that he held at his death. Jecker v. Magee, 76 U. S. 9 Wall. 32, 19 L. ed. 571.

In Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530, 534, the treaty between the United States and the Swiss Confederation invested aliens with an interest in lands in cases where they asserted their claim within three years after their right accrued, and it was held that until the expiration of such time the right to hold was inviolable, but that after the expiration of such time the law of the state would predominate.

XV. *Württemberg.*

In *Re* Strobel's Estate, 39 N. Y. Supp. 169, it was sought to exempt the property of the decedent from a tax imposed by the New York laws of 1887, chap. 713, the contention being that such property was not subject to taxation for the reason that the treaty between the United States and Württemberg, passed in the year 1844, exempted such property "from all duties of detraction," but the court held that the tax imposed by the statute did not fall within the provision of the treaty, but was a tax upon succession; and further that by the change of government between the Kingdom of Württemberg and Prussia, the treaty of 1844 was abrogated by the treaty entered into by the United States and Germany in 1871.

The treaty between the United States and the Kingdom of Württemberg (art. 2) provides that where, on the death of any person holding any property within the territories of one party, such real estate would, by the law of the land, descend on a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof without molestations and exempt from all duties.

In Wieland v. Renner, 65 How. Pr 245, it was held that the provisions of the above treaty were, in effect, a statute of limitations, and in the absence of any prolongation the time affixed by such treaty must prevail.

In Kull v. Kull, 37 Hun, 476, a naturalized citizen died intestate in 1883, leaving no children or father or mother, but a widow, a sister, two brothers, and nephews and nieces, children of deceased brothers who died in 1878 and 1874 respectively him surviving, two of such being nonresident aliens, subjects of the Kingdom of Württemberg. The court held that under the provisions of the treaty the fee vested in the nonresident aliens, the land being descendible as described by the treaty, and that under its provisions an alien heir might come to the state and at once enter into possession, use, and enjoyment of the property, and exercise rights of ownership and use of possession for the purpose of making sale, such rights, being conferred upon him by the treaty, which intended to confer on an alien heir, for the period of two years, precisely the same rights he would enjoy if a resident heir, imposing upon him simply an obligation to sell and convey to some other party capable of holding, within such period or such prolonged period as the state might confer, or by his becoming, or declaring his intention to become, a citizen, and that in the meanwhile he might possess and improve the property and exercise authority and enjoy the rents and profits, the state's rights being suspended for two years, the rights of other heirs being also suspended by operation of the treaty, its effect being to vest the alien heirs with title to their respective proportions of the rents and income into whatsoever hands it might come. E. W.

that case the court, through Mr. Justice Campbell, said, "The case before the district court in Louisiana concerned the distribution of the succession of a citizen of that state, and of property situated there," and then added that they concurred with this court "in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting powers were, or might be, subject to onerous taxes upon property possessed by them within the states of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies, pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there, in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty." The opinion of the court in that case does not in any way militate against the decisions of this court. The record shows that Amelie Rixner died at Marcella, Sicily, where she was domiciled, and at that place she executed her last will, on the 24th of July, 1892; that her property is situated in Louisiana, where her succession is being administered, and her universal legatee resides at the place of her domicil. It is therefore evident that this case does not come within the purview of that decision.

This investigation has led us to the conclusion that the situation of the parties to this litigation is the same, identically, as that of the litigants in the Dufour and other cases, and that the heir of the deceased is quite as much entitled to the protection of the French treaty as were the subjects and citizens of France, he having invoked the benefit of "the most favored nation" clause in the Italian treaty with the United States. In *Levy* v. *Hitsche*, 40 La. Ann. 501, we said, after a careful review of the authorities, that, after the intent and meaning of a law have been settled by judicial construction, the construction becomes, in so far as contract rights acquired under it are concerned, as much a part of the law as the text itself; and the same rule must be true in so far, also, as treaty rights and obligations are concerned. *Vide, Douglass*, v *Pike County*, 101 U. S. 677, 25 L. ed. 968; *State* v. *Thompson*, 10 La. Ann. 122. It is both wise and conservative for courts "to adhere to what has already been adjudged." Entertaining this view we deem it unnecessary to examine and decide the constitutionality of act 130 of 1894; for, accepting the same in its fullest force, it yields precedence to the treaty stipulations invoked as part of the supreme law of the land.

Judgment affirmed.

Petition for rehearing denied March 23, 1896.

CALIFORNIA SUPREME COURT (In Banc).

John J. CHARNOCK *et al.*, *Appts.*,
v.
Francisco HIGUERRA *et al.*, *Respts.*

(111 Cal. 473.)

1. **The right to raise water by means of pumps** for purposes of irrigation may be included in the rights of a riparian proprietor.
2. **The reasonableness or lawfulness of any diversion** of water is in no wise affected by the mere mode of diversion.
3. **The altitude of the land of a riparian proprietor, which makes it impossible to irrigate it** solely by natural gravitation from the stream without the aid of appliances other than ditches and dams thereon which will not back the water on lands of other persons, will not defeat his right to a just and equal proportion of the water for irrigating purposes.

(March 10, 1896.)

APPEAL by plaintiffs from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action to enjoin alleged wrongful use of the water of a certain stream. *Affirmed.*

The facts are stated in the opinion.
Mr. **E. E. Howard** for appellants.
Mr. **R. Dunnigan** for respondents.

Van Fleet, J., delivered the opinion of the court:

This is an action brought by several riparian proprietors against certain persons above them on the stream, to restrain them from diverting any of the waters of the stream. The complaint alleges that the plaintiffs are riparian proprietors, and as such entitled to all the waters of the stream; that the defendants are not entitled to use any of the water for any purpose; and that they, by means of certain machinery, artificially and wrongfully raise and divert from the stream a large amount of the waters thereof, for the purpose of irrigating certain lands not of right irrigable from the stream, and which do not so lie as to be irrigated by the waters of said stream "diverted therefrom by any natural means" on said lands. The facts found by the court are, in substance, that both plaintiffs and defendants are riparian proprietors on the stream, the lands of defendants being above those of plaintiffs, and that neither plaintiffs nor defendants have any right to the waters of the stream, except

NOTE.—The above decision as to the right of a prior appropriator to pump water from a stream for irrigation is an unusual one, although it is not quite without precedent. On the general rights of prior appropriators, see *note* to Isaacs v. Barber (Wash.) 30 L. R. A. 665.

as such riparian owners; that all of the lands of the plaintiffs, and 30 acres of the lands of the defendants, are so situated that the water of the stream can be diverted and conducted thereon solely by natural gravity from dams in the stream, situated within the limits of said lands, respectively, without backing the water upon the lands of the owners next above them, and that no other part of the lands of the defendants can be irrigated in that manner; that the defendants have erected pumping machinery and pumps on their land, and, by means thereof, pump water from the stream onto land belonging to them, bordering on the stream and within its watershed, but which lie too high to be irrigated solely by natural gravity from dams situated within the limits of their lands without backing the water upon the lands of others above them; that all of the lands of both parties are dry, and of little value without irrigation but are of great value and very productive when irrigated; that defendants have not used, and do not threaten or propose to use, more than their just proportion of the water of the stream. On these findings, judgment was entered in favor of defendants, with leave to any of the parties at any time to "maintain another action to determine the exact proportion of the water of said creek which the respective owners may use." A portion of these findings is attacked as unsupported by the evidence, but we think that the evidence fully justifies them in the particular in which they are so attacked. The only question, then, is whether the findings support the judgment.

1. It is contended by appellants that a riparian proprietor has not, for the purpose of irrigation, the right to raise water by means of pumps. No authorities are cited in support of this contention, and counsel states his inability to find any. So far as we can understand, this argument is based on the meaning of the word "irrigate," which counsel contends is "to convey water by ditches," and on the alleged universal custom in the past to employ only such means in irrigation. As to the meaning of the word "irrigation," counsel cites some doubtful passages from civil law writers; but it is evident that this court, in holding, as it has repeatedly held, that riparian proprietors have the right to use a reasonable proportion of the water of the stream to irrigate their lands, used the term in no such restricted sense. The Latin word from which it is derived means, primarily, to convey water to or upon anything, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, by flooding, or simply by sprinkling. The mere method of obtaining the water with which to irrigate has nothing to do with the process of irrigation, or the meaning of the word. There was no proof in this case of any such custom as is claimed by appellants; and, if we can take judicial notice of such a matter at all, we are unable to say that pumping has never been used for such purpose. It may be that, owing to the comparatively greater expense of that method, it has been little used in the past; but, if improvements in machinery have made or shall make that method practicable, we see no reason why riparian proprietors may not, like others, take advantage of such improvements. In fact it has always been considered that the reasonableness or lawfulness of any given diversion of water is in no wise affected by the mere mode of diversion. Thus, in *Elliot* v. *Fitchburg R. Co.* 10 Cush. 191 (cited with approval in *Lux* v. *Haggin*, 69 Cal. 402, 404), Chief Justice Shaw said. "One man . . . may take water from a perennial stream of moderate size by means of buckets or a pump,—for the mode is not material,—to water his garden." And in such a case, he says, "the water would be used for irrigation" and such "might be regarded as a reasonable use." So this court has repeatedly held that a prior appropriator of water may change, at pleasure, the place or mode of his diversion, so long as others are not injured by such change. And in *Earl Norbury*, v. *Kitchin*, 7 L. T. Rep. N. S. 685, it was held that a riparian proprietor, so long as he took no more than his reasonable share of the water, might take water from the stream by pumping machinery, elevate it into a reservoir, and thence convey it by pipes to other land, not riparian, and there use it; the court holding that neither the mode of diversion nor the use to which the water was actually applied was material,—the only question being whether or not the defendant had taken more than his reasonable share.

2. But appellants claim, as we understand them, that, whether the particular mode is material or not, the mode by which the land of a riparian proprietor can possibly be irrigated is a material factor in ascertaining what portion of the water he may divert for irrigation. They contend that a riparian proprietor cannot be allowed to use any portion of the water of the stream to irrigate land which, though bordering on the stream, lies so far above it that water cannot be conducted thereon solely by natural gravitation from the stream, without the use of any appliances other than ditches originally on such land and dams situated thereon, and which will not back the water on the lands of other persons. In other words, the reasonable proportion of water which any riparian proprietor may withdraw for irrigation is made to depend, primarily, upon the area of his land which can be irrigated in that particular manner. In the first place, that question does not properly arise in this case. The complaint was framed on the theory that the defendants were not riparian proprietors at all, and had no right to divert any water. No issue was tendered as to what amount or proportion of the water of the stream could lawfully be used by the defendants, if they had the right to use any portion. It was denied that they had any rights to the stream, and the complaint furnished no *data* from which any rights of the parties, as tenants in common of the water, could be determined. Nevertheless, as the question seems to have been treated as an issue, evidence being introduced on the subject, apparently without objection, and as the court below did, to a certain extent, consider it, it calls for consideration at our hands. No authorities whatever are cited by appellants in support of this contention, nor can we find that any such doctrine has ever been even suggested by any court or writer. Appellants do

cite some cases to the point that riparian diversion must be "on the bank of the proprietor," but the judgments in those cases do not sustain that doctrine, and we are not prepared to say that any such rule exists. It is, however, not necessary to decide that question, for its determination would shed no light on the subject now under consideration. The only question now is whether the mere altitude of this land can deprive the riparian owner of the right to irrigate it. No rules have ever been laid down by this court for determining the relative and proportional rights of riparian proprietors to the use of water for irrigation, nor has any case come before us in which we could properly determine what are the rules on that subject. But, whatever difficulties may arise in matters of detail, that problem must find its solution in an application of the principles upon which the right to use water for that purpose at all is based. That right, as recognized in the decisions of this court, is founded upon the proposition that in an arid country the use of water for irrigation is of such vital consequence that, of necessity, it must be considered as embraced within the spirit of the category of rights accorded by the common law to riparian proprietors. The common law rule, as interpreted in this country, is that the right to the waters of the stream, with certain exceptions, not material here, belongs to the riparian proprietors in common and equally, and may be exercised by each as the necessities of the situation may require, only so as not to infringe upon the equal rights of the others. As irrigation is here a necessity of the situation, resulting from climatic conditions, the right to use a just and equal portion of the water for that purpose has been held to be an essential part of the riparian ownership.

Such being the foundation of the right, it is evident that the restriction contended for by appellants is inconsistent with the rule itself. The right to use the water for this purpose results from the need of water upon the land. Assuming this need, in any given case, to exist equally as to all the riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream. No other method would conform to the rule of equity. If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream, and with the same susceptibility to and need of irrigation, each would be entitled to precisely the same quantity of water for that purpose. We do not now decide how far a variation in any one of those factors would affect the question nor whether all of them are necessarily to be considered in any case. But it must necessarily be true, from the very nature of the right, that in no case can one proprietor be deprived of this just and equal proportion merely because his land, by reason of its altitude or level above the stream, cannot be irrigated by the same method employed on some other land. That the rule contended for by appellants would be utterly inconsistent with the very foundations of the riparian doctrine in this country will readily be seen by observing its results in particular instances. According to appellants' theory, none of the waters of the Colorado river, in the greater part of its course, can ever be used by the riparian owners for irrigation, for none of them can erect a dam high enough to divert any water by gravity on his own land without backing the water upon his neighbor. The same is true of many important streams in the mountainous districts of this state, now extensively used for irrigation. Yet nowhere is irrigation more needed than in such localities. Coming next to the level plains, we find streams with so little fall that diversion by a dam on the very tract of land to be irrigated is only possible on tracts having very considerable frontage on the stream. Suppose six adjoining proprietors on such a stream, neither of whom can divert the water on his own land in the manner required by appellants. According to appellants' contention, they could not, even by agreement among themselves, divert the water on the land of one, and carry it to the land of another, of their number, or pump it onto the land of any of them. They must permit all the water to flow down to the more fortunate proprietor below, whose acres are thousands to their hundreds. And yet, if one of the six should buy the lands of the others, he would then be entitled to divert the water. Such are some of the consequences, suggesting themselves to the mind, of the rule we are asked to declare, and they show clearly that the mode of diversion of the water is a false quantity in the discussion. Whatever be the just proportion of water to which any riparian proprietor is entitled, that proportion cannot be diminished by the fact that, in order to utilize it, he must raise it from the bed of the stream by pumps or other similar appliances. Every diversion of water from a stream is artifical,—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump,—it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does. The right to take the water at all is a right to change the ordinary course of nature; and the methods employed, so long as their use does not infringe the like and equal rights of others, are immaterial. We do not wish to be understood as now deciding how, in any given case, the respective proportions of the different owners upon a stream are to be determined. Whether they are to be ascertained according to the extent of ownership or frontage along the stream, or according to the area of land bordering on the stream, or the amount of land needing or susceptible of irrigation, or the character of the soil, or according to several or all of these circumstances, or other circumstances that may exist, has never been decided, nor has there been, so far as we know, any opportunity for deciding it. We merely hold that the mere mode of diverting the water from the stream, so long as that mode does not deprive others of their equal rights, is not a factor to be considered. We will add, in view of any further effort that the parties may make to obtain a judicial determination of their respective rights in this stream, that a final and satisfactory adjustment can never be had without the presence of every person having any right in the stream, and that all the facts which can possibly bear on the question should

be laid before the court. In the present case, as we have suggested, no sufficient data are furnished by the pleadings or evidence for a determination of that question, and the learned judge of the court below would have been justified in no other disposition of the case as presented than the one made.

The judgment and order are therefore affirmed.

We concur: **Harrison, J.**; **Garoutte, J.**

Annie L. SLOANE *et al., Respts.*,
v
SOUTHERN CALIFORNIA RAILWAY COMPANY, *Appt.*

(111 Cal. 220.)

1. An action against a carrier for violation of his obligation to carry a passenger may be in the nature of an action on the case.

2. The wrongful expulsion by a conductor of a passenger who had no ticket because it had been taken up by another conductor renders the carrier liable.

3. A passenger is not called upon to question the right of a conductor in taking up a ticket, in order to preserve the right to be carried to destination.

4. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril may produce a complete change in the nervous system of an individual, and render weak and timid one who was physically strong and vigorous.

5. Paroxysms of the nervous system caused by the indignity and humiliation suffered by a passenger on being wrongfully ejected from a train constitute a bodily injury for which damages are recoverable.

6. Ignorance of a carrier of the susceptibility of a passenger to nervous disturbance, and absence of reason to anticipate nervous disorder from an injury, will not prevent its liability if such a disorder is actually caused by its negligence.

7. Reasonable prudence of a woman when ejected from a train in undertaking to walk to a certain place is a question for the jury.

8. Technical error in refusing to strike out mere probative matter from a complaint is not ground for reversal.

9. A complaint for personal injuries specifying humiliation, injuries to health, etc., as elements of damage, need not designate the particular amount of damage sustained in each particular.

10. A denial by a corporation for want of sufficient information and belief is insufficient if the matters alleged were presumptively within the knowledge of any of its officers, even if the one verifying the answer was without information or belief upon the subject.

11. A verdict of $1,400 for the ejection of a woman from a train, which obliged her to walk about a mile and caused a recurrence of insomnia and nervous paroxysms to which she had been subject, is excessive.

12. A remittitur of the excess of a verdict may be required as a condition of denying a reversal.

(March 23, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Riverside County in favor of plaintiffs in an action brought to recover damages for the alleged wrongful ejection of one of the plaintiffs from defendant's train. *Affirmed on condition.*

The facts are stated in the opinion.

Mr. **George J. Leovy,** with *Mr.* **William J. Hunsaker,** for appellant:

Under the system of pleading prevailing in this state only the ultimate or issuable facts should be stated in the complaint.

Code Civ. Proc. §§ 426, 453; *Green* v. *Palmer*, 15 Cal. 412, 76 Am. Dec. 492; *Bowen* v. *Aubrey*, 22 Cal. 566; *Grewell* v. *Walden*, 23 Cal. 169; *Patterson* v. *Keystone Min. Co.* 30 Cal. 364; *Larco* v. *Casaneuava*, Id. 565; *Willson* v. *Cleaveland*, Id. 200; *Coryell* v. *Cain*, 16 Cal. 567.

The complaint was uncertain in the particulars specified in the demurrer thereto; and for that reason the demurrer should have been sustained.

Lamb v. *Harbaugh*, 105 Cal. 680; *Mallory* v. *Thomas*, 98 Cal. 645; *Grandona* v. *Lovdal*, 70 Cal. 161.

None of the matters stated in the complaint which were denied on information or belief were presumptively within the knowledge of the corporation defendant or its general manager who verified the answer on its own behalf.

Smith v. *Janesville*, 26 Wis. 291; *Boorman* v. *Americn Exp. Co.* 21 Wis. 154; *Oregonian R. Co* v. *Oregon R. & Nav. Co.* 22 Fed. Rep. 245; *Colorado Coal & I. Co.* v. *John*, 5 Colo. App. 213; *Bennett* v. *Leeds Mfg. Co.* 110 N. Y. 150; *Martin* v. *Erie Preserving Co.* 48 Hun, 81; *Maclay* v. *Sands*, 94 U. S. 586, 24 L. ed. 211; *Hagman* v. *Williams*, 88 Cal. 146.

A railroad company has the right to require passengers to pay fare in advance or produce a proper ticket; and upon refusal to pay fare or produce a ticket, to remove such person from its cars, at a regular station or near a dwelling house.

Code Civ. Proc. §§ 2186–2188; *Yorton* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23; *Shelton* v. *Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Crawford* v. *Cincinnati, H. & D. R. Co.* 26 Ohio St. 580; *Townsend* v. *New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Frederick* v. *Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep 531; *Cheney* v. *Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190; *Jerome* v. *Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Mosher* v. *St. Louis, I. M & S. R. Co.* 127 U. S. 396, 32 L. ed. 251; *Van Dusan* v. *Grand Trunk R. Co.* 97 Mich. 439; *Mahoney* v. *Detroit Street R. Co* 93 Mich. 612, 18 L. R. A. 335; *Peabody* v. *Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823; *Breen* v. *Texas & P. R. Co.* 50 Tex. 43; *McKay* v. *Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132; *Chicago, B. & Q. R. Co.* v. *Griffin*, 68 Ill. 504; *Chicago & N. W. R. Co.* v. *Bannerman*, 15 Ill. App.

NOTE.—As to injury caused by fright as a cause of action for damages, see, in connection with the above case, that of Ewing v. Pittsburgh, C. C. & St. L. R. Co. (Pa.) 14 L. R. A. 666, and *note*.

See also 40 L. R. A. 679; 42 L. R. A. 199; 47 L. R. A. 323, 325.

100; *Pouilin* v. *Canadian P. R. Co.* 52 Fed. Rep. 197, 17 L. R. A. 800, 6 U. S. App. 298; *Bradshaw* v. *South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Hibbard* v. *New York & E. R. Co.* 15 N. Y. 455.

Persons who perpetrate torts are, as a rule, responsible, and only responsible, for the proximate consequences of the wrongs they commit.

Western R. Co. of Alabama v. *Mutch*, 97 Ala. 194, 21 L. R. A. 316; 16 Am. & Eng. Enc. Law, pp. 428, 429, 431, 437; Shearm. & Redf. Neg. § 26; *Durgin* v. *Neal*, 82 Cal. 595; 5 Am. & Eng. Enc. Law, p. 21.

The measure of damages for the breach of an obligation not arising from contract, under the provisions of § 3333 of the Civil Code, is the amount which will compensate for all the detriment proximately caused thereby, while for the breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.

Fairbanks v. *Williams*, 58 Cal. 241; 2 Greenl. Ev. § 256; *Anderson* v. *Taylor*, 56 Cal. 131, 38 Am. Rep. 52; *Hicks* v. *Herring*, 17 Cal. 566; *Chidester* v. *Consolidated People's Ditch Co.* 53 Cal. 56.

Neither mental anguish nor physical injury was proximately caused by the acts of the conductor.

2 Wood, Railroads, Minor's ed. 1894, p. 1411; Wood's Mayne, Damages, § 54, and notes; *Johnson* v. *Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Haile* v. *Texas & P. R. Co.* 60 Fed. Rep. 557, 23 L. R. A. 774; *Gulf, C. & S. F. R. Co.* v. *Trott*, 86 Tex. 412; *Atchison, T. & S. F. R. Co.* v. *McGinnis*, 46 Kan. 109; *Hall* v. *Memphis & C. R. Co.* 15 Fed. Rep. 57; *Morse* v. *Duncan*, 14 Fed. Rep. 396; *Trigg* v. *St. Louis, K. C. & N. R. Co.* 74 Mo. 147; *Ewing* v. *Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666; *Anderson* v. *Taylor*, 56 Cal. 131, 38 Am. Rep. 52; *Salina* v. *Trosper*, 27 Kan. 544; *Phillips* v. *Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Georgia* v. *Kepford*, 45 Iowa, 48; *Hampton* v. *Jones*, 58 Iowa, 317; *Western U. Teleg. Co.* v. *Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706, 13 U. S. App. 317; *St. Louis & S. F. R. Co.* v. *Farr*, 56 Fed. Rep. 994, 12 U. S. App. 520; *Benson* v. *Central P. R. Co.* 98 Cal. 45; *Summerfield* v. *Western U. Teleg. Co.* 87 Wis. 1; *Western U. Teleg. Co.* v. *Rogers*, 68 Miss. 748, 13 L. R. A. 859; *Butner* v. *Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770; *Chicago* v. *McLean*, 133 Ill. 148, 8 L. R. A. 765.

The requirement of extraordinary care on the part of the carrier only applies to such matters as involve the safety of a passenger.

2 Shearm. & Redf. Neg. 501; *Illinois C. R. Co.* v. *Miner*, 69 Miss. 710, 16 L. R. A. 627; *Moreland* v. *Boston & P. R. Corp.* 141 Mass 31; *Palmer* v. *Pennsylvania Co.* 111 N. Y. 488, 2 L. R. A. 252; *Kelly* v. *Manhattan R. Co.* 112 N. Y. 443, 3 L. R. A. 74; *Morris* v. *New York C. & H. R. R. Co.* 106 N. Y. 678; *Taylor* v. *Pennsylvania Co.* 50 Fed. Rep. 755; Wood, Railroads, § 301; 2 Rorer, Railroads, 948; Ray, Passenger Carriers, 95, 96.

The verdict is excessive and manifestly was the result of undue consideration for the female plaintiff and the prejudice of the jury against defendant.

Chattanooga, R. & C. R. Co. v. *Lyon*, 89 Ga. 16, 15 L. R. A. 857; *Tarbell* v. *Central P. R. Co.* 34 Cal. 616; *Trigg* v. *St. Louis, K. C. & N. R. Co. supra; Atchison, T. & S. F. R. Co.* v. *McGinnis*, 46 Kan. 109; *Quigley* v. *Central P. R. Co.* 5 Sawy. 107; *Georgia R. & Bkg. Co.* v. *Eskew*, 86 Ga. 641.

Messrs. **Works & Works** and **Sweet, Sloane, & Kirby,** for respondents:

Plaintiff could recover in this action his proper damages of all sorts.

Head v. *Georgia P. R. Co.* 79 Ga. 358.

It is immaterial that the injury is charged to have been committed in violation of a contract. If the act producing the injury be in itself tortious it may be so treated for all remedial purposes, and it would be absurd to hold that because the wrong done amounts to the breach of a contract it is therefore purged of its tortious character.

Sheldon v. *The Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193; *Serwe* v. *Northern P. R. Co.* 48 Minn. 78; *Pouilin* v. *Canadian P. R. Co.* 47 Fed. Rep. 858; *Willson* v. *Northern P. R. Co.* 5 Wash. 621; *Com.* v. *Power*, 7 Met. 596, 41 Am. Dec. 475, note; *Muckle* v. *Rochester R. Co.* 79 Hun, 32; *Baltimore & O. R Co.* v. *Bambrey* (Pa) 16 Atl. 67; *East Tennessee, V. & G. R. Co.* v. *King*, 88 Ga. 443; *Philadelphia, W. & B. R. Co.* v. *Rice*, 64 Md. 63; *Pittsburg, C. & St. L. R. Co.* v. *Hennigh*, 39 Ind. 509; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Murdock* v. *Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307, 133 Mass. 15, 43 Am. Rep. 480; *Moore* v. *Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 83; *Hufford* v. *Grand Rapids & I. R. Co.* 64 Mich. 631; *International & G. N. R. Co.* v. *Smith* (Tex.) 1 S. W. 565.

Plaintiff is entitled to recover here as for a tort.

5 Am. & Eng. Enc. Law, p. 6; 1 Sutherland, Damages, p. 21; *Hawthorne* v. *Siegel*, 88 Cal. 159; *Myers* v. *Malcom*, 6 Hill, 292, 41 Am. Dec. 744; *Topeka* v. *Tuttle*, 5 Kan. 312; *Gray* v. *Waterman*, 40 Ill. 522; *Krippner* v. *Biebl*, 28 Minn. 139.

The recovery of damages for indignity, mental suffering, etc., applies to an expulsion from the cars accompanied by acts and conditions which are calculated to inflict, and do inflict, upon the expelled passenger feelings of insult, indignity, and mortification.

Curtis v. *Sioux City & H. P. R. Co.* 87 Iowa, 622; *Baltimore & O. R. Co.* v. *Bambrey, Head* v. *Georgia P. R. Co., Muckle* v. *Rochester R. Co.* and *Willson* v. *Northern P. R. Co. supra; Foster* v. *Chesapeake & O. R. Co.* 36 W. Va. 318; *Central R. & Bkg. Co.* v. *Roberts*, 91 Ga. 513; *Homiston* v. *Long Island R. Co.* 3 Misc. 342; *Pennsylvania R. Co.* v. *Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Malone* v. *Pittsburgh & L. E. R. Co.* 152 Pa. 390; *Pine* v. *St. Paul City R. Co.* 50 Minn. 144, 16 L. R. A. 347; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Chicago & E. I. R. Co.* v. *Conley*, 6 Ind. App. 9.

Even the old line of decisions which hold that there must be an actual physical injury to serve as a basis of consequential damages from

mental suffering concedes that a very slight foundation of physical suffering will do to build upon.

Sutherland, Damages, 2d ed. § 75; *Canning* v. *Williamstown*, 1 Cush. 452.

Physical injury and suffering purely the result of mental disturbance without any primary bodily hurt, can be recovered for if the mental distress was wrongfully inflicted and a proper element of damages in itself.

Seger v. *Barkhamsted*, 22 Conn. 298; *Purcell* v. *St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203; Sutherland, Damages, 2d ed. §§ 21–23; *Bell* v. *Great Northern R. Co.* L. R. 26 Ir. 428; *Razzo* v. *Varni*, 81 Cal. 289; *Mann Boudoir Car Co.* v. *Dupre*, 54 Fed. Rep. 646, 21 L. R. A. 289, 13 U. S. App. 183; *Fitzpatrick* v. *Great Western R. Co.* 12 U. C. Q. B. 645; *Buchanan* v. *West Jersey R. Co.* 52 N. J. L. 265; *Barbee* v. *Reese*, 60 Miss. 906; *Ft. Worth & N. O. R. Co.* v. *Smith* (Tex.) 25 S. W. 1032; *Stutz* v. *Chicago & N. W. R. Co.* 73 Wis. 147; *Oliver* v. *La Valle*, 36 Wis. 592; *Renner* v. *Canfield*, 36 Minn. 90.

Defendant is not relieved from liability because plaintiff's suffering may have been aggravated by a predisposition to such injuries.

Purcell v. *St. Paul City R. Co. supra;* 2 Am. & Eng. Enc. Law, p. 767; *Louisville, N. A. & C. R. Co.* v. *Falvey*, 104 Ind. 409; *Mann Boudoir Car Co.* v. *Dupre, supra;* 2 Shearm. & Redf. Neg. § 742; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Heney* v. *Dennis*, 93 Ind. 452, 47 Am. Rep. 381; *Ehrgott* v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Louisville, N. A. & C. R. Co.* v. *Snyder*, 117 Ind. 435, 3 L. R. A. 434; *Vosburg* v. *Putney*, 86 Wis 278; *Oliver* v. *La Valle, supra; Cincinnati, H. & I. R. Co.* v. *Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

It was the duty of the carrier to exercise a very high degree of care and caution in taking up or exchanging the passenger's ticket.

Palmer v. *Charlotte, C. & A. R. Co.* 3 S. C. N. S. 580, 16 Am. Rep. 755; *Louisville, N. A. & C. R. Co.* v. *Conrad*, 4 Ind. App. 83; *Georgia R. & Bkg. Co.* v. *Eskew*, 86 Ga. 641; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229; *Georgia R. Co.* v. *Homer*, 73 Ga. 251.

Harrison, J., delivered the opinion of the court:

The plaintiff Annie L. Sloane purchased a ticket, April 8, 1894, from the agent of the defendant, at North Pomona, for passage from that place to San Diego, and on the same day took passage upon the regular passenger train of the defendant. Before reaching San Bernardino the conductor of the train took up her ticket, without giving her any check or other evidence of her right to be carried to San Diego, and on arriving at San Bernardino she was required to change cars, and enter another train of cars of the defendant. After entering this train of cars the conductor in charge thereof demanded of her her ticket, and upon her stating to him that she had given it to the conductor of the other train, and the circumstances therewith, she was informed by him that she must either pay her fare or leave the train. She had no money with her, and when the train reached East Riverside she left the car. After getting off the train, she started to walk back as far as Colton upon the railroad track, a distance of about 3 miles, but, after walking a portion of the way, secured a seat in a passing vehicle, and was carried to Colton, where she spent the night with her sister-in law. On the next day, having borrowed some money with which to purchase another ticket, she resumed her passage, and was carried to San Diego. The present action was brought to recover damages sustained by reason of the wrongful act of the defendant's agents. The cause was tried by a jury, and a verdict rendered in favor of the plaintiffs for the sum of $1,400. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

It is contended by the appellant that, as the plaintiff left the car at East Riverside in accordance with the previous directions of the conductor, and no personal violence was used or displayed towards her, her only right of action is for a breach of the defendant's contract to carry her to San Diego, and that the extent of her recovery therefor is the price paid for the second ticket, and a reasonable compensation for the loss of time sustained by her. The plaintiff's right of action against the defendant is not, however, limited to the breach of its contract to carry her to San Diego, but includes full redress for the wrongs sustained by her by reason of the defendant's violation of the obligations which it assumed in entering into such contract. If she was wrongfully prevented by the defendant from completing the passage to San Diego for which it had contracted with her, she could either bring an action simply for the breach of this contract, or she could sue it in tort, for its violation of the duty, as a common carrier, which it assumed upon entering into such contract. *Jones* v. *The Cortes* 17 Cal. 487; *Head* v. *Georgia P. R. Co.* 79 Ga. 358; *Carsten* v. *Northern P. R. Co.* 44 Minn. 454, 9 L. R. A. 688. The complaint in the present case is not merely for the breach of the contract, nor is it merely for the wrong committed in excluding her from the car, but it is to recover the damages sustained by her by reason of the wrongful acts of the defendant committed in the violation of its contract. It is in the nature of an action on the case arising out of the conduct of the defendant in wrongfully depriving her of her ticket, and thereafter, by reason of such wrongful act, excluding her from its car, and refusing to carry out its contract. Although her action is for the tort resulting from the defendant's conduct, the wrong which produced that result was twofold, —depriving her of the evidence of its contract to carry her to San Diego, and afterwards excluding her from its car for failure to produce the evidence of which it had wrongfully deprived her. For the purpose of giving her this right of action, it is immaterial that these different acts were by different agents of the defendant. If the conductor who took up the ticket had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its train to different conductors *Muckle* v. *Rochester R. Co.* 79 Hun, 32. The plaintiff was not called upon to question the right of the first conductor in

taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars.

In her testimony regarding her exclusion from the cars, the plaintiff recounted the interview between her and the conductor, and the manner in which she was directed to leave the car, and it was claimed at the trial that she had been thereby subjected to humiliation and indignity, for which she was entitled to redress. Counsel for the appellant does not question, as a proposition of law, that, if the conductor was insulting and violent in removing her, such treatment forms an element of damage to be recovered by her; but he maintains that the evidence fails to show such conduct. The evidence was, however, before the jury, and they were properly instructed in reference thereto; and, although it might be urged upon them that this evidence was insufficient to establish such conduct, we cannot say, as a matter of law, that it was not proper to submit the question to their judgment.

Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. The court instructed the jury that, if they found for the plaintiffs, "in assessing damages, if it appears from the evidence that the plaintiff Annie L. Sloane was wrongfully deprived of her right to ride on defendant's cars, and expelled therefrom in a manner and under circumstances calculated to inflict, and which did inflict, feelings of indignity and insult, the jury is authorized to consider under the evidence, the injured feelings of the plaintiff, the indignity endured, her mental suffering, the humiliation and wounded pride which one in her condition of life and standing in the community would experience, together with any bodily harm or suffering occasioned, and to award such an amount for damages as will compensate her for such humiliation, suffering, and other detriment." The jury were not specially instructed with reference to any damages that might have been sustained by reason of the recurrence of this disturbance of the nervous system, but it is reasonable to suppose that the above evidence was offered by the plaintiffs for the purpose of recovering damages for the injury that might be thus established, and that, under that portion of the above instruction in which the jury were authorized in assessing damages to consider "any bodily harm or suffering occasioned" by the explusion of Mrs. Sloane from the cars, it was intended that they should consider this evidence, and the injury which it established. The defendant objected to the introduction of the evidence, and excepted to the instruction, and insists that under no circumstances could the jury consider this effect upon the plaintiff as an element of damage for which the defendant is liable; that the court should not have directed the jury to consider any mental suffering experienced by her.

Counsel for the appellant has discussed, in his brief, the want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. To the extent that the term "mental suffering" is included in the above instruction, this proposition is inapplicable. The term, as there used, is to be construed with reference to the context in which it occurs. The "mental suffering," there named, is not the mental anguish or pain referred to in the above proposition cited by the appellant, but is the mental experience which is concomitant with the insult, indignity, and humiliation named in the instruction. It would be a contradiction of terms to hold that the individual whose pride had been humiliated, or whose dignity had been insulted, had no mental suffering in connection therewith, or that this humiliation and insult did not of themselves constitute mental suffering; that he could have redress for the injured pride, but not for the mental suffering it produced. Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. 3 Sutherland, Damages, § 1245.

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and distroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of *Bell* v. *Great Northern R. Co.* L. R. 26 Ir. 428. Mrs.

Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of its opinion Lord Chief Baron Palles says: "In conclusion, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time." This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treaties on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (vol. 1, pp 77–81), also comments upon it with great approval. In *Purcell* v. *St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." See also *Canning* v. *Williamstown*, 1 Cush. 451; *Seger* v. *Barkhamsted*, 22 Conn. 290; *Mann Boudoir Car Co.* v. *Dupre*, 4 C. C. A. 540, 54 Fed. Rep. 646, 21 L. R. A. 289, 13 U. S. App. 183; *Stutz* v. *Chicago & N. W. R. Co.* 73 Wis. 147; *Razzo* v. *Varni*, 81 Cal. 289. "It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock." *Warren* v. *Boston & M. R. Co.* 163 Mass 484.

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. Civ. Code, § 3333. If the facts under which she was excluded from the car would be an act of negligence on the part of the defendant as to any and all persons, whoever might sustain injury by such act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm. In *Baltimore City Pass. R. Co.* v. *Kemp*, 61 Md. 74, and 619, 48 Am. Rep. 134, the plaintiff was injured upon a car of the defendant, and thereafter a cancer developed itself upon her breast at the place where she had been hurt. Testimony was given to the effect that such hurt was sufficient to cause the development of the cancer,

and that, in the opinion of the experts, they would attribute it to that cause. It was shown that, previous to the accident she had been in apparently good health and condition. The court held that it was for the jury to determine, from the evidence, whether the cancer did result from the injury, and, if so, that the defendant was liable, even though it had no reason to anticipate such a result. "It is not for the defendants to say that because they did not, or could not in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know, and to contemplate, all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act." See also *Fell* v. *Northern P. R. Co.* 44 Fed. Rep. 253.

The court properly left to the jury to determine whether Mrs. Sloane exercised reasonable prudence in undertaking the walk from East Riverside to Colton, and, if so, that the injury sustained by her was a proper element of damage to be recovered. It could not say, as matter of law, or instruct the jury, that under the evidence before them such walk was or was not necessary, or whether the route selected by her was the most feasible; nor would it have been justified in directing them not to allow compensation for any injury sustained by the walk, upon the ground that, if she had waited a few hours, she could have gone upon the cars. *Malone* v. *Pittsburgh & L. E. R. Co.* 152 Pa. 390.

The refusal of the court to strike out certain portions of the complaint as irrelevant is not a ground for reversal of the judgment. The matter embraced therein was relevant to the plaintiffs' right of recovery, and they were justified in setting forth in their complaint the several acts of the defendant which constituted the wrong for which they sought redress. The defendant does not claim to have been prejudiced by any of the probative matters contained in these allegations, and, even if this matter might have been properly struck out by the court, after the cause has been tried upon its merits, the judgment will not be reversed for such technical error.

The demurrer to the complaint was properly overruled. The cause of action set forth therein is neither ambiguous nor uncertain. It clearly states a single ground of recovery, *viz.*, the unlawful violation by the defendant of the obligation it had assumed to carry Mrs. Sloane to San Diego; and, although the damages caused to her by this violation of its obligation were made up of the injuries to her person, as well as the money paid by her as the consideration of this obligation, they all resulted from the wrong committed by the defendant. It was necessary that she should point out the particulars in which she had sustained injuries from the defendant,—the humiliation, injuries to her health, etc.— in order that evidence thereof might be given at the trial, and also that the defendant might be prepared to meet such evidence; but it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity that she had been compelled to undergo, distinct from the amount sustained from the injury to her health. These elements of damage were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury, in the exercise of an intelligent discretion.

Neither does the action of the court in striking out a portion of the defendant's answer justify a reversal of the judgment. The denial of an allegation in the complaint for want of sufficient information and belief to enable the defendant to answer the same justifies the court in disregarding or striking out such denial, if the matter is presumptively within the knowledge of the defendant; and, although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of information and belief, if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject. In the present case it, moreover, clearly appears that the defendant was not prejudiced by the action of the court. In a separate defense to the action, the defendant directly alleged many of the facts which, in the portion of the answer thus struck out, it had denied for want of information and belief; and, although an admission in one defense is not available as against a denial in another, it is competent for the court to consider such admission for the purpose of determining whether the answer containing the denial is sham or evasive. After the ruling of the court the defendant amended its answer by directly denying the matters alleged in one of the paragraphs which the court held had been insufficiently denied, and at the trial it stipulated to the truth of the matters that had been denied by it in another of the paragraphs which was stricken out. The defendant was therefore not precluded from defending the action in any particular upon which it relied. After a cause has been tried upon its merits, a ruling of the court either in striking out, or in refusing to strike out, a portion of a pleading, will not justify a reversal of the judgment, if it appears that the party against whom the ruling was made has not been prejudiced thereby, and has been able to present to the court his entire cause of action or defense. Mere technical error, unaccompanied by injury, will be disregarded. Code Civ. Proc § 475.

The court did not err in its instructions to the jury respecting the measure of care which a railroad company must exercise towards its passengers. Rorer, Railroads, p. 951; *Georgia R. Co.* v. *Homer*, 73 Ga. 251. The passenger is not required to question the action of the conductor in taking up his ticket, but has to assume that his conduct in taking or withholding the ticket is in accordance with the rules of the company. It is therefore incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the ticket from the passenger, the latter shall be provided with the means of continuing his journey. It is not error to hold that this requires extreme care and diligence. We are of

the opinion, however, that the damages allowed by the jury were excessive, and not justified by the evidence. They were properly told that they could not award the plaintiff exemplary damages, but only such as would be a full and fair compensation to her for the injury and detriment she had suffered as the proximate results of the defendant's wrongful acts. The testimony tending to show that the conductor was rude and insulting in directing her to leave the train at East Riverside is quite meager, and consists more of her statement of its character than of the language used by him. The jury were instructed that, in estimating the amount of damages she could recover by reason of the humiliation in being excluded from the car, they were not at liberty to consider her peculiar nervous temperament, but to allow only such damages as would have resulted to a person of ordinary or usual temperament. So, too, the evidence concerning the effect of this expulsion from the car upon her nervous condition consists more of general statements than of details, and it does not appear that this effect was of more than brief duration. She does not claim to have sustained any direct physical injury by reason of the walk to Colton. She testifies, as do also her husband and Dr. Averill, that, except for her nervous condition, she was in fair health, and that she was abundantly able to take a walk of 2 or 3 miles, and it is not suggested that the walk had any effect upon her nervous condition, or that she suffered any direct inconvenience therefrom after her return to San Diego. The walk itself was not attended with any unusual inconvenience. It was upon the railroad track, in a level county, on an afternoon in April. The distance is not given, but, after going about a mile, or as far as the railroad bridge, she was taken into a passing vehicle, and carried to Colton. While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited, discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict.

The judgment and order denying a new trial are reversed unless the plaintiffs shall, within thirty days after the filing of the remittitur in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of $1,000. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order shall stand affirmed.

We concur: **Van Fleet**, J.; **Garoutte**, J.

Rehearing in banc denied.

ALABAMA SUPREME COURT.

T. J. WHITE *et al.*, *Appts.*,
v.
W. C. YAWKEY.

(.....Ala.....)

Damages for the conversion of logs in an action against one who purchased them innocently from an inadvertent trespasser are measured by the value of the logs immediately after severance, with interest thereon, excluding any enhancement of the value by transportation to another place.

(January 16, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Geneva County in favor of plaintiff in an action brought to recover damages for the value of certain logs which defendants were alleged to have wrongfully converted to their own use. *Reversed.*

The principal defense to the action was that at the time of the alleged conversion defendants were engaged in cutting timber from property adjoining that of plaintiff, and not knowing the true dividing line and without any intention of taking or appropriating any of plaintiff's property, they mistakenly cut it and carried it away.

The court gave a general affirmative charge for plaintiff and refused to instruct the jury that plaintiff could not recover as damages more than the proved value of logs prior to the removal of them from the land.

Further facts appear in the opinion.

Mr. **M. E. Milligan** for appellants.

Mr. **J. J. Morris** for appellee.

Head, J., delivered the opinion of the court:

The case was tried in the lower court upon the second count of the complaint, which was in trover, and claimed damages "for the conversion of 100 pine logs cut and taken away" from the lands of the plaintiff. The material facts are that, within a year prior to the commencement of the suit, one Jack Brewer cut the pine logs from the timber lands belonging to the plaintiff, and sold them to defendants, to be delivered on the banks of Pea river, where he did in fact deliver them; and that neither he nor the defendants knew at the time the cutting was done that trespasses were being committed on the plaintiff's property, this fact not having been discovered until a survey was made, some time after the acts complained of had been performed. The defendants disposed of the logs, which were worth 4 cents per foot, at Pea river. These facts were established by the plaintiff's witness, and in regard to them there was no dispute. With a view to mitigating the damages, the defendants offered to prove the value of the logs prior to their removal from the land, accompanying the offer with the statement to the court that they ex-

NOTE.—The measure of damages for injury to or destruction of trees is the subject of a *note* to Bailey v. Chicago, M. & St. P. R. Co. (S. D.) 19 L. R. A. 653.

See also 34 L. R. A. 821.

pected to prove the logs were worth materially more after being transported to and placed on the banks of Pea river than they were before such removal. The court refused to allow this proof to be made, and to the ruling an exception was duly reserved. This presents the single question of merit to be decided upon the appeal.

It will be observed from the foregoing statement, that the record makes the case of a conversion by purchasers, innocent of wrongdoing, from an inadvertent trespasser, who by the expenditure of time, labor, and, doubtless, money, had enhanced the value of the pine logs, after their severance from the freehold and transformation into chattels. The effect of the ruling of the circuit court was to exclude from the jury all evidence upon the subject of value, except that confined and limited to the place of delivery to the defendants, and thereby to necessitate a verdict for the value at that place, as being the only authorized measure of damages justified by the facts of the case. If the law authorized or required the recovery to be calculated upon the basis of the lesser value, under the circumstances stated, it is obvious the ruling of the circuit court was erroneous and prejudicial to appellants. No Alabama case has been found or cited in which the question here presented has been adjudicated. In *Riddle* v. *Driver*, 12 Ala. 590, decided in 1847, where trover was brought for 1,500 bushels of coal, into which the wood of the plaintiff had been transformed by the defendant, it was suggested by the court as a possibility that the jury might consider the value of the defendant's labor on the rough material in estimating the damages; but no opinion was given upon the point, as no question upon the measure of damages had been made in the lower court, and hence the case did not call for an authoritative adjudication in respect of the amount of plaintiff's recovery. No occasion seems, subsequently, to have arisen for a decision by this court as to the measure of damages which a plaintiff ought to recover in an action of trover against an unintentional trespasser or his innocent vendee, where, as frequently happens when portions of the realty are severed, the value has been enhanced by the labor of the trespasser in preparing and transporting the chattels to market. Many cases, however, are to be found upon this question, in the reports of other American states, and the English judges have likewise frequently considered and decided it. It would be tedious to review the numerous cases we have examined, and it is unnecessary to do so. It is sufficient to say that the modern authorities are practically unanimous in holding that the rule of just compensation for the injury sustained, which is the ideal measure of actual damages, does not require the assessment, against an inadvertent trespasser, of the accession to the value of a chattel which his labor has produced, but that he is entitled to an abatement therefor from the enhanced value. *Winchester* v. *Craig*, 33 Mich. 205; *Beede* v. *Lamprey*, 64 N. H. 510, and 10 Am. St. Rep. 426, and many authorities cited in each of those cases. 26 Am. & Eng. Enc. Law, p. 829. The same rule prevails when trover is brought against the unintentional trespasser's innocent vendee, who is treated as standing in the shoes of his vendor. Such is this case of *E. E. Bolles Wooden Ware Co.* v. *United States*, 106 U. S. 432, 27 L. ed. 230; *Whitney* v. *Huntington*, 37 Minn. 197. It is no answer to this to say that the plaintiff might have brought detinue for the logs wherever he might have found them, short of a change of identity, and thereby have recovered them in specie after their value had been enhanced. In detinue the title prevails, and the question of damages is not considered. If a party aggrieved elects to bring the equitable action of trover, the assessment of damages may be so adjusted as to compensate the plaintiff for his injury, without paying him a premium, or depriving an innocent party of that which he has in good faith added to the chattel. *Weymouth* v. *Chicago & N. W. R. Co.* 17 Wis. 550, 84 Am. Dec. 763. The rule is different if the trespass is wilful or in bad faith. *Nesbitt* v. *St. Paul Lumber Co.* 21 Minn. 491; *Parker* v. *Waycross & F. R. Co.* 81 Ga. 395; *Heard* v. *James*, 49 Miss. 236; *Tuttle* v. *White*, 46 Mich. 485, 41 Am. Rep. 175; *E. E. Bolles Wooden Ware Co.* v. *United States, supra.* The authorities do not agree upon the question whether, in trover against an inadvertent trespasser, or his innocent vendee, for severed portions of the realty, the rule is to allow the value of the property in place, as if it had been purchased *in situ* by the defendant, at the fair market value of the district,—as, for instance, the value of timber standing, or, for coal or ore mined, the value in place,—or whether the value to be taken as the basis of recovery is that of the property converted immediately after severance, when it becomes a chattel. The case of *Wood* v. *Morewood*, 3 Q. B. 440 (which is regarded as conflicting with the earlier English cases), is the leading English, and *Forsyth* v. *Wells*, 41 Pa. 291, 80 Am. Dec. 617, subsequently criticised in that state, is one of the leading American, cases supporting the rule first stated, and they have been frequently followed. Many cases which are often cited in favor of the same rule may be distinguished by noting that they were not actions of trover, or that they arose in states which have abolished forms of action, or that the decisions were made in proceedings in equity where the courts were not influenced by the technical rules governing the various common-law actions. In this state, forms of action have not been abolished, and parties must be here held to the legitimate and logical consequences of the particular action which has been instituted.

Trover is brought for the conversion of personal property, and it would seem incongruous to say that the damages could be assessed upon the principle adopted in actions of trespass *quare clausum fregit*, when the gravamen of the complaint is essentially different. Cases can be easily perceived in which the value of the timber after severance would very inadequately compensate the owner for the trespass. This would be so when the trees were prematurely cut, or were valuable for shade or fruit. Under such circumstances, he may accommodate his selection of a form of action to the necessities of the case, and bring trespass for entering his land, and severing and removing timber or trees, in which case he would recover, as actual damages, the diminished value

of the land, or, to state it more definitely, the value of the trees standing and any injury to the freehold by reason of their removal. *Foote* v. *Merrill*, 54 N. H. 490, 20 Am. Rep. 151; *Mitchell* v. *Billingsley*, 17 Ala. 391; 26 Am. & Eng. Enc. Law, pp. 563–566. When trover is brought, the trespass upon the land is, so to speak, waived or disregarded; and when brought for the conversion of logs or trees as chattels, under the circumstances of this case, the true rule, in our opinion, is the second above stated, according to which the value immediately after severance, with interest, furnishes the proper measure of recovery. And this holding is well sustained by authority. *Beede* v. *Lamprey*, *supra*; *Bailey* v. *Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L. R. A. 653; *Moody* v. *Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Omaha & G. Smelting & Ref. Co.* v. *Tabor*, 13 Colo. 41, 5 L. R. A. 236; *Smith* v. *Gonder*, 22 Ga. 353. The circuit court erred in rejecting the proffered proof.

The third plea was no answer to the complaint, and, if it had been demurred to, would, doubtless, have been adjudged insufficient. Actual possession of land, if thereby is meant *possessio pedis*, is not required to maintain an action for the conversion of timber severed from the freehold. The legal title, which draws to it constructive possession, is, in the absence of adverse possession by another, sufficient. *Cooper* v. *Watson*, 73 Ala. 252. But the plaintiff took issue upon the plea, and the evidence left it a question for the jury whether the plaintiff had actual possession of the land at the time the trees were cut. Though the issue was in law immaterial, the parties made it material by their pleadings; so that, if plaintiff was not in actual possession, as alleged, the plea was established, and defendants were entitled to a verdict. The court therefore erred in refusing the first charge requested by the defendants.

The fourth plea was likewise demurrable. A mistake as to boundaries and an honest belief as to ownership would constitute no defense to the action, although it might affect the amount of recovery. There is, however, no evidence in the record that the defendants were engaged in cutting trees on adjacent lands, nor that they cut the trees for whose conversion the suit was brought. The cutting was done by one Brewer, who sold the logs to the defendants. In other words, the fourth plea was not proved.

Before another trial, these insufficient pleas should be eliminated by a demurrer. Cases ought not to be tried on false issues. No good reason can be seen for filing special pleas containing averments of facts that may be availed of under the general issue; and the practice of complicating and confusing a case with numerous unnecessary special pleas, upon which parties are often led, in the hurry of a trial, to take issue to the detriment of the right of the cause, ought not to be pursued.

The court did not err in refusing the affirmative charge to the defendants.

We need not comment particularly on the charge requested by the defendants upon the measure of damages, as what we have already said upon that subject will enable the circuit court to declare properly the law on another trial.

For the error in rejecting the evidence designed to mitigate the damages, and in refusing said charge, *the judgment is reversed*, and the cause remanded.

R. L. VANSANDT, *Appt.*,
v.
V. L. WIER and Wife.

(.....Ala.....)

1. **The doctrine of equitable estoppel cannot operate** to deprive a married woman of her statutory separate estate.
2. **A married woman cannot dedicate to public use her statutory real estate,** except by joint deed of herself and husband executed as the statute prescribes, or in some other way provided by statute.

(February 4, 1896.)

APPEAL by plaintiff from a decree of the Chancery Court for Calhoun County in favor of defendants in an action brought to enjoin the closing of a certain street in the town of Jacksonville. *Affirmed*

The bill alleged that Mrs. Wier owned a parcel of land in the town of Jacksonville; that the Jacksonville Mining & Manufacturing Company owned lands adjoining; that the corporation platted its land showing an avenue named Quill avenue an extension of which would run through the lands of Mrs. Wier; that Mrs. Wier joined in an agreement to extend the avenue through her land; that Mr. Wier acquiesced in the dedication and that plaintiff in reliance on the dedication built a store house with reference to Quill avenue; that the Wiers were erecting a fence across the avenue which would be of great, special, and irreparable damage to plaintiff; that Mr. Wier was the general agent of his wife in the management of her lands and that he platted the same showing Quill avenue on the map with her knowledge and acquiescence; and that he entered into the written agreement which he signed dedicating the street to the public.

Further facts appear in the opinion.

Mr. **S. D. G. Brothers,** for appellant:

There is no form necessary for the dedication of land to a public use.

Yolo County v. *Barney*, 79 Cal. 375; *Osage City* v. *Larkin*, 40 Kan. 206, 2 L. R. A. 56; *Harrison County Supers.* v. *Seal*, 66 Miss. 129, 3 L. R. A. 659; *State* v. *Trask*, 6 Vt. 355, 27 Am. Dec. 559; *Stacey* v. *Miller*, 14 Mo. 478, 55 Am. Dec. 113; *San Francisco* v. *Calderwood*, 31 Cal. 585, 91 Am. Dec. 545.

A dedication to public use of land may be done by writing, or it may be done verbally without any writing.

Forney v. *Calhoun County*, 84 Ala. 215; *Steele* v. *Sullivan*, 70 Ala. 589; *State* v. *Trask*, *supra*; *Hayes* v. *Livingston*, 34 Mich. 384, 22

NOTE.—As to estoppel of married woman by deed or covenant, see *note* to Wadkins v. Watson (Tex.) 22 L. R. A. 779.

Am. Rep. 533; *Harding* v. *Jasper*, 14 Cal. 642.

While acceptance by formal adoption by public authorities or by public user is necessary to impose on the public the duty to keep in repair a dedicated highway or street, still that is not essential to the consummation of the dedication.

Harrison County Supers. v. *Seal, supra; Methodist Episcopal Church* v. *Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *State* v. *Trask, supra.*

A dedication may be either statutory or according to the common law.

State v. *Trask*, 6 Vt. 355, 27 Am. Dec. 559, note.

Common law dedications do not operate on the principle of a grant, but upon that of an estoppel *in pais* or equitable estoppel.

2 Dill. Mun. Corp. § 491.

The principles of the common law authorize the gift and estop the giver to retract it.

Harding v. *Jasper, supra.*

An equitable estoppel upon which a common-law dedication is based arises from the conduct of a party.

2 Pom. Eq. Jur. § 802.

When one of two innocent persons,—that is, persons each guiltless of an intentional, moral wrong,—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions to act—has rendered the injury possible.

2 Pom. Eq. § 803, p. 262; *Leinkauff* v. *Munter*, 76 Ala. 194; *Noble* v. *Moses*, 74 Ala. 604; *Turner* v. *Flinn*, 72 Ala. 532; *Allen* v. *Maury*, 66 Ala. 10; *Young* v. *Lehman*, 63 Ala. 519.

While an acceptance is generally necessary to complete the dedication the party may so act as to estop himself from denying the dedication or that it was accepted.

Tousley v. *Board of Education*, 39 Minn. 419; *Giles Lithographic & L. Print. Co.* v. *Chase*, 149 Mass. 459; *Marines* v. *Goblet*, 31 S. C. 153; *Nicholas* v. *Austin*, 82 Va. 817; 6 Wait, Act. & Def. 702, 705; Bigelow, Estoppel, p. 617.

Dedications of land are not within the statute of frauds.

Hayes v. *Livingston*, 34 Mich. 384, 22 Am. Rep. 533.

An agent without written authority can make the dedication.

Franklin v. *Pollard Mill Co.* 88 Ala. 318; *Alabama G. S. R. Co.* v. *South & North Ala. R. Co.* 84 Ala. 570.

And the principal may so act as to estop himself from denying authority to make the dedication.

Ibid.

He does so act if he sees and knows of another spending money on the faith of the dedication.

Godeffroy v. *Caldwell*, 2 Cal. 489, 66 Am. Dec. 360; *Davis* v. *Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Nicholas* v. *Austin, supra; Humphreys* v. *Finch*, 97 N. C. 303; *Velsian* v. *Lewis*, 15 Or. 539; Bigelow, Estoppel, p. 617; *Forney* v. *Calhoun County*, 84 Ala. 215.

When a party so acts as to cause another to believe in the existence of a certain state of things, and that other acts to his prejudice on such belief, he is estopped to deny the existence of such things.

6 Wait, Act. & Def. 689.

If Mrs. Wier gave her husband general authority as her agent to deal with her land he had the right to make the dedication.

1 Parsons, Cont. 51, and authorities cited; Bigelow, Estoppel, 617.

A married woman may authorize her husband to manage her property as her general agent.

Louisville Coffin Co. v. *Stokes*, 78 Ala, 372; *Standifer* v. *Swann*, Id. 88; *Whitfield* v. *Riddle*, Id. 99.

The principle of estoppel operates against a married woman and her estate the same as against any other person.

Wilder v. *Wilder*, 89 Ala. 414, 9 L. R. A. 97; *Robinson* v. *Walker*, 81 Ala. 404.

Purchasers of lots according to a plan acquire an interest in all the streets marked thereon.

Bartlett v. *Bangor*, 67 Me. 460; *State* v. *Trask*, 6 Vt. 355, 27 Am. Dec. 568, note; *Derby* v. *Alling*, 40 Conn. 410; *Grogan* v. *Haywood*, 6 Pac. C. L. J. 351; *Carter* v. *Portland*, 4 Or. 339.

Mr. **J. T. Martin** also for appellant.

Messrs. **Agee & Stevenson** and **John H. Caldwell** for appellees.

Head, J., delivered the opinion of the court:

Under general principles of equity jurisprudence, uncontrolled by statute, a married woman, in respect of her separate estate, was regarded as a *feme sole*. She could dispose of, charge, or incumber it in like manner as if she rested under no marital disability. There being no other trustee, her husband was regarded as the dry holder of the legal title, while she held the entire beneficial interest, subject to her own unlimited control and disposition. When not acting under the actual or implied coercion of the husband, she could bind the estate by acts *in pais* amounting to an equitable estoppel. *Drake* v. *Glover*, 30 Ala. 382 And she could, by such acts, dedicate her lands to public use. 5 Am. & Eng. Enc. Law, p. 399. A prime question now presented is whether she can, by acts and conduct *in pais*, dedicate to public use land which is made a separate estate in her by the statutes of Alabama. As is well known, the land in question of Mrs. Wier (which, it must be presumed, in the absence of contrary averment, was acquired not under a conveyance excluding the marital rights of the husband) would not, in the absence of legislation, have constituted property belonging to her. If it belonged to her at the time of the marriage, or was afterwards acquired, it would, at common law, *eo instanti* the marriage or its acquisition, have vested in the husband for the joint lives of himself and wife, and, he surviving her, for his life as tenant by the curtesy, the other conditions of curtesy being present. So that we see at once that Mrs. Wier's ownership of such land is purely the creation of the statute, and, of consequence, she takes just such an estate as the grace of the statute confers. If the statute which creates and confers the estate imposes limitations or restrictions upon her powers over it, she takes the estate *cum onere* such limitations or restrictions. Recurring to our legislation on the subject, we see that all equitable separate estates,

such as we have said the wife could have disposed of or charged in equity as a *feme sole*, have been abolished, with the single exception of estates where the legal title is vested in an active trustee for the use of the wife; and all such abolished equitable estates, and all other estates coming to the wife, which, as we have said, would have vested in the husband at common law, are created and converted by the statute into legal, separate estates of the wife, freed from all title, interest, or control on the part of the husband. We see, further, that by the same legislation certain limitations and restrictions are attached to or imposed upon the estates so created, prominent among which is the provision that her real property shall not be disposed of (save in specified contingencies) except by the joint deed of the husband and wife. This provision substantially obtained in our former married woman's law, so long in force, and frequently became the subject of judicial consideration in this court; and in our adjudications it was well settled that a married woman could not dispose of her statutory separate estate by way of equitable estoppel; that she was confined to the mode of disposition prescribed by the statute, which was by the joint deed, in writing, of herself and husband. *Canty* v. *Sanderford*, 37 Ala. 91; *Wilder* v. *Wilder*, 89 Ala. 414, 9 L. R. A. 97; *Steiner Bros.* v. *Tranum*, 98 Ala. 315, and cases therein cited; *Curry* v. *American Freehold Land Mortg. Co.* (Ala.) 18 So. 328, explaining *Wilder* v. *Wilder*, *supra*. She may be devested of title by the adverse possession of her lands by another, under the statute of limitations. Code, § 2624. What effect might be produced upon her estate by actual fraud committed by the wife is not now for our consideration. Nor have we any reference to judicial sales of her estate, in the enforcement of contracts which she may lawfully make, nor to the subjection of her lands under the right of eminent domain. Dedications of land to public uses, not effected by statute or grant, and where private rights have been acquired, as alleged in the present case, operate upon the principle of estoppel *in pais*, or, as it is termed, "equitable estoppel." It arises from the conduct of the owner, including his spoken or written words, his positive acts, and his silence or negative omission to act when he should, naturally inducing many persons to purchase property, expend money, or otherwise alter their conditions, to their detriment. 2 Pom. Eq. Jur. § 802; 5 Am. & Eng. Enc. Law, p. 410, notes; *People* v. *Reed*, 81 Cal. 70. The conclusion, then, is irresistible that a married woman cannot devest herself of her statutory real estate by dedicating it to public use, except by the joint deed of herself and husband, executed as the statute prescribes, or, perhaps, by a statutory dedication under the act of 1887 (Acts 1886–87, p. 93). Fettered by law with the disabilities we have mentioned, the public and individuals dealing with her in reference to her lands do so with knowledge of such disabilities, and will not be heard to invoke against her an estoppel which the statute, in effect, declares she cannot create. The chancellor committed no error in dissolving the injunction and dismissing the bill for want of equity.

Affirmed.

KENTUCKY COURT OF APPEALS.

W. T. LAFFERTY *et al.*, *Appts.*,
v.
L. D. HUFFMAN.

(.....Ky.....)

1. **An enrolled bill** signed by the governor and by the presiding officer of each of the two Houses of the legislature cannot be impeached by reference to the journals of either House to show that a vote thereof was not taken by the yeas and nays and entered in the journal as required by the Constitution.

2. **A vote on a question of local option** may be held by a town alone, under Stat. § 3704, although a special prohibitory law had been in force in a magisterial precinct that included the town.

3. **A constitutional provision that officers shall hold** until their successors are elected and qualified applies in case of failure to hold an election to choose their successors.

(April 1, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Harrison County enjoining them from issuing liquor licenses. *Reversed.*

The facts are stated in the opinion.

Mr. **J. Q. Ward** for appellants.

Messrs. **Blanton & Berry** for appellee.

Hazelrigg, J., delivered the opinion of the court:

Pursuant to the provisions of what is known as the "local option law" of August 6, 1892, a vote in the town of Berry, in Harrison county, was taken on January 31, 1894, and resulted in favor of the sale of spirituous, vinous, and malt liquors. When the county judge was about to direct the certificate of the election officers to be entered of record, and the trustees of the town were accordingly about to grant licenses, the appellees, certain citizens of the town, instituted this suit to prevent such action on the part of these officials. The chief point relied on in the petition for injunction is that the law under which the election was held was not enacted by the general assembly in the manner required by the Constitution; the allegation on that behalf being, in effect, that, on the final passage in the Senate of the bill as amended in the other House, the vote was not taken by yeas and nays, and entered in the journal, as required by § 46 of the Constitution. A

NOTE.—For analysis of the numerous cases respecting the conclusiveness of an enrolled bill, see *note* to State, Reed, v. Jones (Wash.) 23 L. R. A. 340.

See also 34 L. R. A. 487; 38 L. R. A. 74; 39 L. R. A. 439; 40 L. R. A. 195; 43 L. R. A. 408; 44 L. R. A. 164; 45 L. R. A. 772.

consideration of other points relied on will be deferred until after disposition of the principal question.

It is conceded that the bill, properly enrolled, was signed by the presiding officer of each of the two Houses, and signed and approved by the governor. The question is, Can a law thus promulgated be impeached by reference to the journals of either House? Different answers have been given to this inquiry in various courts of last resort in this country, but in this state it remains substantially unanswered; for, whatever may be said of the argument of the question in the *World's Fair Case* (*Norman* v. *Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 536), we are not to take the case as decisive of that which it expressly disclaims to decide. After a discussion tending, it may be admitted, to the conclusion that such an impeachment might be had, the majority opinion yet determines it to be unnecessary to decide the question, and the plaintiffs, seeking to recover under a law sought to be so impeached, were there denied relief on grounds not pertinent to this inquiry. It is to be observed, at the outset, that this is not a case where the enrolled bill is supposed to be in any wise different from the bill actually adopted by the legislative body. It is not a dispute over contents. Such a question is presented in many of the cases. Thus, in *Field* v. *Clark* (1892) 143 U. S. 649, 36 L. ed. 294, the allegation was that a section of the bill as it actually passed was not in the enrolled bill as authenticated by the signatures of the presiding officers and deposited with the secretary of state. And so in *State* v. *Chester* (1893) 39 S. C. 307, the contention was that the original bill which was sent from the Senate to the other House was altered by the speaker of the House of Representatives at the time or after it passed that House, and amended as he saw fit, when the journals of the House showed no such alterations. These cases, and we note them here as samples of many others to the same effect, hold that the official attestation of the presiding officers of the legislative body and of the executive are conclusive that an act so authenticated is the very act passed by the body, and leave undetermined, in express terms at least, the further question whether an act may be impeached if the journals fail to show that which the Constitution expressly requires them to show, such as that the bill was passed by a yea and nay vote. An examination of these cases, however, shows that the argument against the use of the journals to show that the bill was not the same as that actually adopted is quite conclusive against their use to show the absence of the steps contemplated by the organic law. And we may observe, in this connection, it would be strange if it were otherwise. For why should the journals, if deemed capable of shedding light on any question touching the bill, be rejected as evidence affecting the substance,—the very bill itself,—and held competent to affect the mere steps in the process of passing it? Indeed, does there not seem to be stronger reason for seizing hold of the journals to expose the fraud of promulgating as valid a law which had in fact never passed at all, than for using them to undermine a law because of flaws in the steps taken during its passage? Manifestly, therefore, the case of *Field* v. *Clark* and the numerous decisions of the state courts which have gone to the extent—and no further, because the particular case did not demand it—of holding the journals incompetent to declare the enrolled bill not to be the very one adopted by the legislative body, must be classed, with a few exceptions, along with the authorities holding that the verity of the enrolled bill, when duly certified and authenticated by the presiding officers, is absolute and conclusive. So construing these cases, it becomes palpable that the overwhelming weight of authority is against the impeachment of the enrolled bill by the journals, whether in a matter affecting the contents of the bill, or merely the regularity of the steps taken in its passage.

When we look to the argument, much may be said on either side of the question, and we shall content ourselves with suggesting only a few of the controlling reasons for our opinion. In the first place, no court can begin its scrutiny of the manner in which the legislative department may have performed the details of its work, as shown by its daily journals, without a sense of assumed superiority, or without seeming to arrogate to itself a supervisory power wholly inconsistent with the fundamental truth that the departments are equal and independent in their respective spheres. Surely must the passing of bills, and all the accompanying minutiæ, be exclusively legislative processes. Courts do not make laws, or pass bills; and the various steps required by the organic law to be taken seem, in the nature of things, to call for the exercise of legislative, and not judicial, functions. The judiciary, at every step of its investigation into the journals of a legislative body, must find itself confronted with the embarrassing question, How is it that the courts have come to be the exclusive guardians of those mandatory provisions of the Constitution which direct the legislature only how to transact its business? The answer must be more embarrassing, because such a thing cannot be, except on the assumption that the courts must regard themselves as alone competent for such oversight. It is to be admitted that, unless the constitutional mandate is followed, "no bill can become a law." The Constitution so says. But the question remains, What shall be taken by the courts as the basis of judicial knowledge? Must they look to the journals, and accept as conclusive the hasty memoranda of the clerk or his assistant, or shall they assume that the legislature obeyed the Constitution, and accept as conclusive the certifications of its presiding officers? That the act or successive acts of some agency, somewhere or somehow, must be held conclusive, is entirely evident, unless we open the doors to all competent proof, including that of the member on the floor,—an absurdity not to be thought of. The result is we must accept as conclusive either the entries of the clerk in the journals or the more deliberate acts of the presiding officers. It must be conceded,

on all sides, that at least some of the directions of the Constitution, prescribing steps to be taken in the passage of a bill, are addressed primarily, if not exclusively, to the legislature. Thus, no bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each House. Sec. 46. And so, before the presiding officer of each House shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. The bill shall then be read at length, and compared, and if correctly enrolled, the presiding officer, in the presence of the House, in open session, and before any other business is entertained, shall affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other House. When it reaches the other House, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed in every respect as in the House in which it was first signed. And thereupon the clerk of the latter House shall immediately present the same to the governor for his signature and approval. Section 56.

Can it be said that a statute has not become a law if the journals show it was not reported by a committee, or printed for the use of the members, or read at length on three different days, or was signed by the presiding officer without a suspension of all other business, and when no entry appears in the journal noting such signature? At least some of these steps are specially required to be entered in the journal, and nearly all of them ought to appear there, if the Houses keep a journal of their proceedings as required by § 40 of the Constitution. In some of the courts, where the journals are held to be competent evidence to impeach the enrolled bill, it is said that, where those records are merely silent, the presumption is absolute that the required steps were in fact taken. This seems to us hardly logical. If the validity of a law is to rest at all on the entries in the journals, it seems to us, when there is a total absence of evidence that a necessary step has been taken, the superstructure—the law—thus built up without a foundation must fall. Those courts assume that the failure of the clerk to make the entry, and in this violate the Constitution requiring the entry to be made, was an oversight or mistake, and treat the entry as made, supplying the omission; and yet they are not willing to assume it to be a mistake or mere misapprehension of the inferior officer if an entry is made showing steps taken not in conformity with the constitutional requirements. Even if resort is had to the journals, it would seem as consistent to overlook the sins of commission by the clerk, and treat his entry showing a violation of the Constitution as not true, as to overlook his sins of omission, and supply the defects in his record. To avoid the necessity of resorting to these fine spun distinctions, we are convinced that the consistent and safe rule is to assume that the legislature, in obedience to the Constitution, has taken the steps required by that instrument in the passage of every law attested by the signatures of its presiding officers, the journals to the contrary notwithstanding. The enrolled bill, so attested and signed, and approved by the executive, is easy of access and inspection; but what shall we say of the journals? At the session at which the law now under consideration was adopted, those records consist of over 4,000 pages. They seem to have been hurriedly and imperfectly indexed, as in the nature of things they must ever be. The assiduous lawyer who plods through these volumes may fail to find the evidence of an important step required by the Constitution to support a statute which has been promulgated as the law of the land, and the court in his case declares as a matter of fact that the prima facie law so promulgated is not in fact the law. In an adjoining circuit the court is more fortunate, and the missing step is found, or the erroneous entry is found corrected elsewhere in the record. So the law is upheld. And this confusing result will be reached, not because the law depends on the testimony or the pleadings in any given case, for the courts must take judicial notice of the journals, if they are controlling, as well as of the signatures of the presiding officers, if these are to be held conclusive; but the confusion comes from the nature of the record to be inspected. This is usually prepared by the subordinate officers, hurriedly, amidst the excitement and confusion incident to legislative bodies, and with small concern for those details which are to become so important if the record is to be subjected to judicial scrutiny.

But, it is said, since the Constitution requires the journals to be kept, it must be because they are to be used as evidence of legislative compliance or noncompliance with the constitutional requirements. We can see, however, much use for these journals other than the one suggested. Besides being necessary for the conduct of the business, it is to be remembered that our government is a representative one, and the journals show the respective parts borne by each representative in the enactment of the laws and the conduct of the public business. Responsibility cannot be shifted or made to rest on the body as a whole. Again, we know that the enrollment of bills receives careful attention at the hands of special committees for that purpose. It is the final act of the body, the climax of the work before the finishing hand of the presiding officer sets his approval thereto. It receives and merits attention for that reason, and there is small room for imposition or fraud. The enrolled act is wellnigh necessarily the very act passed by the body. But the chances of mistake are very great in the make-up of the journals as they are ordinarily kept; and, if it be understood that the enrolled bill may be impeached by them, the chances of fraud are likewise great. They are usually read from loose sheets or hurriedly made memoranda, and are approved with slight attention, and are then passed

to the journal clerk or some copyist to be transcribed formally in the journal. They receive, usually, no further consideration at the hands of the body. In after years, the careless omission of a name on the affirmative side of a law requiring a certain number of votes is made the basis of a judicial finding that the law has not been enacted by a constitutional majority. This feature is well put in the recent case of *State* v *Jones* (1893) 6 Wash. 468, where it is said: "Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the legislature at a few dollars a day." The same point is thus stated by Justice Harlan in *Field* v. *Clark:* "The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them."

It is said, however, that such a conclusion results in leaving the legislative department free to nullify the plain provisions of the Constitution, and refuse to comply with the formalities required by that instrument in the enactment of the laws. If this is true, it does not follow that the courts may interfere with the processes of the legislature in that respect. If that department fails or refuses to do the bidding of the Constitution, it is responsible to the people, and not to the courts. Besides, an assumption that it will so fail or refuse is not to be made the basis of judicial action. To the argument that, if the authenticated roll is conclusive before the courts, then less than a quorum of each House may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the Constitution, the supreme court of Indiana, in *Evans* v. *Browne*, 30 Ind 514, 95 Am. Dec. 710, responded thus: "It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers who, being human, may violate the trusts reposed in them. This, perhaps cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others, nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments, and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. . . . Nor is there any great force in the argument, which seems to be regarded as of weight by some American courts, that some important provisions of the Constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution, or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligation." From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeached by the journals. When we look to the authorities, we find, as indicated before, a great diversity of opinion. They are too numerous to be reviewed here. We notice, however, that the more recent cases are adopting the English rule, and holding the enrolled bill conclusive. In several of the cases, where the courts felt constrained to follow their former rulings holding the journals competent, regret is expressed that a different rule had not prevailed. *State* v. *Moore*, 37 Neb. 13. Others express a doubt whether it is the better rule, and in South Carolina the court overrules its former decisions, and adopts the views expressed in *Field* v. *Clark*. *State* v. *Chester*, 39 S. C. 307. In the recent case of *Carr* v. *Coke* (1895) 116 N. C. 223, 28 L. R. A. 737, the question was considered as one of new impression in that state, and after what seems to us a very satisfactory course of reasoning, and a review of the principal authorities, the conclusion was reached that, "when the legislature has solemnly certified to a fact,—that is, to the passage and ratification of an act which is within its own sphere,"—the judiciary will not be permitted "to inquire into or dispute that certification." To the same effect is the case of *Harwood* v. *Wentworth* (Ariz.) 42 Pac. 1028. The opinion in this case is well considered, and the doctrine restated on principle and authority. See also the recent cases of *Lyons* v. *Woods*, 153 U. S. 649, 38 L. ed. 854; *State, Sutherland*, v. *Nye* (Nev.) 42 Pac. 866; *Hunt* v. *Wright*, 70 Miss. 298; *Hollingsworth* v. *Thompson*, 45 La. Ann. 222; *State, Benton County*, v. *Boice*, 140 Ind. 512, and *Western U. Teleg. Co.* v. *Taggart*, 141 Ind. 281. The older authorities are found collated in the notes to *Field* v. *Clark*, and the Washington and North Carolina cases cited, and need not be further discussed.

Regarding, therefore, the act of August, 1892, as constitutionally enacted, it is yet insisted by the appellees that as, prior to January 31, 1894, when the vote in the town

of Berry was taken, a special prohibitory law (1884) was in force in the magisterial precinct that included the town, therefore no vote in the town alone could undo the vote of the entire precinct, and that the same subdivision which voted out the sale must act to vote it in. The case of *Com.* v. *King*, 86 Ky. 436, is relied on to support this contention. But in that case the right claimed by the town to take a separate vote was confessedly derived from the same law which conferred a similar right on the precinct which included the town. The power given each subdivision was from the same source, and was simultaneously conferred. Hence, the conclusion was reached that no greater, but equal, power was conferred on each, and when the whole acted under the general law the part could not undo what it had done. But here we have a new political division created, and new powers conferred. A complete, separate entity is created by a new charter of the town of Berry, and the trustees thereof given exclusive control of the question at hand, except they cannot grant license, when forbidden by a previous law, until the law is changed. And as showing that such a change might be had, and how, we have only to quote a provision of the charter on that subject adopted in July, 1893, to wit: "That in any town of the sixth class, in which the question as to whether spirituous, vinous, and malt liquors might or should be sold . . . shall hereafter be submitted to the voters thereof, and the majority of votes cast thereat shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege, or discretion to refuse to grant licenses to sell such liquors therein until another election is held therein as provided by general laws, and a majority of the voters of that town have voted against the sale of such liquors." Ky. Stat. § 3704, subs. 4. A vote in the new territory was therefore clearly contemplated and authorized by this charter, and, moreover, the general law—the local option law—was adopted, to the end that consistent and uniform laws should prevail everywhere, in place of these various and irregular special acts. Such was our conclusion in the recent cases of *Brown* v. *Com.* 17 Ky. L. Rep. 216, and *McTigue* v. *Com.* 17 Ky. L. Rep. 1418. Of course, the same precinct in which the vote was originally taken can never have another vote taken. It is well known that both the magisterial and voting precincts of 1884 have long since been obliterated, and new ones erected (Ky. Stat. §§ 1078, 1443); and it is even doubtful if a special act of the legislature could be constitutionally enacted, as, where a general law can be made applicable, a special one should not be enacted.

Nor do we find any difficulty in determining the appellants to have been the trustees of the town of Berry at the time of the institution of this suit. They had been regularly elected, under the old charter, for one year from April, 1893; and, while § 167 of the Constitution provided for a termination of their offices at the November election, 1893, it provided that the old officers should yet hold until their successors should be elected and qualified. In *Johnson* v. *Wilson*, 95 Ky. 415, the successor of the old officer was in fact elected at the November election, 1893, and, of course the old officer was not entitled to hold thereafter. In answer to his contention that he might so hold over, we said: "It is true he was to hold until the general election in November, 1893, and until his successor was elected and qualified; but this is the usual method provided to prevent a vacancy, when, from some unforeseen circumstance, no election has been held at the regular time, or some time must elapse until the succeeding officer shall qualify and be inducted into the office." Here there was no election held in the town of Berry in November, 1893, and, under the express terms of the Constitution, the appellants were entitled to hold over, and were therefore not usurpers, as contended by appellees. The act of March, 1894 (Ky. Stat. § 3672), was passed to cure any possible doubt of the legality of the acting trustees of towns of the sixth class arising out of the failure of many of those towns to elect trustees in November, 1893, and was not enacted, as contended by counsel, in recognition of the alleged fact that there were vacancies in those offices, or that the acts of the holdovers were void. Such a legislative declaration, if made, would have been inoperative, as an unauthorized interference with the functions of the judiciary in the exercise of its exclusive right to interpret the laws.

We conclude, therefore, that upon none of the grounds relied on are the appellees entitled to the relief granted by the perpetuation of the injunction, and *the judgment below is reversed*, with directions to dismiss the petition.

GEORGIA SUPREME COURT.

J. S. McTIGHE *et al.*
v.
MACON CONSTRUCTION COMPANY *et al.*,
Mercantile Trust & Deposit Company of Baltimore, Intervener.

(94 Ga. 306.)

*1. **There being in force a general law for the incorporation of railroad companies,** if the subsequent special charters of the two railroad companies involved in this litigation were unconstitutional, and therefore wholly void, each of said companies was, nevertheless, a corporation *de facto*, and, as such, could acquire and own property, and would be bound to its creditors by all acts which would have bound it had it been duly incorporated under the general law. Bonds issued by it, and deeds or mortgages made to secure the same, are enforceable to the same extent they would be if no special charter had been granted, and the company had been organized as a corporation in the method prescribed by the general law, and such bonds, deeds, and mortgages had been thereafter executed; and any person making claim upon the assets of one of these corporations *de facto*, whether as its own creditor directly, or as a creditor of such creditor or of a stockholder, sustains the same relation to it in respect to such claim as would be sustained under like circumstances were it a corporation *de jure*.

2. **A corporation created under the general law of this state for incorporating railroad companies** can bind by mortgage or trust deed, executed to secure bonds issued by it to provide funds for constructing its railroad, future acquired property, as well as property owned by it at the time of the execution of the instrument. This being so, a corporation *de facto* can do the like.

3. **A loan of $850 for the term of forty years is not rendered usurious by the lender taking from the borrower his bond for $1,000,** bearing interest on that principal at the rate of 6 per cent per annum, payable semiannually, although the bond contained a stipulation that, after ninety days' default upon any one of the instalments of interest, the

*Headnotes by LUMPKIN, J.

NOTE.—*Jurisdiction to order foreclosure sale of railroad in different states.*

The authorities all seem to agree that if a court has jurisdiction of the mortgagor it may compel a sale of the entire property although it extends into several states, but that any attempted sale by an officer of the court unaccompanied by a conveyance by the owner will be of no avail as to property out of the jurisdiction of the court.

A court which has jurisdiction of the mortgagors and trustees in a railroad mortgage may decree a sale of the road although a portion of it extends into another state. Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Farmers' Loan & T. Co. v. Chicago & A. R. Co. 27 Fed. Rep. 148; Brown v. Chesapeake & O. Canal Co. 73 Md. 567; Union Trust Co. v. Olmstead, 102 N. Y. 729.

Of the propriety of a foreclosure in one court operating upon an entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure and the completeness of the title that will pass by such sale, there can be now no longer any question. In Muller v. Dows that question was put at rest. Central Trust Co. v. Wabash, St. L. & P. R. Co. 29 Fed. Rep. 620.

The decree is made effective by means of the power which the court has over the defendants. Boston Safe-Deposit & T. Co. v. Bankers' & M. Teleg. Co. 36 Fed. Rep. 288.

It is a principle firmly established that equity as it acts primarily *in personam* and not merely *in rem* may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or an equity subsisting between the parties respecting property situated out of the jurisdiction. Mead v. New York, H. & N. R. Co. 45 Conn. 199.

A court is not limited to its territorial jurisdiction in ordering a sale of property under a mortgage where it has jurisdiction of the parties. Randolph v. Wilmington & R. R. Co. 11 Phila. 502.

A railroad company which has constructed part of its road through another state and has mortgaged its rights in the whole road can be authorized or compelled to sell whatever interest of the corporation will pass under the terms of the mortgage. McElrath v. Pittsburg & S. R. Co. 55 Pa. 189.

In Hand v. Savannah & C. R. Co. 12 S. C. 314, it was held that where a state court attempts to decree a foreclosure sale of a railroad extending into another state it should make the sale subject to such liens on the property as existed in the other state.

No title will be conveyed as to property in other states by a sale by an officer appointed by the court for the purpose of making the sale. Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co. 44 Hun, 400.

The decree of sale followed by a sale by a receiver will not affect the title in another state. There must be a conveyance by the owner. Farmers' Loan & T. Co. v. Postal Teleg. Co. 55 Conn. 334.

There are two cases in which expressions used and the action of the courts seem to conflict with the above decisions. But there was probably no intention of passing upon the question of the method of effecting the sale. And the courts would doubtless have required a conveyance by the owner in aid of the title.

In one of the cases it was held that where corporations of three states are consolidated into one a court of equity in foreclosing a consolidated mortgage upon the entire property has jurisdiction to sell all the property in all the states. Blackburn v. Selma, M. & M. R. Co. 2 Flipp. 525.

Muller v. Dows, *supra*, was cited as authority for that proposition. So the decision cannot be regarded as going further than that case would warrant.

In Wilmer v. Atlanta & R. Air Line R. Co. 2 Woods, C. C. 447, the court decreed a sale of the entire road although it extended into another state, upon the ground that to cut up a railroad into pieces for the purpose of sale would result in too much injury, and that therefore it should not be done. But there is no discussion of the power of the court to order the sale.

Of course courts in the separate states may aid each other in the foreclosure if such course seems desirable. And in some cases such proceeding might be necessary.

In Rome & D. R. Co. v. Sibert, 97 Ala. 393, the sale was made under a decree made by the courts of the two states into which the railroad extended.

H. P. F.

whole of the principal should then become due and payable; it not being stipulated that in this event the lender was not to account for any interest received, whether by discount or payment, over and above 8 per cent per annum on the principal actually loaned, and it not appearing that there was any device or contrivance to cover up usury, or any intent or expectation that default would be made in the payment of interest before the expiration of the full term of forty years. Nor would it matter that the bonds were not, in fact, delivered and the money received thereon till after a lapse of thirty-nine days or less from the date when the bonds began to bear interest at the 6 per cent rate.

4. Where a railroad forming a continuous line, and located partly in this state and partly in an adjoining state, is mortgaged by a corporation (whether *de facto* or *de jure*) of which the courts of this state have jurisdiction, the mortgage consisting of a trust deed made to secure bonds issued by the corporation, the superior court of the county in this state having jurisdiction over the corporation may, in the exercise of its equitable powers, make a decree foreclosing the mortgage as to the corporate property embraced in it situate in both states, and may effectuate the decree by directing a sale of the whole property and the execution of a proper conveyance to the purchaser by the receiver, the trustee, and the mortgagor. And if the fact be that the adjoining state has incorporated a company which has been consolidated under the forms of law with a corporation (*de facto* or *de jure*) of this state, and that this consolidated company executed the mortgage and is really the party before the court as the mortgagor, the truth of the case in this respect is admissible in evidence, and the jurisdiction is the same in all respects over the consolidated company as it would be over a corporation created exclusively under the laws of this state.

(August 20, 1894.)

ERROR to the Superior Court for Bibb County, to review a judgment rendered in favor of the Mercantile Trust & Deposit Company as intervener in a creditors' bill by McTighe *et al.*, to reach assets of the Georgia Southern & Florida Railroad Company which established bonds secured by mortgages held by intervener as valid liens on the road. *Affirmed.*

The official report set out the following facts:

This litigation was begun by petition in the nature of a creditors' bill filed by J. S. McTighe & Co. against the Georgia Southern & Florida Railroad Company, the Macon Construction Company, and others, under which petition a receiver of the defendant companies was appointed. Numerous interventions were filed, among them that of the Mercantile Trust & Deposit Company of Baltimore, trustee for the bondholders of the Georgia Southern & Florida Railroad Company, asking for foreclosure of the mortgages given to secure the bonds. It was agreed that this intervention was to be segregated from the main case and from the other interventions, and be tried separately. Said railroad and construction companies filed several pleas, which were stricken on demurrer of the intervener. McTighe & Co. filed an amendment to their petition, attacking the charter of the railroad company, on the ground that it was a special enactment of the legislature after the passage of the general act for the incorporation of railroads, and was void, and that the bonds and mortgages to secure them, made by the railroad company, and held by the Mercantile Trust & Deposit Company, were likewise void. It was alleged that the construction company was the real owner of the railroad and its property; and that McTighe & Co. had never dealt with the railroad company, but all their dealing had been with the construction company, as owner of the road, etc. This amendment was disallowed. The pleas of the construction company were similar to those of the railroad company, with the additional allegation that the former was the owner of all the stock and property of the latter.

These pleas were: (1) The bonds held by intervener as trustee, or by the persons represented by it, and the mortgages sought to be foreclosed, are null and void, and were made without authority of law, the railroad company never having been properly and legally incorporated.

(2) The mortgage sought to be foreclosed was executed when the railroad had been completed for only the first 20 miles from Macon, in the direction of Florida, and had obtained the right of way for the further construction of the road to Valdosta, Ga., and no further. All the property of defendant from Valdosta to the line of the state of Florida, together with the rolling stock belonging to it, was acquired by it after the execution of the mortgage; all said after acquired property, and all property acquired after the execution of the mortgage, is free from the lien of the mortgage, and not covered thereby.

(3) The bonds held by intervener, or the persons represented by it, and the mortgages given to secure them, are infected with usury. The bonds were issued by the railroad company to the holders thereof on July 1, 1887, in the aggregate sum of $3,420,000, payable July 1, 1927, with interest at 7 per cent per annum from date, semiannually, on the 1st days of January and July, the principal indebtedness to become due at the option of said trustee, upon the failure of the railroad company to promptly pay any interest instalment at maturity, after ninety days from such default; while, in point of fact, the holders of the bonds loaned only $2,907,000, but charged and received interest on the entire $3,420,000 at the rate of 7 per cent *per annum;* it being stipulated in each of the bonds that said interest should be reserved and paid on the face or par value thereof, instead of the amount so actually lent by the holders of the bonds. The mortgages now sought to be foreclosed were given to secure the usurious interest so contracted to be paid, as well as the face or par value of said bonds. Therefore, $513,000 of the aggregate amount called for by the bonds, and secured by the mortgages, together with the interest on the $513,000 from the date of the bonds, which interest is also included in the bonds and mortgages, is usury; and plaintiff's demand should be reduced by the $513,000, together with the interest thereon, and all interest paid on the $513,000 in the past amounting to $189,550. The in-

struments executed by the railroad company for the purpose of securing the bonds, and in the petition to foreclose termed "mortgages" or "deeds of trust," are in fact deeds attempting to convey to the intervener, as trustee, the absolute title to the property therein described, for securing the payment of the bonds; and, by reason of the above recited facts, the bonds being infected with usury, said deeds or instruments given to secure the payment thereof are absolutely void. Of the bonds held by intervener, or by persons represented by it, 360, for $1,000 principal each, were dated and executed July 1, 1887, and 3,060, for $1,000 principal each, on July 24, 1888; the aggregate principal of all these bonds being $3,420,000. Though these bonds were dated and executed as aforesaid, they were not in fact issued or delivered on said date. The 360 bonds first mentioned were delivered January 19, 1888; and the parties to whom they were so delivered, and who now hold and own them, loaned this defendant on them, and on the deed of trust executed cotemporaneously with them, to secure their payment, $306,000; said loan having been made to this defendant on January 19, 1888, and the interest on the bonds being payable on the 1st days of January and July in each of the years during which they were to run, which interest was represented by coupons attached to the bonds. Interest for nineteen days had accrued on the bonds, according to the tenor thereof, since the maturity of the coupons falling due January 1, 1888, and before said loan was made this defendant. The interest coupons which matured on July 1, 1888, represented the interest on the bonds from January 1, 1888, to July 1, 1888, and included the interest for the nineteen days from January 1 to January 19, 1888. These coupons were paid by this defendant in full, and no deduction was made for the nineteen days; nor was credit for the nineteen days interest allowed or contemplated at the time of the loan on January 19, 1888. This defendant only had the use of the money from January 19, 1888, and paid interest thereon and contracted to pay such interest from January 1, 1888. Defendant contends that the interest for the nineteen days was improperly required of it, as well as the $54,000 taken and reserved as discount in advance, both said sums being interest charged and paid for the first year of each loan, and being usury. The amount of this interest so overcharged was $1,320. Similar claim is made as to the 3,060 bonds of the second issue above mentioned, the amount of interest or discount in advance claimed to have been taken as to these being $459,000, and the amount of interest overcharged, for the time between the date of issue and the date of delivery, being $19,380.

The mortgages or deeds of trust in question, dated January 3 and July 24, 1888, were in evidence. The only material portions of them are the recitals that the Georgia Southern & Florida Railroad Company, a railway corporation under the laws of Georgia, was authorized by act of the legislature to consolidate with any railroad in Florida; that the Macon & Florida Air-Line Company, a railway corporation under the laws of Florida, had like authority to consolidate with any railroad company in or out of Florida; that in pursuance of the unanimous vote of the stockholders of the two railroads, respectively, a consolidation thereof was effected; and that the mortgage or deed of trust was executed by the consolidated company known as the Georgia Southern & Florida Railroad Company in favor of the trustee. There are further recitals as to resolutions of the board of directors, thereafter adopted and confirmed by the stockholders, authorizing the issuance of coupon bonds of $1,000 each, secured by the mortgage or deed of trust covering the railroad from Macon to Palatka, Fla., with all its properties enumerated, etc., and the provision, among others, that, in default of the payment of interest upon any of the bonds for a certain period, the whole principal sum secured by the deed should become due and payable, with the right in the trustee to sell the property under certain regulations, or apply to any court of competent jurisdiction to foreclose the mortgage, etc. The intervener proved, over defendant's objections, that the Macon & Florida Air Line was duly incorporated under the laws of Florida, and that said company and the Georgia Southern & Florida Railroad Company were duly consolidated as one railroad company, operating a railroad from Macon, Ga., to Palatka, Fla.; the objections being that such evidence was irrelevant and illegal, because the court had no jurisdiction over the railroad and other property in Florida, or authority to make any judgment concerning the same.

Messrs. **Anderson & Anderson** for plaintiffs in error.

Messrs. **Hoke Smith, Steed, & Wimberly, Hardeman, Davis, & Turner, S. A. Reid, Gustin, Guerry, & Hall, Hill, Harris, & Birch, Washington Dessau,** and **C. L. Bartlett** for defendants in error.

Lumpkin, J., delivered the opinion of the court:

The controlling questions presented in these cases are indicated in the headnotes. How these questions arose will appear from an examination of the reporter's statement. We have not decided, and will not discuss, whether or not a special charter granted by the general assembly to a railroad company after the passage of the general law for the incorporation of railroad companies is unconstitutional, and therefore void. Among many good reasons which might be stated for pursuing this course, and which would doubtless be accepted as satisfactory, we deem it sufficient to say it is not now necessary to pass upon this question, it not being essential to a proper disposition of the present cases. We wish it distinctly understood, however, that we do not intend in anything which follows to intimate any opinion whatever upon this question; and, if any expression we may use should seem to do so, it must not be so construed.

1. If such a charter is unconstitutional, is not a company organized under it, at least, a *de facto* corporation, and, as such, capable of making contracts, acquiring and owning property, and of becoming bound to its creditors by all acts which would have been binding upon it had it been duly incorporated under the general law? We entertain no doubt at all,

and will presently endeavor to show that this question should be answered in the affirmative; and, if so, it will follow that bonds, deeds, and mortgages executed by the *de facto* corporation are valid, not only as against the corporation itself, but also as against any one making a claim upon its assets, whether as a creditor directly of the corporation, or as a creditor of its creditors or stockholders. It is too well settled, both upon principle and authority, to require argument, that neither a *de facto* corporation nor those who recognize and deal directly with it as a corporation will be heard to deny its rightful corporate existence; and there is no good reason for applying a different rule to one claiming assets of a *de facto* corporation acquired solely in the exercise of corporate functions, but for the assumption of which there would have been no company of any kind, and, of course, no assets. Nor is it at all material whether the claim be made directly or indirectly. Whatever may be the manner in which it is presented, if the assets sought to be reached were in fact assets of a *de facto* corporation, the very act of making the claim puts the claimant in the same legal attitude as a direct creditor of the corporation; for such claimant has no better rights in the premises than his debtor of whose rights he seeks to get the benefit, and consequently can no more dispute the existence of the corporation than could the latter. So far, therefore, as the parties to this record are concerned, we have only to show that railroad companies operating in Georgia under special legislative charters granted after the passage of the general law referred to are at least corporations *de facto*.

The fact that this very law was in force at the time the railroad companies involved in the present litigation obtained their special charters makes it absolutely certain that, even if these charters are mere nullities, lawful and valid charters might have been obtained for just such companies. In other words, there was, beyond doubt, legal authority in this state for incorporating railroad companies with substantially the same rights, powers, duties, and liabilities as those specified in the special charters. This is a most important fact; for, where there cannot lawfully be a corporation *de jure*, there cannot be one *de facto*. This was distinctly ruled in *Evenson* v. *Ellingson*, 67 Wis. 634. "If an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation," one who contracted with the organization is not estopped from denying its corporate existence. *Heaston* v. *Cincinnati & Ft. W. R. Co.* 16 Ind. 276, 79 Am. Dec. 430. See also *Snyder* v. *Studebaker*, 19 Ind. 462, 81 Am. Dec. 415, and cases there cited. In *St. Louis Colonization Asso.* v. *Hennessy*, 11 Mo. App. 555, it was held that one who had subscribed for stock in a supposed corporation prohibited by the state Constitution was not estopped from denying its lawful existence. "Corporations cannot exist except by force of express law. A society that cannot be incorporated because organized to resist the enforcement of laws, cannot sue in its society name for the collection of a debt." *Detroit Schuetzen Bund* v. *Detroit Agitations Verein*, 44 Mich. 313, 38 Am. Rep. 270. "A corporation organized under a void law cannot enforce a mortgage made to it; but if not organized for an unlawful purpose a receiver for it can demand in equity an accounting for the debt purporting to be secured thereby." *Burton* v *Schildbach*, 45 Mich. 504. "A corporation *de facto* cannot exist in the absence of a law authorizing its organization, and in such a case the carrying on of the business in the corporate name is no evidence of user which can be considered in aid of corporate existence." *Eaton* v. *Walker*, 76 Mich. 579, 6 L. R. A. 102. In this connection, see also *Scovill* v. *Thayer*, 105 U. S. 143, 26 L. ed. 968; and *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178. One of the headnotes in the latter case is as follows: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." And, accordingly, it was held that the acts of a person assuming to perform the duties of an office which was created by an unconstitutional law, and therefore having no *de jure* existence, were utterly void.

We may assume, without further citation of authorities and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid, constitutional law authorizing the creation of such a corporation, it cannot exist, even as a corporation *de facto*. The rule thus stated does not by any means, however, negative the soundness of the proposition that an organization assuming to be a corporation *de jure*, but for sufficient reasons not so in fact, may be a corporation *de facto* when it is of such a character that it could, under existing laws, have full and complete corporate being and powers. The doctrine is thus broadly stated in *Snider's Sons' Co.* v. *Troy*, 91 Ala. 224, 11 L. R. A. 515. "A corporation *de facto* exists when, from irregularity or defect in the organization or Constitution, or from some omission to comply with conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might lawfully be incorporated for the purpose and with the powers assumed and a user of the rights claimed to be conferred by the law; that is when there is an organization with color of law, and the exercise of corporate franchises and functions." In *Stout* v. *Zulick*, 48 N. J. L. 601, it is said: "Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation *de facto* is established." The supreme court of Illinois, in *McCarthy* v. *Lavasche*, 89 Ill. 270, 31 Am. Rep. 83, held, in substance, that, even where a corporation has been formed under a charter which is unconstitutional and void, the stockholders would be estopped from urging this fact in order to defeat the collection of a bona fide debt against the corporation which a creditor is seeking to enforce under a provision of the charter making the stockholders liable individually. And

see *Hudson* v. *Green Hill Seminary Corp.* 113 Ill. 618, as to what will constitute proof of the existence of a *de facto* corporation. "A *de facto* corporation that by regularity of proceeding might be one *de jure* can sue and be sued; and a party who contracts with such corporation while it is acting under its *de facto* organization, is estopped, in a suit on such contract, from denying such organization at the date of the contract." *Heaston's Case, supra.* The case of *East Norway L. N. E. Lutheran Church* v. *Froislie*, 37 Minn. 447, is strongly in support of the proposition that there may be a *de facto* corporation where there is a law under which a corporation of the particular kind might be formed; and the decision seems to have been made irrespective of the question whether, in organizing the corporation, there was an attempt to comply with the requisite legal forms or not. This case also holds that no private person will be allowed to attack collaterally the regularity of the organization of such a corporation. "A party is estopped to deny the existence of a corporation at the time he contracted with it as such, if the corporation could constitutionally exist." *Brookville & G. Turnp. Co.* v. *McCarty*, 8 Ind. 392, 65 Am. Dec. 768. In Missouri it has been held that even where a corporation is organized under a special charter, void because of a constitutional provision for incorporation by general law, a private party cannot question its rightful existence when it is recognized by the state, the latter alone being allowed to raise the question. *St. Louis Comrs.* v. *Shields*, 62 Mo. 247. We find the following in *Central Agri. & M. Asso.* v. *Alabama Gold L. Ins. Co.* 70 Ala. 120: "When an association of persons is formed in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation cannot be inquired into collaterally, if the state acquiesces in the usurpation, individuals cannot complain." The general rule that private persons will not be allowed to attack collaterally the validity of a *de facto* corporation is supported by many authorities, among which may be mentioned 7 Atl. 362, and cases there cited in note; *Duggan* v. *Colorado Mortg. & I. Co.* 11 Colo. 113, and cases cited; *Tar River Nav. Co.* v. *Neal*, 3 Hawks, 520; *Hasselman* v. *United States Mortg. Co.* 97 Ind. 365, and authorities cited.

In addition to the numerous cases above noticed, we have examined a very large number of others, decided in states other than our own, many of which are more or less pertinent to the question in hand. In some, there are expressions and rulings not entirely in harmony with the conclusion we have reached, but we think we have settled upon and announced the true law. Before concluding this division of the present opinion, we will briefly refer to a few of our own cases which support the doctrine here laid down. *McDougald* v. *Bellamy*, 18 Ga. 411, recognizes the rule that a corporation, though unlawfully organized, is so far a valid corporation as to make it liable to creditors for its own acts. See also *Georgia Ice Co.* v. *Porter*, 70 Ga. 637. In *Planters' & M. Bank* v. *Padgett*, 69 Ga. 159, it was held that, although a charter granted by the superior court to a manufacturing company was void, one who dealt with the company as a corporation could not deny its corporate existence. Where one corporation has dealt with another company as a corporation, recognizing it as such, the first corporation is estopped from denying the existence of the second. *Imboden* v. *Etowah & B. B. & H. H. Min. Co.* 70 Ga. 86. On page 107, Chief Justice Jackson says: "This court, as, indeed, all civilized courts, has ruled that such recognition of a being—even of an artificial being—will stop the mouth of any other being, natural or artificial, from denying, in a case growing out of such recognition, that the being thus recognized ever had being." See, in this connection, *Lester* v. *Georgia Car & N. R. Co.* 90 Ga. 802.

Our decision is not based upon the idea that the organization of these railroad companies under unconstitutional charters would make them *de facto* corporations, but upon the idea that the purpose for which they were organized being lawful and proper, if they had obtained charters under the general law, and organized under them, which they might have done, they would in substance have done what they actually did; that is they would have observed about the same forms and requirements in the one case as in the other. They undoubtedly attempted to organize according to some law, and did not set up to be corporations without pretense of legal authority. If the laws under which they proceeded were not good, they may, in our judgment, avail themselves of the existence of the general law on our statute book, and of its terms at least so far as to enable them to be regarded as *de facto* corporations, because they have done practically what that general law required, though not actually following it nor professing to do so.

2. No question was raised as to the power of either of the railroad companies, under its special charter, to embrace in a mortgage property acquired after the execution of the mortgage. The right to mortgage "future acquired property" was denied solely on the ground that these companies, being without legal charters, had no charter power for so doing, and that there was no other source from which such right could be lawfully derived. While it is true that § 1954 of the Code in effect restricts (except as to stocks of goods or other things in bulk, but changing in specifics) the property which a mortgage may embrace to that "in possession, or to which the mortgagor has the right of possession," it is also true that the general law of this state for incorporating railroad companies expressly provides that a company created thereunder may, by mortgage or trust deed executed to secure bonds issued to provide funds for constructing its railroad, bind property acquired after the execution of the instrument. If we have succeeded in showing that these railroad companies, supposing their special charters to be void, are *de facto* corporations, because of the existence of the general law, it would seem that they could make any contracts authorized by that law, and become bound by such contracts to those with whom the same were made. As a practical proposition, it is well known that most, if not all, of the railroads of any length in the United States which have been built for years past, have been constructed by issuing in advance bonds upon their entire lines, including the

unbuilt portions, as well as those already constructed, with mortgages to secure the bonds covering the whole. If a *de facto* railroad company is a corporation for any purpose at all, it ought, on general principles, to have the power to mortgage "future acquired property;" and this seems to be the doctrine very generally recognized by the courts. Upon this question, see *Wright* v. *Bircher*, 72 Mo. 179, 37 Am. Rep. 433; *Quincy* v. *Chicago, B. & Q. R. Co.* 94 Ill. 537; *Wade* v. *Chicago, S. & St. L. R. Co.* 149 U. S. 327, 37 L. ed. 755; *Williams* v. *Winsor*, 12 R. I. 9; *Branch* v. *Atlantic & G. R. Co.* 3 Woods, C. C. 481, Fed. Cas. No. 1,807; *Seymour* v. *Canandaigua & N. F. R. Co.* 25 Barb. 284; *Holroyd* v. *Marshall*, 10 H. L. Cas. 191. And these citations might be indefinitely multiplied.

3. The third headnote expresses the views we entertain of the usury question presented. A calculation will show that if the bonds ran to full maturity, as contemplated, the lender of the money would not receive, in the aggregate, as much as 8 per cent per annum for the use of the money, although at the beginning he put out on each bond only $850 and at the end received $1,000. The $150 added to the 6 per cent interest annually received would not amount to as much as 8 per cent per annum on $850 for the full term. That the bonds, by their terms, bore interest from a date previous to their delivery, makes no difference, because, notwithstanding this fact, the gross amount of interest for the full term would not have been equal to 8 per cent per annum. So the original contract, if the bonds ran forty years, was not usurious; and it does not appear that they contained any stipulation which would prevent a fair and legal adjustment of the interest between the parties in case the bonds became due earlier, because of the default in paying interest. Nor does it appear that, in providing for the maturity of the bonds in case of such default, there was any device or contrivance to cover up usury. The above is applicable if the railroad company issued the bonds and borrowed money directly on them. If that company delivered the bonds to the construction company unde a contract with it, the latter, of course, had a right to sell them at any discount it pleased, and there would be no usury in such a transaction.

4. Had the decree foreclosing the mortgage on the Georgia Southern & Florida Railroad Company, and directing a sale of all its property in both states, been made by a court of the United States, its validity could hardly be doubted. The following Federal cases are conclusive upon this question, and we are confident there are others to the same effect: *Randolph* v. *Wilmington & R. R. Co.* 11 Phila. 502, Fed. Cas. No. 11,563; *Blackburn* v. *Selma M. & M. R. Co.* 2 Flipp. 525, Fed. Cas. No. 1,467; *Wilmer* v. *Atlanta & R. Air Line R. Co.* 2 Woods, C. C. 409, Fed. Cas. No. 17,775; Id. 2 Woods, C. C. 447, Fed. Cas. No. 17,776; *Muller* v. *Dows*, 94 U. S. 444, 24 L. ed. 207. The opinion of Mr. Justice Strong in the case last cited is so clear and pertinent that we feel justified in making copious extracts from it: "If such a foreclosure and sale cannot be made of a railroad which crosses a state line and is within two states, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one state and partly in an adjoining state, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than $100,000 000 have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments,—if, as in this case, where the mortgage is upon the whole line and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the state,—it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division." The learned justice further says that it is "undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath* v. *Pittsburg & S. R. Co.* 55 Pa. 189,—a bill for foreclosure of a mortgage,—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the state of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

The remaining question is, Can a state court, in a case of the kind now under consideration, with all the parties at interest before it, and having jurisdiction of the corporation, decree

a foreclosure, and direct a sale of the entire railroad and the assets of the company in both states? We think that, taking the precautions and following the course indicated in the headnote, it can. The leading case in support of this proposition is that of *McElrath* v. *Pittsburg & S. R. Co. supra*, mentioned by Mr. Justice Strong. It is, for our purpose, squarely in point; and the fact that it was cited approvingly in a case decided by the Supreme Court of the United States makes it a very strong authority. It would therefore seem immaterial whether the jurisdiction in question is exercised by a state or a Federal court. We deem it unnecessary to say more on this subject, except to cite the following authorities, which to a greater or less extent, sustain the conclusion we have reached. *Mead* v. *New York, H. & N. R. Co.* 45 Conn. 199; *Hand* v. *Savannah & C. R. Co.* 12 S. C. 314; *Wood* v. *Goodwin*, 49 Me. 260, 77 Am. Dec. 259; 3 Wood, Railway Law, § 474; Jones, Railroads, §§ 413, 414.

If the foregoing views are sound, it follows, of course, that in admitting the evidence referred to in the headnote no error was committed by our gifted Brother Gamble, of the circuit bench, who handled with great skill these important and somewhat complicated cases.

Judgment affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

Elizabeth PRICE *et al.*, *Appts.*,
v.
PLANTERS' NATIONAL BANK *et al.*

(.....Va.....)

(January 16, 1896.)

1. **The modes of alienation by the wife** prescribed in an instrument creating a separate estate in her are not exclusive of other modes, unless such an intention can be clearly gathered from the face of the instrument.
2. **A wife is conclusively presumed to have intended** to make such separate estate as she owned, free from restraint, at the time of making a contract, liable therefor, unless a contrary intention is expressed in the contract.
3. **The equitable separate estate of a wife may consist of any property and of any interest therein,** and its nature and extent are to be determined according to the intention of the creator as ascertained from the construction of the instrument by which it is created; and it is not arbitrarily limited to such interest or property as would otherwise inure to the husband at common law.
4. **The liability of the equitable separate estate of a wife for her debts** contracted on faith thereof does not terminate upon discoverture by the death of the wife or husband, unless the estate is determined by the particular event that terminates the coverture.
5. **A wife's equitable separate real property which is without restraint of alienation** by her may be sold under decree after her death to discharge her general engagements contracted on faith of her separate estate, where her separate personal estate is insufficient for that purpose, and the rents and profits of the real estate will not within a reasonable time amount to enough to discharge them.

(*Buchanan, J., dissents.*)

APPEAL by defendants from a decree of the Chancery Court of Richmond establishing plaintiffs' claim against certain separate property of Mary Triplett Haxall for debts which she had contracted. *Affirmed.*

A parcel of land on Franklin street in the city of Richmond was conveyed in trust for the sole, separate, and exclusive use and benefit of Mary Triplett Haxall free from the debts, contracts, control, management, and marital rights of her husband, present or future, with power in the trustee "to sell, exchange, or dispose of the property whenever directed so to do" by Mary Triplett Haxall by a writing under her hand attested by two witnesses, the proceeds to be given to her to be disposed of as she might wish or to be invested as she might direct. She was also given full power to dispose of the property by will. She died in 1892, leaving a will which devised the property to her husband for life with remainder to defendants in this action.

Further facts appear in the opinion.

Messrs. **Pegram & Stringfellow,** for appellants:

The terms of the deed import absolute dominion neither as to the *corpus* nor profits of her estate, and her estate and her power of alienating or charging the same are most essentially modified and restrained by the decisions of this court and by statute law.

See *Justis* v. *English*, 30 Gratt. 572; Acts 1877–78, p. 248.

The separate estate was created only for the purpose of excluding the common-law marital right of the husband, and to secure to the wife an independent estate and income free from the control and influence of her husband.

Kelly, Contracts of Married Women, p. 232.

The mere creature of equity is allowed and maintained for the protection and maintenance of the wife against the improvidence and misfortune of the husband, and consequently it has its existence only during the period of coverture.

Cooney v. *Woodburn*, 33 Md. 326; 1 Beach, Mod. Eq. 209; *Yale* v. *Dederer*, 18 N. Y. 269, 72 Am. Dec. 503; *Radford* v. *Carwile*, 13 W. Va. 671; *Howe* v. *Stortz*, 27 W. Va. 555; *Lechmere* v. *Brotheridge*, 32 Beav. 363.

NOTE.—While modern statutes have made much change in the property rights of husband and wife in most states, the above decision respecting the equitable separate estate of a wife and its liability for her debts, especially after her death, will be valuable in several jurisdictions. As to the implied liability of a wife for family expenses, see *note* to Dodd v. St. John (Or.) 15 L. R. A. 717.

As to the liability of community property for debts, see *note* to Oregon Imp. Co. v. Sagmeister (Wash.) 19 L. R. A. 233.

As to rights in estates by the entirety, see *note* to Hiles v. Fisher (N. Y.) 30 L. R. A. 305.

So purely was the benefit to the wife alone contemplated that this separate estate was originally not liable for any of her contracts or engagements made during the coverture.

Tullett v. *Armstrong*, 4 Myl. & C. 405.

There is nowhere any hint that it was designed to extend her control over the *corpus* of her separate, any more than over that of her common law, real estate to the injury of the heir, ever the prime favorite of the law. The modern doctrine of courts of equity is founded on what appears to be a misconception of the leading principle of a settlement which obviously is to disable the husband and not to enable the wife,—at least further than is consistent with the security of her title, of which the grantor ought in the particular case to judge.

Thomas v. *Folwell*, 2 Whart. 11, 30 Am. Dec. 230.

This court should not assume legislative functions and extend it beyond the reason and necessity which gave rise to, and has been supposed to justify its creation.

Hutchings v. *Commercial Bank*, 91 Va. 68; *West* v. *West*, 3 Rand. (Va.) 385; *Justis* v. *English*, 30 Gratt. 574.

The *corpus* of the wife's separate real estate could in no case be held liable for her general engagements, except where specifically charged thereon by her own act, whether suit should be brought during her life or after her death.

Hulme v. *Tenant*, 1 White & T. Lead. Cas. in Eq. 4th ed. pt. 2, p. 679; *Allen* v. *Papworth*, 1 Ves. Sr. 163; *Heatley* v. *Thomas*, 15 Ves. Jr. 596; *Norton* v. *Turvill*, 2 P. Wms. 144; *Court* v. *Jeffery*, 1 Sim. & Stu. 107.

Since *Taylor* v. *Meads*, 4 De G. J. & S. 597, a married woman, unless restricted, may in England charge, alien, encumber, convey, or devise the *corpus* of her separate real estate by her sole act, in all respects as a *feme sole*.

But *Taylor* v. *Meads* has not been followed in Virginia. The married woman here, "as to her separate real estate, has no power to dispose of the same unless the deed or instrument creating the same confers such power on her."

Dillard v. *Dillard* (Va.) 21 S. E. 670; *Chapman* v. *Price*, 83 Va. 394; *Justis* v. *English*, 30 Gratt. 571; *Christian* v. *Keen*, 80 Va. 374; *Taylor* v. *Cussen*, 90 Va. 42; *Leake* v. *Benson*, 29 Gratt. 157; *Harshberger* v. *Alger*, 31 Gratt. 62; *Filler* v. *Tyler*, 91 Va. 458.

In Virginia the separate estate of a married woman is liable for her general engagements only to the extent of her personalty and the rents and profits of her realty, whether such liability is treated as an incident of the estate or is based on her presumed intention to bind it.

Frank v. *Lilienfeld*, 33 Gratt. 377; *French* v. *Waterman*, 79 Va. 623; *Radford* v. *Carwile*, 13 W. Va. 585; Kelly, Contracts of Married Women, 534; *Taylor* v. *Cussen*, *supra*.

This must be so on principle, for the possession of a separate estate does not enlarge the wife's capacity to contract so as to bind herself personally.

Yale v. *Dederer*, 18 N. Y. 270, 72 Am. Dec. 503.

Only the rents and profits accruing during the coverture can be subjected to the married woman's general engagements.

Radford v. *Carwile*, 13 W. Va. 674; *Hogg* v. *Dower*, 36 W. Va. 200; *Hughes* v. *Hamilton*, 19 W. Va. 371; *Howe* v. *Stortz*, 27 W. Va. 559; Macqueen, Husb. & W. 313; *Nix* v. *Bradley*, 6 Rich. Eq. 57; Bishop, Married Women, §§ 795, 796; *Tullett* v. *Armstrong*, 1 Beav. 22.

If this court should hold, upon the principle of estoppel, substitution, or any other ground, that the rents and profits accruing during the lifetime of the wife are liable for her general engagements made during the coverture, it certainly does not follow that the rents and profits arising after her death are in like manner liable, and certainly not under the terms of the deed in question.

Waul v. *Kirkman*, 25 Miss. 619; 1 Beach, Mod. Eq. 207; Schouler, Dom. Rel. 4th ed. § 107; Cord, Rights of Married Women, 2d ed. § 256, note; Clancy, Husb. & W. p. 282; *Allen* v. *Papworth*, 1 Ves. Sr. 163; *Grigby* v. *Cox*, Id. 517; 2 Spence, Eq. Jur. 547.

The general engagement of the wife does not constitute any lien on the *corpus* of her separate estate.

Hughes v. *Hamilton*, 19 W. Va. 395; *French* v. *Waterman*, *supra*; *Gore* v. *Knight*, 2 Vern. 535.

That separate estate is in fact suspended during discoverture brought about by the death of the husband.

Nickell v. *Handly*, 10 Gratt. 346, and cases cited; 1 Lead. Cas. in Eq. pt. 2, 4th ed. 714, 769, and cases cited.

To hold that, while in Virginia a married woman cannot, unless expressly authorized so to do, convey the *corpus* of her separate realty by her sole deed, she can nevertheless, by the simple execution of her promissory notes, pledge the rents and profits thereof forever, would be to establish a principle somewhat more anomalous than any yet advanced in respect to property laws. "If a man seised of lands in fee by his deed granteth to another the profits of those lands to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth passe; for what is the land but the profits thereof?"

Pollock v. *Farmers' Loan & T. Co.* 157 U. S. 590, 39 L. ed. 822.

Mrs. Haxall gave no lien on the *corpus* of her land, and could not in law or in equity by notes alone give any perpetual lien on its rents and profits. Her separate estate in her land ceased at her death, and that alone she pledged to her creditors.

Bishop, Married Women, § 863; *Pike* v *Fitzgibbon*, L. R. 17 Ch. Div. 454; *Ex parte Jones*, L. R. 12 Ch. Div. 488; 3 Pom. Eq. Jur. § 1121; *West* v. *West*, 3 Rand. (Va.) 384.

Mr. **Julien Bryant** also for appellants.

Messrs. **Christian & Christian,** for appellees:

Under such settlements as this, where the *feme* has the absolute estate, and plenary powers of disposal, the trustee merely holds the legal title and has no discretion to refuse to obey her directions.

2 Perry, Tr. §§ 654, 655, 667; *Hulme* v. *Tenant*, 1 Lead. Cas. in Eq. Hare & W's notes, 394; *Jaques* v. *Methodist Episcopal Church*, 17 Johns. 549, 8 Am. Dec. 447; Burks, Separate Estates, p. 19.

The expression of one method of alienation does not impliedly prohibit others.

Lee v. *Bank of United States*, 9 Leigh, 200;

Woodson v. *Perkins*, 5 Gratt. 345; *Christian* v. *Keen*, 80 Va. 369.

The separate estate is chargeable with debts contracted for its benefit.

Cater v. *Eveleigh*, 4 Desauss. Eq. 19, 6 Am. Dec. 596; *James* v. *Mayrant*, 4 Desauss. Eq. 591, 6 Am. Dec. 630; *Elliott* v. *Gower*, 12 R. I. 79, 34 Am. Rep. 600; *Turner* v. *Shaw*, 96 Mo. 22; Bishop, Married Women, § 847; *Nicoll* v. *New York & E. R. Co.* 12 N. Y. 121; *Taylor* v. *Meads*, 4 De G. J. & S. 597.

The separate use standing alone gives the wife the power of disposition as if she were a single woman.

Cooper v. *Macdonald*, L. R. 7 Ch. Div. 292; Lewin, Trusts & Trustees, *644, 645; *Stead* v. *Nelson*, 2 Beav. 245; *Pride* v. *Bubb*, L. R. 7 Ch. 64; *Hall* v. *Waterhouse*, 11 Jur. N. S. 361; *Johnson* v. *Gallagher*, 3 De G. F. & J. 509.

Not only the income, but the *corpus* of any property, whether real or personal, may be limited to the separate use of a married woman.

Wms Real Prop. p. 225; Bright, Husb. & W. p. 204; *Baggett* v. *Meux*, 1 Phill. Ch. 627; Macqueen, Husb. & W. 66, Law Lib. 295; 1 Cord, Rights of Married Women, § 774; Kelly, Contracts of Married Women, pp. 213–244, and cases cited in notes.

A bill filed against a *feme sole* in order to affect her separate estate will not be defeated by the subsequent death of her husband, although the separate use then ceases.

Field v. *Sowle*, 4 Russ. Ch. 112; *Nail* v. *Punter*, 5 Sim. 555; *Hentley* v. *Thomas*, 15 Ves. Jr. 596; *Kenge* v. *Delarall*, 1 Vern. 326; *Johnson* v. *Gallagher*, 3 De G. F. & J. 513.

After the death of a *feme sole* covert having separate property, creditors may file a bill for the payment of their debts.

Owens v. *Dickenson*, 1 Craig & Ph. 48; *Gregory* v. *Lockyer*, 6 Madd. 90. See 1 Jarman, Wills, *39, 40; 1 Bishop, Married Women, §§ 861–863; Story, Eq. Jur. § 1390.

When the Virginia decisions are carefully examined none can be found that are in point inconsistent with the decree entered by the learned and able chancellor who decided this case in the court below.

West v. *West*, 3 Rand. (Va.) 373; *Vizonneau* v. *Pegram*, 2 Leigh, 183; *Williamson* v. *Beckham*, 8 Leigh, 20; *Lee* v. *Bank of United States*, 9 Leigh, 200. See *Newman* v. *Moore*, 94 Ky. 147; *Woodson* v. *Perkins*, 5 Gratt. 345; *Nixon* v. *Rose*, 12 Gratt. 425; *Penn* v. *Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478; *McChesney* v. *Brown*, 25 Gratt. 393; *Darnall* v. *Smith*, 26 Gratt. 878; *Hawley* v. *Twyman*, 29 Gratt. 728; *Bank of Greensboro* v. *Chambers*, 30 Gratt. 202, 32 Am. Rep. 661; *Ropp* v. *Mimor*, 33 Gratt. 97; *Bailey* v. *Hill*, 77 Va. 492; *Green* v. *Claiborne*, 83 Va. 386; *Justis* v. *English*, 30 Gratt. 565; *Garland* v. *Pamplin*, 32 Gratt. 305; *Frank* v. *Lilienfeld*, 33 Gratt. 398; *French* v. *Waterman*, 79 Va. 617; *Christian* v. *Keen*, 80 Va. 369; *Wynn* v. *Louthan*, 86 Va. 946; *Gentry* v. *Gentry*, 87 Va. 478; *Virginia Coal & I. Co.* v. *Roberson*, 88 Va. 117; *Taylor* v. *Cussen*, 90 Va. 40; *Dillard* v. *Dillard* (Va.) 21 S. E. 670; *Norris* v. *Woods*, 89 Va. 873.

There are other Virginia decisions which decide the principle involved in our favor.

Burging v. *McDowell*, 30 Gratt. 236; *Burnett* v. *Hawpe*, 25 Gratt. 481; *Leake* v. *Benson*, 29 Gratt. 153.

The specification of one mode of alienation will not exclude others.

Burks, Separate Estates, p. 38; *Christian* v. *Keen*, 80 Va. 369; *Lee* v. *United States Bank*, 9 Leigh, 200; *Woodson* v. *Perkins*, 5 Gratt. 345; *Frank* v. *Lilienfeld*, 33 Gratt. 395.

A general power of devising property, when exercised in favor of mere volunteers, renders the property liable for all debts of the appointer, on the principle that equity requires that the donee of the power should be just before he be generous.

18 Am. & Eng. Enc. Law, p. 986; Wms. Real Prop. ed. 1894, pp. 438, 439; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

This doctrine has been applied by recent English decisions to married women exercising a power of disposition by will; and they have held that such disposition makes the property disposed of liable to the wife's engagements.

London Chartered Bank v. *Lempriére*, L. R. 4 P. C. 572; *Mayd* v. *Field*, L. R. 3 Ch. Div. 587; *Re Harvey's Estate*, L. R. 13 Ch. Div. 216; *Hodges* v. *Hodges*, L. R. 20 Ch. Div. 749.

Mr. **A. W. Patterson** also for appellees.

Riely, J., delivered the opinion of the court:

The liability of the equitable separate estate of a married woman after her death for her general engagements is the important question that confronts us in this case. Is it liable at all, and, if so, in what manner and to what extent? This precise question, so far as I am aware, has not heretofore been directly presented to this court for decision. The solution of this vexed question depends upon and must be governed by the nature of the separate estate, and the extent of the power of the married woman over it. Whatever may have been the adjudications and judicial expressions of the courts of England and of this state in the past, it is now settled, both there and here, that where property is settled to the separate use of a married woman, and the power is given to her, expressly or impliedly, to deal with it, she has the other power incident to property in general, namely, the power of creating debts to be paid out of it; and a court of equity will give effect to them, not as personal liabilities, but by laying hold of the separate property, and subjecting it to the payment of the debts contracted by her with reference to her separate property, and upon the faith and credit of it. *Hulme* v. *Tenant*, 1 Bro. Ch. 16, 1 White & T. Lead. Cas. in Eq. pt. 2, p. 679; *Owens* v. *Dickenson*, Craig & Ph. 48; *Bank of Greensboro* v. *Chambers*, 30 Gratt. 202, 32 Am. Rep. 661; *Justis* v. *English*, 30 Gratt. 565; *Frank* v. *Lilienfeld*, 33 Gratt. 377; *Bain* v. *Buff*, 76 Va. 374; *Christian* v *Keen*, 80 Va. 369.

Where the instrument creating the separate estate prescribes one mode of alienation by the wife, the prescribing of that mode is not to be construed as an intention to exclude alienation by her in any other manner, unless an intention to do so can be clearly gathered from the face of the instrument. *Lee* v

Bank of United States, 9 Leigh, 200; *Woodson* v. *Perkins*, 5 Gratt. 345; *Frank* v. *Lilienfeld*, and *Christian* v. *Keen*, *supra*. This is said by Mr. Burks, in his admirable treatise on Separate Estates (page 38), to be the decided weight of authority, both English and American. When the separate estate is created, it is nevertheless competent for the settlor to indicate what shall be the extent of her control over it. He may, contrary to the course of the common law, impose restraint, either absolute or qualified, on her power of alienation; and his intention to restrain may be either express or implied, but in either case it must be clear. When such intention appears, or can be gathered from the whole instrument, —the language used, the scheme of settlement, or the facts and circumstances of the particular case to be gathered from the instrument,—equity will respect it, and enforce the restraint that may be imposed. *Bain* v. *Buff*, *supra;* Burks, Separate Estates, 33; 1 Bishop, Married Women, § 859. And in the enforcement of the general engagements of a married woman having an equitable separate estate, when it is once established that the contract which it is sought to enforce is hers, it is presumed, as a matter of law, that she intended to make liable for it such separate estate as she owned, free from restraint, at the time of entering into the engagement, unless the contrary intention is expressed in the contract; and a court of equity will so subject it, or so much of it as may then be owned by her. Va. Code, § 2295; Burks, Separate Estates, p. 86; *Frank* v. *Lilienfeld*, *supra;* *Pike* v. *Fitzgibbon*, L. R. 17 Ch. Div. 454; Pom. Eq. Jur. § 1123. So much for her power over her separate estate.

The next inquiry is: Of what may the separate estate consist? And according to what rule are its nature and extent to be determined and fixed? Are the nature of the estate and the degree of the interest of the married woman in it to be fixed by certain arbitrary rules, which may or may not, in the particular case, create in her a separate estate to the extent intended by the settlor, or are they to be arrived at by the natural and reasonable method of inspecting the instrument creating the estate, and discovering the intention of the settlor, and then construing the instrument and fixing the character of the estate and the quantity of the interest of the married woman in it according to such intention? When equity first created the separate estate, the main purpose was, no doubt, to intercept the marital rights of the husband; but, if it ever restricted the separate estate to such of the property of the married woman as her husband would have been entitled to by virtue of his marital rights at common law, such rule has long since been departed from. "Property of any kind, real or personal, and any interest therein," says Pomeroy in his Equity Jurisprudence (§ 1103), "may be conveyed, settled, or held to the wife's separate use. Her equitable separate estate may, therefore, include estates in fee in land, in possession, or reversion, life estates, estates for years, things in action, securities, specific chattels, or money." And not less comprehensive and emphatic is the language of Williams in his work on Real Property: "Not only the income, but the *corpus*, of any property, whether real or personal, may be limited to the separate use of a married woman." p. 225. See also Bright, Husb. & W. p. 204. "It was contended at the bar," said Lord Westbury in *Taylor* v. *Meads*, 4 DeG. J. & S. 597, "that the effect of this devise was to give the married woman an estate to her separate use only during the joint lives of herself and her husband, with remainder to herself in fee. But that is not the true construction of the will; the estate given to Elizabeth Meads [who was the married woman] is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single, and not a married, woman." In *Burging* v. *McDowell*, 30 Gratt. 236, it was held that the married woman took a separate estate in fee in the land under the settlement made upon her, and that her sole deed vested in the purchaser, to whom she had sold and conveyed it, a perfect title. The equitable separate estate may therefore consist of any property and of any interest therein. It is what the settlor intended it to be, according as the intention may be ascertained by the true construction of the instrument by which the trust for the separate use is created, and is not arbitrarily limited to the interest or property covered by the marital rights of the husband at common law.

This brings us to the main question: To what extent and in what manner will a court of equity enforce the general engagements of a married woman against her equitable separate estate? It has been repeatedly held by this court that, unless the power of alienation by the married woman be restrained by the instrument creating the estate, all the personalty and the rents and profits of all the realty settled to her separate use may be subjected to their payment. As to this, there has never been any difficulty, but the controversy has been as to the right to subject the *corpus* of the real estate by a sale thereof. I can recall no case in which this court has gone so far, and none was cited by counsel in argument. In the case of *Frank* v. *Lilienfeld*, 33 Gratt. 399, Judge Burks, in delivering the unanimous opinion of the court, said: "I think the English rule, as stated by Lord Thurlow, is substantially correct; and therefore, to satisfy a general engagement of the wife (and by general engagement I here mean an engagement made with reference to her separate estate, so as to make it liable in a general sense, but which does not amount to a specific lien of any sort upon such estate), the personal property, where the interest of the wife is absolute, and there is no restraint upon the alienation of such property imposed by the instrument creating the separate estate, may be sold by decree of the court, and, under like conditions, the rents and profits of the separate

real property may be subjected; and to that end, following the analogy of the law so far, such real estate may be leased from time to time, by order of the court, until the debt out of the rents be discharged; but in no case, I think, should the real estate or any part thereof be sold by decree to satisfy the debt of the wife unless such debt be one secured by specific lien on such estate, created in a mode which conforms to the mode required for a valid disposition by her of that estate. If the creditor desires to bind the real estate in such a way as shall authorize the sale of it for the satisfaction of his debt, let him take the appropriate security within the power of the wife to give. If he fail to do this, equity cannot provide him a security which he has neglected to provide for himself." I have quoted thus fully from this opinion because it was concurred in by all the members of the court, and lays down with great accuracy and clearness the rule as to the liability of the equitable separate estate, according to the long course of decision in this state, except that, so far as I am aware, it is the only case in which it is stated that in no case should the real estate, or any part thereof, be sold to satisfy the debt of the wife, unless such debt be one secured by specific lien on such estate. Nevertheless, this court, in the enforcement of the general engagements of the wife, has never gone further than to subject to their payment the personalty and the rents and profits of the realty; and the doctrine that the *corpus* of the real estate—certainly as a general rule—will not be sold to satisfy the general engagements of a married woman is deeply imbedded in the law of this state. This is sustained by an unbroken line of decisions, many of which are collated in Burks on Separate Estates, p. 22, note. If we say now that these decisions are all wrong, and that the *corpus* of the real estate may be sold in all cases, will not our successors have more right to reverse our decision than we have to reverse those of our predecessors that may be said to be hoary with age? These decisions were made by this court when it was composed of judges of eminent ability and learning, and are entitled to the greatest weight and respect. As was said by Chief Justice Church in *Yale* v. *Dederer*, 68 N. Y. 335, in delivering the opinion of the court of appeals of New York upon a similar question: "It is better to adhere to a rule of doubtful propriety, which has been deliberately settled for a long series of years, and repeatedly reiterated by all the courts of the state, than, by overturning it, to weaken the authority of judicial decisions, and render the law fluctuating and uncertain." I am aware that there exists a decided difference of opinion among judges and lawyers upon the particular question in controversy here, which makes it all the more proper, if the general rule, so long and so uniformly adhered to by this court, is to be abrogated, that it should be done by legislative power. But, while this court has never gone further than to subject the personalty and the rents and profits of the realty to the payment of the general engagements of the married woman, yet the right to subject them is not confined to the period of the coverture. If these are liable for her debts during the coverture, and may be subjected to that end during that period, no good ground is perceived, nor can any valid reason be assigned, why they should not continue to be liable after the termination of the coverture, whether by her own death or that of her husband or otherwise, unless the estate is determined by the particular event that terminates the coverture. Once liable, the right to subject it to the extent of the separate estate should continue until the debts are discharged.

In *Ropp* v. *Minor*, 33 Gratt. 97, 116, Judge Burks said: "The subsequent discoverture . . . cannot *per se* give any other or greater force and effect to her prior engagements than they had during the coverture. Such engagements did not bind her personally either at law or in equity, so as to warrant a personal judgment or decree against her. They affected her separate estate to the extent, and only to the extent, of her then existing powers over it. They had no other operation. Her subsequent discoverture could not, upon any principle known to us, operate, by estoppel or otherwise, to enlarge the liabilities of that estate imposed by the engagements when entered into." If, in the creation of the particular separate estate, it was so created that it might extend beyond the period of coverture, the continuance thereafter of its liability for her debts until discharged is not in conflict with what was said in *Ropp* v. *Minor*, *supra*. Such continuance of liability does not enlarge the estate or its liability for the debts of the *feme covert* or her powers over it. These are not enlarged by the discoverture; neither should they be thereby lessened or restrained, but should remain the same. The married woman having the right during the coverture, in the absence of any restraint on her power of alienation, to make her separate estate liable for her general engagements, and having contracted debts on the faith and credit of the estate, and thereby created the right to subject it to their payment, it is equitable and just that such separate estate should continue liable as well after the termination of the coverture as during its existence; and equity, because it is just, will, after the termination of the coverture, as well as during its existence, enforce the right against the estate, or so much of it as may then remain in her ownership. 1 White & T. Lead. Cas. Eq. pt. 2, p. 692; *Norton* v. *Turvill*, 2 P. Wms. 144; *Gregory* v. *Lockyer*, 6 Madd. 90; *Heatley* v. *Thomas*, 15 Ves. Jr. 596; *Anonymous*, 18 Ves. Jr. 258; 2 Roper, Husb. & W. 245. In *Burnett* v. *Hawpe*, 25 Gratt. 481, the suit was brought, after the termination of the coverture by the death of the husband, against his widow, who had married again, to subject her separate estate to the payment of a debt she had contracted during the coverture with her first husband. Having sold, after his death, a part of the land settled to her separate use, the purchaser was decreed to pay to the plaintiff the balance he owed her on the land, it being considered a just compensation for the rents and profits that might have

accrued from the land if she had not sold it, in satisfaction *pro tanto* of his claim; and an account was ordered to be taken of her separate personal estate, and the rents and profits of the residue of the lands settled to her separate use, for the purpose of applying the same to the debt of the plaintiff. On appeal to this court, the decree of the lower court was affirmed. And so, in *Leake* v. *Benson*, 29 Gratt. 153, the rents and profits of land which had been purchased with the proceeds of the sale of the land in which the *feme covert* had an equitable separate estate for her life were subjected to the payment of debts contracted by her after the termination of the coverture by the death of her husband, and also for debts contracted by her during the coverture as surety for him. These two cases clearly decide, in the result, that the rents and profits of real estate settled to the separate use, which accrued after the termination of the coverture, were liable to the payment of the general engagements of the married woman entered into by her during the coverture, and refute the contention that the right exists to subject only such as accrue during the coverture, and that the liability of her separate estate for the payment of her debts ceases with the termination of the coverture. It may be said that this question was not raised in those cases, and was not therefore considered by the court. It is true that the precise question does not appear to have been discussed by Judge Staples, who delivered the opinion in each case, but it is not to be presumed that it escaped the attention and consideration of himself and the other able and vigilant judges who then administered justice from this bench.

The settlement in this case was made upon Mrs. Haxall by her mother during the coverture. An examination of the deed of settlement shows that it vested in Mrs. Haxall an equitable separate estate in fee in the real estate. While the deed enumerates certain specific powers (and they are very broad), which may be exercised by her, it nevertheless contains no negative words restraining her from exercising any other power, nor anything from which restraint on her power of alienation may be properly inferred. She had therefore an absolute power of alienation over the estate, and the consequential right to make it liable for her contracts. The debts which are sought to be enforced were all contracted since May 1, 1888, when the present Code went into effect, and she is therefore presumed to have made them with reference to her said separate estate as a source of credit. Besides such presumption, the evidence is express and positive, leaving no room for doubt or question, that she contracted the debts on the faith and credit of her said estate, and intended to bind it for their payment. In accordance with the principles applicable to equitable separate estates, as hereinbefore set forth, her creditors had the right to ask that the rents and profits of the real estate be applied to their payment. But, when we seek to apply the general rule, we are confronted with this difficulty: that the annual rents and profits are insufficient to discharge the interest actually accruing on the debts, from which it follows that the debts will go on increasing, and the creditors be entitled to receive the rents and profits of the land forever. Such a result would be unjust both to the creditors and also to the devisees of Mrs. Haxall. The former would never be able to obtain satisfaction of their debts, and the latter could never have any enjoyment of the property. The subjection of the rents and profits of the realty merely in such case would be a wholly ineffectual remedy, while a sale would be beneficial to all the parties. It is characteristic of equity that it will mould its remedies, as far as consistent with the rights of the parties, to meet the exigency of the case. Where such a state of facts exists as here, a court of equity will, upon the principle of accelerating the remedy, decree a sale of the land, the rents and profits whereof would otherwise, under the general rule, be subjected to the payment of the debts. Indeed, we are not without a precedent in this respect. At common law, lands of the debtor could not be taken to satisfy his debts, except judgments due to the King, and judgments did not therefore operate as liens on land; but, by the statute (Stat. Westm. 2, 13 Edw. I. chap. 18), a new execution was provided,—the writ of elegit,—which enabled the creditor to extend a moiety of the lands of the debtor, either in his own hands or in the hands of a purchaser, or of the heir, to satisfy the judgment, which, by the judicial construction given to the writ, was said to be a lien on the land. *Borst* v. *Nalle*, 28 Gratt. 428; *Stileman* v. *Ashdown*, 2 Atk. 608, 1 Ambl. 13. But, while the writ gave the creditor the right to take the rents and profits of a moiety of the land at an estimated annual value until his debt was satisfied, yet it was held (Lord Hardwicke leading the way, in *Stileman* v. *Ashdown*, *supra*, and Lord Redesdale following, in *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 138) that a court of equity, where the rents and profits would not pay the judgment within a reasonable time, would sell a moiety of the land, and apply the proceeds of sale to the payment of the debt, and that, while equity could not change the rights of the parties, yet it would accelerate the payment of the judgment by directing a sale of a moiety of the land to the rents and profits of which the creditor was only entitled under his writ of elegit, and not compel him to await the tedious operation of its discharge out of the annual rents and profits. See also 2 Rob. Pr. (Old) 46; 2 Story, Eq. Jur. § 1216, *a*, *c*; *Curtis* v. *Curtis*, 2 Bro. Ch. 634; *Blow* v. *Maynard*, 2 Leigh, 31; *Tennent* v. *Pattons*, 6 Leigh, 196; *Burton* v. *Smith*, 38 U. S. 13 Pet. 464, 10 L. ed. 248. The only difference between that class of cases and the one before us is that in that case equity was asked to enforce a judgment that was a legal lien, and that in this case its jurisdiction is invoked to enforce an equitable liability; both being confined to the rents and profits of the real estate, but it being peculiarly the province of equity to enforce the latter against the separate estate, which is the work of its own creation. The principle which justified a

sale of a moiety of the land in the cases decided by Lords Hardwicke and Redesdale applies with all its force to the case before the court. I am of opinion, therefore, that where there is no equitable separate personal estate applicable to the discharge of her general engagements, or, if so, that it is insufficient for that purpose, and the rents and profits of the real estate constituting her equitable separate estate will never discharge the debts, or not do so within a reasonable time, it is proper to decree a sale of the land for that purpose, and that, to this extent, the general rule laid down in the case of *Frank* v. *Lilienfeld*, 33 Gratt. 377, should be qualified. What is reasonable time is a matter of discretion of every day's occurrence in courts of equity. In respect to this matter, they might well adopt, as a general rule, by way of analogy to the law, the period which the legislature, in the statute regulating the enforcement of judgment liens in equity, has, in its wisdom, fixed as a reasonable time within which, if the rents and profits will discharge the judgment, the land should not be sold. Va. Code, § 3571; Rep. Rev. Code 1849, p. 918.

For the foregoing reasons, *I am of opinion that there is no error in the decree* of the chancery court in directing, under the particular circumstances of this case, a sale, instead of the renting of the real estate, *and am therefore for affirming the same.*

Buchanan, J., dissenting:

I regret that I am unable to concur in the opinion of the court.

The principles which ought to control in the decision of this case, in my judgment, have been recognized and acted upon for nearly three quarters of a century in a long line of decisions. Beginning with *West* v. *West*, reported in 3 Rand. (Va.) 373, and coming down to *Taylor* v. *Cussen*, 90 Va. 40, this court has never recognized the right of the creditor of a married woman to subject the *corpus* of her equitable separate real estate to the payment of her general engagements during coverture, but such right, whenever asserted, has always been denied.

How the death of the wife can, upon any principle of law, enlarge such a creditor's rights, and enable him to subject, after her death, property which he had no right to subject during her coverture, I am utterly unable to understand. No reason has been, or, in my judgment, can be, given, for the exercise of such a right after her death, which does not apply with equal force during coverture.

The principle involved in both cases is the same.

The necessary effect of this decision is therefore to overturn a rule of law imbedded in our decisions, and which has become a rule of property, and thus disturb vested rights.

If the rule of law governing this court in its former decisions is founded upon incorrect principles, and fails to accomplish fully the ends of justice, the remedy is with the legislature. Laws by that body operate prospectively only, while laws made by the court operate retrospectively as well as prospectively, and are subject to the double objection that they are made without authority, and disturb vested rights.

RICHMOND RAILWAY & ELECTRIC COMPANY, *Plff. in Err.*,
v.
W. T. GARTHRIGHT.

(..... Va. .....)

1. **An erroneous instruction will not require a reversal** if the verdict was correct and should have been rendered if the instruction had been correct.
2. **The unreasonable overloading of a street car,** and its unlawful speed, which make it impossible to stop the car as soon as may be necessary to avert a collision, are gross negligence which renders the street-railway company liable for a resulting accident.
3. **A verdict for $1,000 damages cannot be held excessive** in a case of personal injury by which a person's teeth were broken and his knee injured so that he was lame for a long time and unable to work efficiently at his trade for six or eight months.

(February 20, 1896.)

ERROR to the Circuit Court for the City of Richmond to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wyndham R. Meredith,** for plaintiff in error:

At the time of the accident the truck company was not going to a fire though one was in progress, but was going to what they call a relief,—that is, they were going from their engine house in the extreme western part of the city to another engine house more centrally located. The orders were not to go as fast to a relief as to a fire.

It was disobedience of the orders that produced the accident, and this plaintiff was clearly the author of his own wrong.

The driver declares that he paid no attention to the car, and made no effort to stop or slacken his speed.

No driver should go on when it is obvious that the collision will be inevitable, or where there is a probability that his attempt to pass will result in a collision he is not entitled to make the experiment.

1 Thomp. Neg. p. 398, and notes 10, 11.

Mr. Garthright was not a passenger, but a stranger. To him, therefore, in the selection of its machines the defendant owed only ordinary care.

Baltimore & O. R. Co. v. *McKenzie*, 81 Va. 73; *Richmond & D. R. Co.* v. *Norment*, 84 Va. 173; *Richmond & D. R. Co.* v. *George*, 88 Va. 229; *Darracott* v. *Chesapeake & O. R. Co.* 83 Va. 294.

NOTE.—As to injuries by street-car collisions with vehicles or horses, see *note* to Hicks v. Citizens' R. Co. (Mo.) 25 L. R. A. 508.

Before the question can be submitted to the jury there must be evidence (1) by experts having competent knowledge of the subject, showing that (2) the particular appliance or machine has been tested; (3) that it materially contributed to the safety of the railway's operations; (4) that it is in practical use; (5) that it could have been adopted by the railway, and (6) that, if adopted, it would have prevented the injury to the plaintiff.

Patterson, Railway Accident Law, pp. 246, 249.

The company discharges its duty in respect to pedestrians and others who have a right to use the streets in common with it when it supplies and maintains those that are in general use and which have been found reasonably adequate and safe.

Unger v. *Forty-Second Street & G. S. F. R. Co.* 51 N. Y. 499.

Upon any just view of the evidence in this case which the jury might have taken the verdict is grossly excessive.

Bertha Zinc Co. v. *Black*, 88 Va. 306; Patterson, Railway, Accident Law, p. 476.

Messrs. **Courtney & Patterson,** for defendant in error:

The *onus* of proving contributory negligence rested upon the defendant.

Baltimore & O. R. Co. v. *McKenzie*, 81 Va. 71; *Southwest Imp. Co.* v. *Andrew*, 86 Va. 273.

The negligence of appellant being the proximate cause of the injury, it is liable even though the appellee may not have been entirely without fault.

Virginia Midland R. Co. v. *White*, 84 Va. 503; *Richmond & D. R. Co.* v. *Yeamans*, 86 Va. 860.

The damages allowed so far from being exorbitant are, in any just view of appellee's injury, very poor and inadequate compensation.

Benn v *Hatcher*, 81 Va. 26, 59 Am. Rep. 646; *Payne* v. *Grant*, 81 Va. 164; *Roanoke Nat. Bank* v. *Hambrick*, 82 Va. 138; *Western U. Teleg. Co.* v. *Reynolds Bros.* 77 Va. 192, 46 Am. Rep. 715; *Snouffer* v. *Hansbrough*, 79 Va. 166; *Baltimore & O. R. Co.* v. *McKenzie*, *supra.*

The court may instruct as to any question upon which there is some evidence without regard to the character of the witness or the weight of his testimony; these being matters for the consideration of the jury alone.

Priest v. *Whitacre*, 78 Va. 151; *Hopkins* v. *Richardson*, 9 Gratt. 485; *Philadelphia Fire Asso.* v. *Hogwood*, 82 Va. 342; *Benn* v. *Hatcher*, *supra.*

The appellate court will not reverse for refusal of new trial by the court below unless, after rejecting all exceptor's parol evidence and giving full force and credit to that of exceptee, the decision still appears wrong.

Roanoke Nat. Bank v. *Hambrick*, 82 Va. 135; *Southwest Imp. Co.* v. *Andrew*, 86 Va. 275.

Riely, J., delivered the opinion of the court:

The judgment to which the writ of error was awarded in this case was recovered for injuries received in a collision between a car of the Richmond Railway & Electric Company and a hook and ladder truck of the fire department of the city of Richmond. Three grounds are assigned for the reversal of the judgment.

The first is that the plaintiff in the suit was barred of the right to recover because of his own contributory negligence. The case comes before us upon a certificate of the evidence, and in considering it we must apply the familiar rules applicable to a demurrer to evidence. These rules require us to accept as true all of the plaintiff's evidence, and all just inferences which could be properly drawn from it by a jury, and to reject all of the evidence of the defendant which conflicts with that of the plaintiff, and all inferences which do not necessarily result from it. Many witnesses were examined on both sides, and there was considerable conflict in much of the testimony. It is unnecessary to rehearse it, but sufficient to say that, testing it by the above rules, the evidence clearly establishes the negligence of the defendant company, and does not justify the claim that the plaintiff was guilty of such contributory negligence that, but for the same, the accident would not have happened.

The second assignment of error relates to the instruction given by the court, numbered 2, which is as follows: "The jury are further instructed that if they believe from the evidence that when the horses of the truck came in sight of persons on the defendant's car the said car was at such a distance from the point of collision that the accident might have been averted but for the want of a Sprague motor on the car, or the crowding on the platform of passengers preventing the motorman's use of his machinery, then the defendant company was guilty of negligence, and the jury must find for the plaintiff, even though they believe that the motorman on the car did all in his power to stop his car, unless they believe that the negligence of plaintiff or tillerman contributed to the accident." The objection made to this instruction is that it pronounces the failure of the company to equip its car with a Sprague motor to be negligence, when there was no evidence before the jury tending to show that such motor was a necessary equipment of its car, or that the want of it caused the accident in which the plaintiff was injured. The evidence upon this point was very meager. Only three witnesses, all of whom were called by the defendant, testified in regard to the matter. One of them, Mr. Hill, who had worked in the shops of the company, and was a conductor on one of its cars at the time he testified, but had never been a motorman, stated that this particular car was the only one that was provided at the time of the accident with a Westinghouse motor, and that the others were equipped with Sprague motors. When questioned as to which was the best machine for stopping a car suddenly, he answered that the Westinghouse "reverses slower," and that the Sprague "takes quicker than the other," whatever that may mean. Mr. Jackson, who was the conductor on the car, was asked by which motor could a car be stopped in the shortest distance, and replied that it was as easy to stop the car with the one as the other. Maj. Selden, the superintendent of the company, was the only other witness as to this matter. He stated that the company, at the time he testified, was using the Westinghouse motor almost entirely on its Main street

line and the Sprague motor on its Clay street line. When asked which was the best motor, he stated, "I think the Westinghouse a little better;" and, when asked further, if a car could be stopped quicker with the Westinghouse motor than with the Sprague, he replied: "The difference is so slight, it is hardly appreciable." The foregoing is substantially all the evidence upon which the instruction complained of was based. It thus appears that it was not testified to that the Sprague motor was a better appliance than the Westinghouse, or that at the time of the accident it had been tested and was in practical use by electric street railways, or had been adopted by them as a safer machine, or that the accident could have been averted if the car had been equipped with a Sprague motor. It was the legal duty of the defendant company to provide its cars with suitable and safe machinery. It is incumbent upon a railway company, propelled by the powerful and dangerous agencies of steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of all new inventions and improvements known to it which will contribute to the safety of its passengers, and prevent accidents to others, whenever the utility of such improvement has been tested and demonstrated; but it is not required to have in use the latest improvements which human skill and ingenuity have devised to prevent accidents. Patterson, Railway Accident Law, §§ 245-247, and Elliott, Roads & Streets, 610. The instruction was erroneous in singling out the Sprague motor, and making the liability of the railway company depend upon its failure to equip its car with such motor, if the jury believed that by its use the accident could have been averted, when it had not been shown in evidence that the Sprague motor was a better and a safer appliance, or that it had been tested, and its superiority over the Westinghouse demonstrated. It does not follow, however, that the judgment for that reason must be reversed. It is the settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that, even under correct instructions, a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the erroneous instruction, it will not for such error, reverse it. *Preston* v. *Harrey*, 2 Hen. & M. 55; *Colvin* v. *Menefee*, 11 Gratt 87; *Kincheloe* v. *Tracewells*, Id. 587; *Danvil'e Bank* v *Waddill*, 27 Gratt. 448; *Brighthope R. Co.* v. *Rogers*, 76 Va. 443; *Western U. Teleg. Co.* v. *Reynolds Bros.* 77 Va. 173, 46 Am Rep. 715; *Snouffer* v. *Hansbrough*, 79 Va. 166; *Benn* v. *Hatcher*, 81 Va. 25, 59 Am. Rep. 645; *Baltimore & O. R. Co.* v. *McKenzie*, 81 Va. 71; *Payne* v. *Grant*, Id. 164; *Richmond & D. R. Co.* v. *Norment*, 84 Va. 167; *Com.* v. *Lucas*, Id. 303; *Wager* v. *Barbour*, Id. 419; *Bernard* v. *Richmond, F. & P. R. Co.* 85 Va. 792; and *Richmond Granite Co.* v. *Bailey* (decided at the present term) 24 S. E. 232. See also Sackett, Instructions to Juries, 2d ed.

The collision between the car and the truck took place at the intersection of Main and Third streets. The car was passing down Main street and the truck was proceeding along Third street. It appears from the evidence that the company had the right, under the law, to run its cars at as great a rate of speed as 6 miles an hour; that this car was capable of seating twenty-two persons, and could comfortably transport as many as fifty persons; that the cars could be stopped within a distance equal to their length, or at most within a distance equal to a length and a half of a car, which was generally understood by the public; and that this particular car was about 22 feet long, including its front and rear platforms. It also appears from the evidence that the car at the time of the collision was crowded with passengers to its utmost capacity, and that both platforms, and even the steps were thronged; it being variously estimated that there were not less than from sixty to eighty people on the car. So crowded and jammed together were they that the conductor was unable to collect the fare from half of them, and the motorman unable, as testified to by some of the witnesses, to have free command of his brake. As to the foregoing facts there was no material, if any, conflict between the evidence of the plaintiff and that of the defendant. There was very much conflict, however, in the evidence in other material respects. If we look to that of the plaintiff alone, it appears that the car was somewhere between 50 and 90 feet—these being the two extremes of the estimates of the witnesses—above Third street when the truck reached Main street, and started to go across the car track; and that it could have been easily stopped, and the collision prevented, if the car had not been overloaded with passengers, and running at the rate of 8 to 12 miles an hour,—much in excess of the speed allowed by law. Upon this evidence, it could but be held that the company was guilty of gross negligence irrespective of the kind of motor with which it was equipped. If we turn now to the evidence of the defendant, it appears that the witnesses estimated that the car was going slower than usual,—at a speed of only 3 to 4½ miles an hour,—and that it was from 40 to 50 feet from Third street when the truck was first seen by persons on the car, passing rapidly from Third street across the track of the railway. There was then ample distance within which the car could ordinarily have been brought to a stop with either the Westinghouse or Sprague motor, and the collision been averted. After the truck, which, together with the horses, measured 50 feet, was seen by the passengers, and was, or should have been, seen by the motorman, it had nearly time enough to clear the track of the railway before the car struck it, the car having struck the truck immediately in front of its hind wheels, about 42 feet back from the heads of the horses drawing it. If the car, with a full complement of passengers, but not loaded beyond its proper capacity, was capable of being stopped within a distance equal to its own length, which was 22 feet, or at most within a space less than twice its length, when running at its maximum speed of 6 miles an hour, as the evidence shows it follows that it could have been brought to a stop in a still shorter distance, if going at a rate not exceeding 4 or 4½ miles an hour. The car had not less than 50 feet, and probably considerably more, within which to be stopped after the truck was seen about to cross the railway track, when ordinarily half of this distance would have sufficed. It is self-

evident that the heavier the load, the more unmanageable the car, and the greater the distance required within which to stop it. And this is fully confirmed by the testimony of Maj. Selden, an expert electrician, and the superintendent of the company, than whom no witness was more competent to speak. In answer to the question, What would be a reasonable distance within which to stop the car? he replied: "From all accounts, they had a very heavy load; probably seventy or eighty passengers." I would estimate that that car weighed at least 15,000 pounds, if it had eighty passengers, knowing the weight of the car and motor. . . . I don't think a car with the weight that that car had on could be stopped in less than 50 or 60 feet, going at any speed." This being so, it is manifest that the collision between the car and the truck was caused by the crowded and overloaded condition of the car, and not all due to the particular motor with which the car was equipped. Upon the whole evidence, therefore, the verdict was right, and the railway company could not have been prejudiced by the error contained in the instruction complained of. The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. "The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other." *O'Neil* v. *Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125; *Buhrens* v. *Dry Dock, E. B. & B. R. Co.* 53 Hun, 571, Affirmed 125 N. Y. 702; *Chicago City R. Co.* v. *Young*, 62 Ill. 238, and Booth, Street Railway Law, § 304, and cases there cited. And it is gross negligence in a street-railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, and, consequently, not to be able to control and stop them readily as they approach an intersecting street, in case it may be necessary to do so to avert a collision or prevent an accident.

The third assignment of error is that the damages are excessive. It was proved by Dr. Ross, the surgeon who was summoned to attend the plaintiff at the time of the accident, that the plaintiff had a wound on the side of his face and through his brow, which he had to close with stitches; that he was suffering from concussion, and insensible when he dressed his wounds, and that he remained insensible until the next morning. He also stated that the plaintiff was much bruised about his body, and that he attended him professionally for ten days or two weeks. The plaintiff himself testified that, besides the injuries mentioned by Dr. Ross, his teeth were broken, that his knee was so injured that he was lame for a long time, and that he was rendered unable to work efficiently at his trade for six or eight months. No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be; and we cannot say, upon the evidence in this case, that $1,000 was excessive damages. It was not so great, considering the injuries proved to have been sustained by the plaintiff, as to furnish ground for believing that the jury were actuated by partiality or prejudice; and, unless such is the case, under the well-settled rule in this state the court should not disturb the verdict. *Farish* v. *Reigle*, 11 Gratt. 697, and *Norfolk & W. R. Co.* v. *Shott*, 92 Va. 34.

There is no error in the judgment complained of for which it should be reversed, and the same is affirmed.

NEBRASKA SUPREME COURT.

David R. BUSH *et al.*, *Plffs. in Err.*,
v.
JOHNSON COUNTY.

(.....Neb.....)

***1. An outgoing county treasurer turned over to his successor a certificate evidencing the deposit of county funds in a bank** for safe-keeping, and the same was received by the incoming treasurer as a payment to him, to its amount, of such funds. The certificate of deposit was, by the new treasurer, delivered to the bank which had issued it, and was canceled, and the treasurer received in lieu thereof a certificate of deposit for a like sum, payable to him as county treasurer. *Held*, that the incoming treasurer and his bondsmen were chargeable on his bond for the amount of such payment, and a subsequent failure of the bank during the time the bank was continued, and his consequent inability to realize the money, did not relieve them of the liability.

2. The duty imposed on a county treasurer by law, and assumed by him, of safely keeping and accounting for and turning over the public funds which come into his hands by virtue of his office, is an absolute one. And where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner and their responsibility is the same as that of their principal; and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer.

3. It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are properly discharged; and if the county board shall be negligent or careless in the examination of the accounts or report of the treasurer, such examination and settlement will not be available as a defense to the sureties on his bond in an action for funds which the treasurer has failed to turn over.

4. The periodical settlements assigned

*Headnotes by HARRISON, J.

NOTE.—As to conflict of authorities on liability upon official bonds for loss of money by bank failure, see *note* to Wilson v. People, Pueblo & A. V. R. Co. (Colo.) 22 L. R. A. 449. See also Wilkes Barre v. Rockafellow (Pa.) 30 L. R. A. 393.

32 L. R. A.

by our statutes to be made between the county board and the treasurer of the county do not have in them the elements of a judicial determination of the subjects involved.

5. The case of Ragoss v. Cuming County, 36 Neb. 375, examined and distinguished.

6. A county treasurer, during his first term, had on deposit in a bank $6,000 of the public funds, such deposit being evidenced by a certificate of deposit. At the close of this term of office and the beginning of the second term, in his report to and settlement with the county board, he included and stated the amount of the certificate of deposit as so much cash; the board possessing no knowledge of the existence of the certificate, or of the deposit of the money. Before the close of the treasurer's first term, the bank failed. *Held*, that such settlement did not bind the county, as an acceptance or approval of the certificate of deposit as so much cash accounted for; nor did its retention by the treasurer, or turning it over to himself as his own successor, constitute a paying over of the public funds, but was a failure to do so, which rendered him and the obligors on his bond for his first term liable.

(April 10, 1890.)

ERROR to the District Court for Johnson County to review a judgment in favor of plaintiff in an action to enforce the liability of the parties on the official bond of a former county treasurer for his failure to turn over moneys which had been delivered to him as such treasurer. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. P. Davidson, T. Appelget,** and **I. Reavis,** for plaintiffs in error:

The payment of money in the hands of a county treasurer at the termination of his office to his successor can be effectuated only by the delivery of that which by the law of the land is recognized as money.

The mere delivery of certificates of deposit of a banker,—no money having been realized from them,—even if assented to by the successor, is not a payment, nor will it relieve the outgoing treasurer and his sureties from liability on his official bond, for failing to pay over money found to be due from him to the county on final settlement.

Cedar County Comrs. v. *Jenal*, 14 Neb. 254.

The bondsmen of Bush are liable only for money received by him as county treasurer, and not for checks, certificates of deposit, or open bank accounts, upon which the money was not realized.

The sureties on the bond of defendant are released because the evidence fails to bring their liability within the conditions of the bond, and as a surety is entitled to stand upon the strict terms of his contract, if it is not so brought he is released.

2 Parsons, Cont. 5th ed. p. 5; Brandt, Suretyship, p. 107, § 79; *Lang* v. *Pike*, 27 Ohio St. 498; *Reese* v. *United States*, 76 U. S. 9 Wall. 13, 19 L. ed. 541; *Dumont* v. *United States*, 98 U. S. 142, 25 L. ed. 65.

It is made the duty of county treasurers, under and by the laws of this state, to make settlement of the affairs of their offices with the boards transacting business for their counties and at stated periods. In this case Bush performed that duty, and it is abundantly proved by the testimony that the county board approved all his accounts and made such approval a matter of record.

Whenever such a body in the exercise of jurisdiction acquired pursuant to statute does an act, audits a claim, levies a tax, orders a public road to be opened, and the like, its action is judicial; and while its proceedings are subject to review by an appellate court by writ of error or certiorari, such proceedings, unless reversed or set aside, are conclusive and binding upon the corporation and the claimant or petitioners, and cannot be collaterally impeached.

1 Herman, Estoppel & Res Judicata, § 435; *Dynes* v. *Hoover*, 61 U. S. 20 How. 65, 15 L. ed. 838; *Hefferman* v. *Porter*, 6 Coldw. 391, 98 Am. Dec. 459; *Gillson* v. *State*, 5 Lea, 161; *Hayes* v. *Rogers*, 24 Kan. 143; *Warren County Comrs.* v. *Gregory*, 42 Ind. 32; *Blanchard* v. *Bissell*, 11 Ohio St. 96; *Argo* v. *Barthand*, 80 Ind. 63; *Fall* v. *Paine*, 23 Cal. 302; *Andrews* v. *People, Rumsey*, 84 Ill. 28; *People, Miller*, v. *Brislin*, 80 Ill. 423; *Pitman* v. *Albany*, 34 N. H. 577; *Hume* v. *Burton*, 1 Ridgw. P. C. 43; *Fuller* v. *Elizabeth*, 42 N. J. L. 427; *State* v. *Vanarsdale*, Id. 536; *Marshall* v. *Gill*, 77 Ind. 402; *Miller* v. *Sanborn*, 54 Vt. 522; *Oxborough* v. *Boesser*, 30 Minn. 1; *Ellis* v. *Whan*, 91 Ill. 77; *Wild* v. *Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Breitweiser* v. *Fuhrman*, 88 Ind. 28; *Wright* v. *Wells*, 29 Ind. 354; *Green* v. *Elliott*, 86 Ind. 53; *Hayes* v. *Rogers*, 24 Kan. 143; *Stone* v. *Augusta*, 46 Me. 127; *Rominger* v. *Simmons*, 88 Ind. 453; *McIntyre* v. *Marine*, 93 Ind. 193; *Richland County* v. *Miller*, 16 S. C. 244.

Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally except for fraud.

Ragoss v. *Cuming County*, 36 Neb. 376; *Richmond County Supers.* v. *Ellis*, 59 N. Y. 620; *Onondaga Supers.* v. *Briggs*, 2 Denio, 26; *Hobson* v. *Com.* 1 Duv. 172; *Yalabusha County* v. *Carbry*, 3 Smedes & M. 529; *Mobile* v. *Huggins*, 8 Ala. 440; *Arthur* v. *Adam*, 49 Miss. 404; *United States* v. *Jones*, 33 U. S. 8 Pet. 375, 8 L. ed. 979; *Porter* v. *Luzerne Dist. School Directors*, 18 Pa. 144; *Middletown* v. *Miles*, 61 Pa. 290; *Burnet* v. *Portage County Auditor*, 12 Ohio, 54; *Kendall* v. *United States, Stokes*, 37 U. S. 12 Pet. 524, 9 L. ed. 141.

The Supreme Court of the United States declared that receivers of public money were insurers of the funds intrusted to their hands.

United States v. *Prescott*, 44 U. S. 3 How. 578 11 L. ed. 734.

The same decision was announced in the succeeding cases.

United States v. *Morgan*, 52 U. S. 11 How. 160, 13 L. ed. 646; *United States* v. *Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319; *United States* v. *Keehler*, 76 U. S. 9 Wall. 88, 19 L. ed. 576; *Boyden* v. *United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527.

But notwithstanding the rule was so repeatedly adhered to, the question was again presented in *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89.

While the doctrine of *United States* v. *Prescott, supra*, is not in terms overruled, it is dis-

tinguished and declared to be based upon the terms of the bond sued on.

And it was held that the obligors on the bond sued on were relieved from liability thereunder by an overruling necessity or the act of a public enemy, if without any fault or neglect on the part of the obligor.

This case of *United States* v. *Thomas* is strong authority for overthrowing the doctrine that a receiver of public money is an insurer of the safety of the funds intrusted to his hands. *Cumberland County* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 281; *Wilson* v. *People, Pueblo & A. V. R. Co.*, 19 Colo. 199, 22 L. R. A. 449; *Rose* v. *Hatch*, 5 Iowa, 149; *York County* v. *Watson*, 15 S. C. 1, 40 Am. Rep. 675; *People, Nash*, v. *Faulkner*, 107 N. Y. 477.

A board or officer who is charged by the law with the performance of a duty that involves the examination of evidence and the forming of a judgment from such evidence acts judicially.

Herman, Estoppel & Res Judicata, § 440; *Connecticut & P. Rivers R. Co.* v. *Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Secombe* v. *Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 108, 23 L. ed 67; *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Butman* v. *Vermont C. R. Co.* 27 Vt. 500; *Allen* v. *Utica, I. & E. R. Co.* 15 Hun, 80; *Evans* v. *Haefner*, 29 Mo. 141; *Hueston* v. *Eaton & H. R. Co.* 4 Ohio St. 685; *Read* v. *Victoria Station & P. R. Co.* 1 Hurlst. & C. 821; *Queen* v. *London & N. W. R. Co.* 3 El. & Bl. 443; *Chapman* v. *Monmouthshire R. & Canal Co.* 2 Hurlst. & N. 267; *Re Newbold*, 14 C. B. N. S. 405; *Barber* v. *Nottingham Canal Co.* 15 C. B. N. S 726; *Townsend* v. *Chicago & A. R. Co.* 91 Ill. 545; *Galena & C. U. R. Co.* v. *Pound*, 22 Ill. 399; *Vought* v. *Foxworthy*, 38 Neb. 790; *Sioux City & P. R. Co.* v. *Washington County*, 3 Neb. 38.

Messrs. **J. Hall Hitchcock** and **E. W. Thomas**, for defendant in error:

If a taxpayer were to give the treasurer his check for money he had in a bank near by in payment of his taxes, and the treasurer carelessly carried it for months, and then the bank should fail and thereafter be unable to pay the same, could it be contended that the man's taxes were not paid or that the treasurer could not be compelled to account for the amount of taxes so paid? We think not.

First Nat. Bank v. *Miller*, 37 Neb. 500.

Suppose there had been a settlement with the the treasurer, is it true that such settlement would estop the county from instituting this action on the bond?

We think that it would not.

Van Sickel v. *Buffalo County*, 13 Neb. 103, 42 Am. Rep. 753; *Vivian* v. *Otis*, 24 Wis. 518, 1 Am. Rep. 199; 19 Am. & Eng. Enc. Law, pp. 544–546.

Harrison, J., delivered the opinion of the court:

David R. Bush was elected treasurer of Johnson county at the election which was held during the fall of 1889, and took possession of and commenced the performance of the duties of the office in January, 1890; was re-elected in the fall of 1891; and in January, 1892, closed his first, and began his second, term as treasurer. The other plaintiffs in error were his bondsmen for the first term. Bush's immediate predecessor in the office of county treasurer, when he turned over the office and funds, in January, 1891, delivered to Bush some $40 or $50 in actual cash or money, in its strict meaning, and gave him certificates evidencing deposits which the retiring treasurer had in banks, and also some checks. These were accepted by the incoming treasurer, and received as between him and the outgoing one, as payment of the amounts stated in them. One of these certificates or checks was for the sum of $6,000, payable by the Bank of Russell & Holmes, at Tecumseh. Bush presented this at the banking office of Russell & Holmes, and, in lieu of it, received a certificate of deposit for the sum named. This he retained through and beyond the entire time and close of his first term as treasurer. In his report to the county board at or near the close of his first term, a certain balance was shown to be on hand. A portion of this balance was this sum evidenced by the certificate mentioned. The bank in which this money was deposited continued business in the regular manner until October, 1891, at which time it closed, a month or two before the expiration of Bush's first term. When the facts were discovered in regard to this and some other certificates of deposit (we have here particularly to deal with this one), action was instituted on the bond against plaintiffs in error to recover the amount as an alleged shortage.

There were two principal questions raised by the pleadings: First, that Bush, the county treasurer, never received the money, the $6,000, to recover which was the object of this suit; second, that, at the expiration of his term of office, he made a settlement of his doings and accounts as county treasurer with the county commissioners, whereby the county became bound, and it cannot or should not be heard to assert any claim as against the treasurer or his bondsmen A jury was waived and a trial had. Judgment was rendered against the treasurer and bondsmen for the $6,000 and interest thereon. The case has been brought to this court by proceedings in error.

In regard to what transpired in January, 1889, between the outgoing treasurer and Mr. Bush, the incoming officer, in regard to the funds of the county and their transfer from one to the other of the officers, Mr. Zutavern, the retiring treasurer, testified as follows:

Q. Mr. Zutavern, what official position did you hold in this county in the years '88 and '89?

A. County treasurer.

Q. Who was your successor?

A. D. R. Bush.

Q. Do you know how much money you turned over to Mr. Bush at the time you went out of the office?

A. I do not know now.

Q. You may state to the court how you delivered the things in the treasurer's office to Mr. Bush, at the time your term of office expired, with reference to the money on hand.

A. I turned over all the money that belonged to the county to Mr. Bush

Q. How did you turn it over?

A. Why, by checks, most of it. I guess I

had a little cash on hand, maybe $40 or $50, in the drawer; and I turned that over. I turned him over a few certificates.

Q. State how it was you did not give him the money.

A. I had the certificates, and asked Bush if he could use them,—whether they would answer as well as money; and he said they would. There was nothing said about me getting the cash, I do not think.

Q. State the facts as to whether they were equivalent to cash at that time, and for how long.

A. They were.

Q. Did Mr. Bush ever give you any information, in any form or manner, after this, that he could not use these certificates, or ask you to take them up, or any of the things you turned over as the amount of money on hand?

A. No, sir.

Q. Why didn't you turn the money over in cash at the expiration of your term of office to Mr. Bush?

A. I had these certificates and showed them to Bush, and asked him if he could use them; and he said that he could. That was my reason. He said they would do him as well as money.

Q. You were acquainted with the financial condition of the different banks upon which you had the bank certificates?

A. I think I was.

Q. You were acquainted with their condition, with reference to paying of their papers presented to them for a year after that? From that time on for another year?

A. I think I was.

Q. Well, what was it?

A. They were good.

Q. They paid all of the demands made on them?

A. Yes, sir.

A portion of the testimony of Mr. Bush is as follows:

Q. Mr. Bush, you are the defendant, one of the defendants, in this case?

A. Yes, sir.

Q. You are the principal defendant, are you not, in this case?

A. Yes, sir.

Q. (Handing witness plaintiff's Exhibit E.) What is that paper you now have?

A. It is a certificate of deposit on the Bank of Russell & Holmes.

Q. You are the person who is named in that certificate as payee, are you?

A. Yes, sir.

Q. You were county treasurer at that time?

A. Yes, sir.

Q. It was paid to you as county treasurer?

A. Yes, sir.

Q. The consideration of that check was county money?

A. It was a check given me for county money.

Q. And you took the check to the bank and got that?

A. Yes, sir.

Q. At your own request?

A. At the request of Mr. Charles Holmes.

Q. Did you ask him for the cash?

A. No, sir.

Q. You did not want it?

A. No, sir.

Q. You could have got it?

A. I do not know whether I could or not.

Q. You have every reason to believe it? You had not known them to refuse any certificates, had you?

A. No, sir.

Q. You have got money out of there, as county treasurer, since that was deposited there, haven't you?

A. Yes, sir.

Q. That was a part of the funds you received from Zutavern, your predecessor?

A. Yes, sir.

Q. At the end of your first term, you did not turn that over except in the form of a certificate, as it appears there, to yourself?

A. There was no change.

Q. Just that certificate?

A. Yes, sir.

Q. When you settled with the county board at the end of your first term, January, 1892, you turned over that certificate in your report to the county commissioners, as part of the funds on hand?

A. Why, I suppose you would call it that, simply in my own hands.

Q. You turned it over to yourself as successor?

A. I believe that is what it would be.

Q. You never turned any cash over to represent that?

A. No, sir.

In this connection it may be further said that all of the testimony introduced which had a bearing upon the question of whether the Bank of Russell & Holmes was, at the time of the transaction between Zutavern and Bush, of date January, 1890, solvent, and meeting all demands for payments of money made upon it, tended to establish that it was so, and so doing and continued in such condition for more than a year subsequent thereto.

It is clear from the evidence that Mr. Bush, on assuming the duties of the office of county treasurer, received from the retiring officer a check or certificate of deposit, entitling him to demand from the Bank of Russell & Holmes the sum of $6,000, and that it was so accepted by him in such form, in lieu of the cash, either coin or legal-tender currency; that he did not demand any other or different payment, but waived it, and the check or certificate of deposit was by him delivered to the bank, and canceled; and, at the request of the banker, he received a new certificate of deposit for the sum named, payable to himself, as county treasurer. The title or right to the sum of money involved was, by the methods stated, transferred from Mr. Zutavern to Mr. Bush, the latter being the recipient of it, by reason of his occupancy of the office of county treasurer. The reception of this money from his predecessor was one of the duties which devolved upon the incoming treasurer, his due and proper performance of which, together with all others pertaining to the office, his sureties, by signing the bond, had guaranteed. Giving the bond was one of the essential prerequisites of his assuming the office, and without which he could not legally do so; and the sureties, by their signatures, en-

abled him to meet this requirement, and to acquire title or right to this money; and, having acquired it, he and the bondsmen became liable to the county for it. The fact that he elected to take a certificate of deposit evidencing the indebtedness of a bank to his predecessor in office for the amount, instead of coin or currency, and to have the certificate canceled, and a new one issued, payable to himself as county treasurer, and to let the money remain in the bank, and to carry the sum thus treated in his accounts as such treasurer, as moneys or funds on hand could in no manner or degree affect his liability, or that of his bondsmen. He became possessed of the right to $6,000 of the funds of the county, and liable for its safekeeping, and to account for it, and, at the request of the banker, left it in the bank. This was a sufficient reception by him of the money of the county to render him and his sureties liable for it under the conditions of this bond, within the rule announced in *State* v. *Hill*, 47 Neb. ——.

What effect the transactions we have outlined between the two treasurers would have upon the rights of the county, if any, existing or arising therefrom, against Zutavern, the outgoing treasurer, and his bondsmen, is not involved in this case, and will not be discussed or decided. It is evident that Bush, the incoming treasurer, acquired the right to act in relation to the $6 000 of the county funds, and by his action it was left in the bank. This was such an act of right of control and disposition of the money as rendered him liable to account for it.

It is argued that the treasurer is only bound to use due and ordinary care for the safe-keeping and preservation of the money of the county, and if he deposited it in the bank after using reasonable and ordinary care and caution in ascertaining the standing and solvent condition of the bank, and was watchful in this particular so long as it remained there, if the bank failed, and the money was thereby lost to the county, in whole or in part, without any fault or negligence attributable to the treasurer, he was not liable for such loss, nor were his sureties so liable. There exists an irreconcilable conflict in the decisions of the courts in regard to the liability of public officers and their bondsmen for funds lost without fault or negligence on the part of the officers; but the weight of authority in this country is to the effect that a public officer and his sureties are to be held responsible for public funds lost, regardless of the question of fault or negligence on the part of the officer, where the law, in positive terms or from its general tenor, and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such.

Where the statutes impose the duty of payment, it is sufficient if the bond is conditioned for the faithful discharge of the duties of the officer, to render the sureties liable to the same extent as their principal. Our statutes on the subject, by their general tenor, if not in direct terms, require the retiring treasurer to account for or pay over the public moneys. The bond in this case was conditioned for the faithful discharge by the treasurer of the duties of the office, and for the faithful accounting for and paying over of all the moneys of the county which he received; and both he and his sureties became liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his fault or negligence. *Pine Island Bd. of Edu.* v. *Jewell*, 44 Minn. 427, and cases cited as follows: *United States* v. *Prescott*, 44 U S. 3 How. 578, 11 L. ed. 734; *United States* v. *Dasheill*, 71 U. S. 4 Wall. 182, 18 L. ed. 319; *Boyden* v. *United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527; *Hancock* v. *Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *New Providence* v. *McEachron*, 33 N. J. L. 339; *Com.* v. *Conly*, 3 Pa. 372; *State* v. *Harper*, 6 Ohio St. 607, 67 Am. Dec 363; *Taylor Dist. Twp.* v. *Morton*, 37 Iowa, 550; *Thompson* v. *Township 16*, 30 Ill. 99; *Hulbert* v. *State, Martin County Comrs.* 22 Ind. 125; *Morbeck* v. *State, Jackson Twp.*, 28 Ind. 86; *Ward* v. *School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477; *Wilson* v. *Wichita County*, 67 Tex. 647; *State* v. *Nevin*, 19 Nev. 162; *State, Mississippi County*, v. *Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State, The Township*, v. *Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Jefferson County Comrs.* v. *Lineberger*, 3 Mont. 23, 35 Am. Rep. 462; *Redwood County Comrs.* v. *Tower*, 28 Minn. 45.

The case of *Ward* v. *School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477, cited in the opinion of the Minnesota court just alluded to, in support of the doctrine of strict accountability of treasurers and their bondsmen, for public money intrusted to the care of the treasurers by virtue of their being such officers; may be said to be not strictly in point, for the reason that the money lost by failure of the bank, and sought in the action to be recovered of the treasurer and his bondsmen, had been deposited by the treasurer in the bank to his own individual credit. This court held: "The defendant, while treasurer of the plaintiff district, deposited the money in question with his banker to his own individual credit. The money was intended to meet certain bonds of the district, then about to fall due, and which were payable at that bank, and the defendant so informed the banker, and directed him verbally to so apply it when the bonds were presented. While in this condition the bank failed, and the money was lost. Held, that the banker was the agent of the treasurer and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond." And it was said in the text of the opinion: "It was Ward's duty under the law to keep the money securely until properly directed, as before shown, to pay it over to the holder of the district bonds. The money was within his control, placed there by force of the statute, and if he saw fit to intrust it to the care of another, he did so at his peril." In the opinion in the case of *State, Craig*, v. *Sheldon*, 10 Neb. 452, in stating the liability of a treasurer for public funds, it was held: "The fact that the public funds have been stolen from the treasury is no legal justification for the failure of the treasurer to account for them." This was not a case, however, wherein the recovery of the public funds was the object of the action, but was one in the nature of a quo warranto to oust the defendant from the office of county treasurer of Greeley county; and, in reaching a

conclusion as to whether the treasurer had been guilty of neglect of duty as an officer, it was observed: "This being the case, the county treasurer having failed to account for the moneys in his hands properly chargeable against him as treasurer, is guilty of wilful neglect of duty, and may be removed from office. And the fact that the moneys were stolen is no legal justification for the failure to account for them." While it may be said that these cases are not in point, and cannot be said to support the rule which holds treasurers to a strict accountability in respect to public funds which come into their possession as officers, for the reason that, strictly speaking, it was not the main question involved in either case, but only incidentally, yet it was necessarily connected with the matters under discussion, and which were determined, and made it necessary to pass upon it; and the decisions show what the opinion of the court was in regard to the responsibility of the treasurers for public money which they handled as officers.

It is argued that if the delivery of the certificate of deposit or check by Zutavern to Bush, when the latter assumed the duties of the office, was a sufficient payment to render Bush and his bondsmen responsible to the county for the amount thus paid, inasmuch as at the expiration of the first term of his services as treasurer, and assumption of the duties of the second term, January, 1892, he turned this $6,000 certificate of deposit over to himself as his own successor, this released the sureties herein sued, who signed his bond for the first term, and the action must fail as to them. Whatever might be said of this contention had the certificate of deposit in question, at the time of the termination of the first term during which Bush occupied the office of treasurer, retained its full force and vigor as a demand against the bank for the sum evidenced by its face, we must now recall to mind the fact that during the month of October, 1891, the bank, payor of the certificate, failed or quit business, had passed out of existence in the business world, and the certificate of deposit was no longer a demand against a living business being, but was merely evidence of a claim against what might at some time be realized of the assets of the bank which had failed, and was certainly not entitled to be considered as such a payment, when retained by Bush in making the change from his first to his second term of the amount of funds on hand, to him as his own successor, as to render or raise a liability for the amount of the certificate against him and his bondsmen for the second term, as a loss occurring during the second term, and certainly was not a paying over of the county funds which worked a release of the sureties who signed the bond for the first term. The failure to otherwise pay the sum expressed by the face of the certificate at the expiration of the first term of office was such a failure to faithfully discharge the duties of the office required by law, to faithfully account for and pay over all funds which had come into his hands or under his control by virtue of his office, as rendered him and the sureties for the first term liable therefor

A further contention is made on behalf of plaintiffs in error that the board of county commissioners had settled with Mr. Bush, comprehending in such settlement all his actions as county treasurer during his first term, and had examined his final account, and approved it, and made such approval a matter of record; that this constituted an adjudication of all these matters, which was final and conclusive; hence this action will not lie. Our statutory law requires the county treasurer to make periodical reports, which must show somewhat in detail the main transactions, more particularly in relation to disbursements of the public moneys and balances remaining on hand in the various funds; and these must be scrutinized and passed upon by the county board, and they make what is denominated a "settlement" with the treasurer. But, call it what you may, we are satisfied that it is nothing more than an examination of the account and report of the business acts of the treasurer during the period covered by it,—a scanning of such acts a "checking up," if the expression is allowable, by the county commissioners, the parties designated by law to attend to it, made in the interest of the public and the county, and for the benefit of the public and the county. Its main object and purpose are to maintain an espionage and supervision over the finances of the county, and their management by the treasurer, and secure, by such means, as great promptitude and care and exactitude in their management as possible. It is not in any sense or degree on behalf of the sureties on the bonds of officers. Their contract is that the officer will perform his duties faithfully and properly, and for any failure so to do they become liable. The law does not contemplate that the officer shall be watched by the county or its officers for the benefit of the sureties. It is no part of the contract with the sureties that it shall be done; and, where reports and settlements are required by law, it does not change the obligation of the sureties, or enter into their contract. It is their duty to see to it that the duties of the officer are faithfully discharged; and if the county board should be negligent or careless or irregular in an examination of an account or report of a treasurer, or in what is termed a "settlement," it would be no available defense to sureties on his bond in an action to recover an amount of public funds which the treasurer had failed to pay over. These periodical settlements assigned by our statutes to be made with county treasurers do not have the elements in them of a judicial determination of the subjects involved. It would not be contended that if the county commissioners state, as a matter of record, as the result of one of these so called "settlements," that the treasurer was short in his accounts in a stated sum, and consequently indebted to the county in such sum, this would constitute an adjudication of the whole matter; and, unless appealed from, it would be final and binding on the parties, and not open to attack No more can the result obtained by the examination be said to be binding and conclusive upon the county in regard to the amounts reported on hand by the treasurer being the exact true amounts; or their payments by the treasurer preclude the institution and successful prosecution of an action

for any further sums which he has failed to report or to pay over. It can have no further or greater conclusiveness than any settlement made between private persons.

We are cited on this point in the case to the decision in the case of *Ragoss* v. *Cuming County*, 36 Neb. 375, as sustaining the position of plaintiffs in error, but we do not so read it. It was held: "Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud,"—which is entirely correct; but, in passing upon the report of a county treasurer, the board do not reject or allow it in the sense in which these words were used in the case referred to. It is only approved or disapproved, and not conclusively. In the same decision it is observed: "An officer who has faithfully performed the duties of his office and made a full settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same." The rule announced in the third paragraph of the syllabus to the case, which we have quoted, had reference to an order of the county board allowing the county clerk deputies, and the application of the fees of the office to the payment of their salaries, as fixed by the board, and was entirely applicable. What was said in the opinion in regard to the settlement was substantially the same as herein stated. Any settlement is all right, and entitled to stand in favor of an officer who had faithfully performed the duties of his office, and when, in the settlement, there is neither fraud, mistake, nor imposition. In support of what we have said in regard to these reports, and their examination and approval and settlement, see *Craun* v. *Com.* 84 Va. 282; *Rose* v. *Douglass Twp.* 52 Kan. 451; *Waseca County Comrs.* v. *Sheehan*, 42 Minn. 57, 5 L. R. A. 785; *Britton* v. *Fort Worth*, 78 Tex. 227.

In the case at bar it was shown by the testimony that, at the close of his first term, Mr. Bush made a report or account, which was examined by the county board. The statements of the commissioners' record in respect to the settlement had at that time were as follows: Under date January 29, 1892: "The county commissioners proceeded to settle with the county treasurer. The board adjourned to January 30 1892." Under date of January 30, 1892: "The board then proceeded to settle with the county treasurer. Board adjourned to February 1, 1892." Under date of February 1, 1892: "The board proceeded to settle with the county treasurer. Pending settlement, the board adjourned to February 2, 1892." Under date of February 2, 1892: "The board completed with the county treasurer." The account indicated the proper and true amount which had come into the possession of the county treasurer, or had been paid to him, as on hand; but it, in fact, included this certificate of deposit for $6 000, issued by the bank, which had, subsequent to such issuance, but prior to the time of settlement, failed. The fact that this was so included and counted by the treasurer as money on hand was not known by the county board. The funds were not asked for by the board, were not produced by the treasurer, and any approval of the account or report of the treasurer at that time was so made without any knowledge of the existence of the certificate of deposit, or that it figured or was claimed by the treasurer as a part of the moneys on hand. There was a mistake in the settlement, if any was made, to the amount evidenced by the certificate; and the paying over the funds shown by the report to be on hand by Bush to himself, to the extent that it consisted of his retaining this certificate, and counting it as so much money, was a failure to account and pay over the moneys of the county,—a failure to faithfully discharge the duties of his office, as required by law, and for which he and his bondsmen became liable.

It follows that *the judgment of the District Court must be affirmed.*

Norval, J., did not sit.

Rehearing denied.

Peter JACOBSON
v.
John VAN BOENING, *Appt.*

(.....Neb.....)

*1. **In this state the common-law rule prevails** that a proprietor may, by barriers or otherwise, protect his land from surface water coming from across adjacent lands; and, for injuries occasioned to others from a proper exercise of that right, he is not responsible.

2. **If in the execution of such object, such proprietor is guilty** of negligence which is the natural and proximate cause of injury to the adjoining proprietor, he is accountable therefor.

3. **One may not accumulate surface waters** on his own land, and, by means of a ditch, discharge them in a volume upon the land of another.

4. **The former decisions** of this court reviewed, and *held* to be in harmony with the foregoing principles.

5. **Against a continuing injury** to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief by injunction.

6. **In such case it is not necessary for the plaintiff to prove** that actual injury occurred before the suit was brought. The remedy is in such case preventive, and will be granted on proof that the acts complained of, unless restrained, will result in damage.

7. **To such an action it is no defense** that the injury is in part threatened by the acts of another. The plaintiff has his remedy against each one contributing thereto.

8. **Where one has a valid cause of action** against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense.

*Headnotes by IRVINE, C.

NOTE.—As to rights in flow of surface waters, see *note* to Gray v. McWilliams (Cal.) 21 L. R. A. 593.

(April 10, 1896.)

APPEAL by defendant from a judgment of the District Court for Adams County in favor of plaintiff in an action to restrain defendant from discharging surface water upon plaintiff's land. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. H. Bowen** and **J. B. Cessna** for appellant.

Messrs. **Smith & McCreary,** for appellee:

The owner of land has the absolute inherent right to keep and use it for such lawful purpose as he sees fit unmolested by the discharge of surface water thereon by another. If the injury inflicted by the unlawful discharge of surface water upon the land of another be serious and in its nature be permanent or such as would continue to operate in all future time, an injunction is a proper and the only adequate remedy.

Morrissey v. *Chicago, B. & Q. R. Co.* 38 Neb. 406; *Fremont, E. & M. V. R. Co.* v. *Marley,* 25 Neb. 138.

Irvine, C., filed the following opinion:

This was an action by the appellee against the appellant for the purpose of obtaining an injunction restraining the appellant from maintaining a certain ditch, whereby it was alleged that waters collected on the lands of appellant were discharged upon the lands of plaintiff, to plaintiff's damage. The evidence is hopelessly conflicting, and in some parts very obscure. As there was a general finding for the plaintiff, we must take it in the light in which it most strongly tends to support the allegations of his petition. So considered, it appears hat the parties are owners of adjoining farms, the plaintiff's lying west of defendant's. Along the north line of these farms there is a highway. On the defendant's farm, and near the northeast corner thereof, there lie what the witnesses style two "lagoons." A review of the evidence discloses, however, that this term is used according to a local signification, and means merely a slight depression in the land, wherein, in wet seasons, surface water accumulates. It is quite evident that these are not permanent ponds or lakes. At some time in the past, a ditch was constructed near the middle of the highway, whereby the surface water from the vicinity was collected, and flowed along the highway westward into a ravine, or as we shall hereafter style it, using another local term, more accurately descriptive than any word of general use, a "draw." This draw crosses the highway north of plaintiff's land, passes over his land, and across defendant's towards the east. Shortly before this action was commenced, in accordance with some action by the county authorities, this ditch was filled up, and another one nearer the south side of the highway was constructed for the same purpose, and having the same outlet. The so called "lagoons," by means of smaller ditches, were connected with this ditch in the highway. The damage alleged is that, whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north, and thence along the highway to the draw; discharging a large body of water thereby across plaintiff's lands, cutting trenches, and covering them with accretions. It also appears that, by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land.

One point urged in support of the appeal is that there is no evidence that, down to the time of the trial, any large quantity of water had been discharged by reason of the ditches in question, or that plaintiff's lands had been in fact injured. It is true that there is very little evidence to the contrary, but we regard this as immaterial. The plaintiff was not obliged to wait until the injury had been inflicted. There is ample evidence tending to show that such an injury, in the event of a wet season, would be the result of maintaining the ditches, and the remedy sought is preventive, and not compensatory. Another point urged is that the action should properly be against the county, because the damage, if any, is directly inflicted by the ditch in the highway. While the prayer of the petition seems to extend to all the ditches, the district court granted the injunction only so far as to restrain the defendant from maintaining the ditches connecting the lagoons with the ditch in the highway. Assuming for the moment that any wrong was committed by maintaining this system of ditches, the defendant was the responsible person to the extent of the water discharged by the ditch the maintenance of which was restrained. The fact that the plaintiff may have a remedy against the county or against other proprietors for similar acts contributing to the same injury does not deprive him of his remedy against the defendant for his share therein.

Another minor point may here be disposed of. The district court excluded testimony accompanied by an offer to show that the plaintiff and others had conspired together to institute criminal and civil actions against Van Boening, contributing to the expense thereof, and with the purpose of harassing him until he should leave the township. This would be no defense to this action. If, as a matter of fact, the plaintiff had a good cause of action against the defendant, his motives in prosecuting it are immaterial.

With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land. That, for a wrong of this kind, injunction is an appropriate remedy, was held in *Davis* v. *Londgreen,* 8 Neb. 43. That one's right to protect his land against surface water does not extend so far as to permit him to collect it in a volume, and by means of a ditch, to discharge it upon the land of another, has been several times decided. *Fremont, E. & M. V. R. Co.* v. *Marley,* 25 Neb. 138; *Lincoln Street R. Co.* v. *Adams,* 41 Neb. 737; *Bunderson* v. *Burlington & M. R. Co.* 43 Neb. 545.

There are other cases applying the principle, but we do not cite them, for the

reason that they seem rather to relate to the diversion of watercourses than of surface water. The announcement of the rule referred to is sufficient to dispose of this case. But, as it developed upon the argument that an impression prevails that the different decisions of the court have not been altogether harmonious upon the subject, it seems well to review these cases, which to our minds are in complete harmony, and to as clearly as possible state the principle which has governed all the decisions.

Prior to 1893 there was no case dealing with the general principles of law on the subject. *Davis* v. *Londgreen*, *supra*, was much like the present, except that it would seem that the pond which had been drained was permanent in its character, and not a mere depression, in which surface water occasionally collected. It was held that such water could not lawfully, by means of a ditch, be discharged upon the lands of one's neighbors. *Pyle* v. *Richards*, 17 Neb. 180, was a case for the diversion of a stream; and, while it has been cited in several surface-water cases, it was in fact governed by different principles. *Stewart* v. *Schneider*, 22 Neb. 286, depended for its solution entirely upon the effect of a prior decree fixing the rights of the parties, the correctness of which was not, and could not have been, then questioned. *Morrissey* v. *Chicago, B. & Q. R. Co.* 38 Neb. 406, is perhaps the leading case on the subject. It was there announced that the common-law rule prevails, and that, therefore, one has the right to defend himself against surface water, and that incidental damage inflicted upon another by such acts is *damnum absque injuria*. It is this case which is thought to be in conflict with some of the others. The opinion is entirely too long to abstract here, but an examination of the case discloses that the court had always in view the fact that there was neither allegation nor proof that the railroad embankment which had caused the injury had been unnecessarily or negligently constructed. The district court gave an instruction to the effect that one might upon his own land erect such barriers as he deemed necessary to keep off surface water falling upon it or coming from adjacent lands, and for any consequent injury to other lands he would not be responsible; but that such waters as fell upon his own lands, or came thereon by surface drainage, he must keep within the boundaries, or permit them to flow off without artificial interference, unless, within the limits of his own lands, he could turn them into a natural watercourse. Commenting upon this instruction, this court, through Commissioner Ryan, said: "In the latter part of this instruction it is barely possible that the court may have erred, as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land, or come by surface drainage, unless, within the limits of his own land, he can turn them into a natural watercourse. It is unnecessary to determine this question." In many of the cases cited in the opinion the distinction was clearly drawn between a proper defense against surface water and a negligent defense. This case, then, merely established the general rule; but there was kept constantly in view the fact that no negligence appeared, and that the existence of negligence might be a controlling feature. In *Lincoln Street R. Co.* v. *Adams*, *supra*, while the rule was very briefly stated in accordance with former opinions that a proprietor may not collect surface waters on his own estate in a ditch, and discharge them in a volume on the land of his neighbor, it is quite evident that the same principle was in view, and that this was deemed a negligent method of protecting one's self. In *Anheuser-Busch Brew. Asso.* v. *Peterson*, 41 Neb. 897, a proprietor, in order to protect himself against surface water, filled in his lots, but in such a manner that water which otherwise would have passed off in another direction accumulated and entered the ice house of plaintiff through a privy vault. The rule in *Morrissey* v. *Chicago, B. & Q. R. Co. supra*, was stated; and the court, through Judge Post, said: "Subject to that rule, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence, which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor. Such is the essence of the authorities cited in *Morrissey* v. *Chicago, B. & Q. R. Co. supra*, and undoubtedly the law of this case." In *Bunderson* v. *Burlington & M. R. Co. supra*, it was held that the construction of a railroad embankment whereby water had been backed up upon the lands of a superior proprietor was no cause of action, and this for the reason that to have made an opening or culvert would have discharged the water in a volume upon the lands of an inferior proprietor, which would have been tortious. In *Lincoln & B. H. R. Co.* v. *Sutherland*, 44 Neb. 526, the railroad company was held liable because of its negligence in the construction of an embankment; and the words above quoted from *Anheuser-Busch Brew. Asso.* v. *Peterson*, *supra*, were quoted with approval, as controlling the case. In *Beatrice* v. *Leary*, 45 Neb. 149, it was said: "The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor; but this rule is a general one, and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter, to his damage; but if, in the execution of such enterprise he is guilty

of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor."

We think the foregoing review of the cases shows that, instead of there existing any conflict in the decisions, it has been the settled and uniform rule, applied in every case, that, while one may protect his land from surface water, he is responsible for any negligence in so doing occasioning damage to his neighbor. The case is no different from the exercise of any other undoubted right. I have as much right to drive along the highway as I have to defend my land from surface water; but if I drive negligently, and injure some one, I am responsible. We think, in view of this principle, the evidence amply sustained the finding and decree of the district court.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Marilla B. CARMICHAEL, *Appt.*,
v.
Ada M. LATHROP *et al.*

(.....Mich.....)

Legacies to daughters of a testator are adeemed, at least *pro tanto*, by his conveyance to them of lands by way of gift, in the absence of any apparent or expressed intent to the contrary.

(February 26, 1896.)

APPEAL by complainant from a decree of the Circuit Court for Wayne County in favor of defendants in an action brought to compel the conveyance of certain real estate which defendants had received under the will of Henry P. Pulling, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. **Fraser & Gates,** for appellant:

The residuary bequests to defendants were respectively satisfied to the amount of the value of the property given them.

The general rule as to the leaning of courts of equity against double portions, and the satisfaction of legacies by advancements, is familiar. But this rule was long subject to many artificial restrictions.

1. It could not be applied to a residuary bequest.

2 Story, Eq. Jur. § 1115.

2. If there was a difference, even in the time of payment, it was no satisfaction.

2 Story, Eq. Jur. § 1121.

3. So if the advancement was not *ejusdem generis* with the legacy.

2 Story, Eq. Jur. § 1109.

These technical obstacles are all now practically obsolete.

A bequest of a residue or a part of a residue will now be satisfied, in whole or in part, by a subsequent settlement, if the circumstances are such as otherwise bring the case within the presumption.

Montefiore v. *Guedalla*, 1 De G. F. & J. 93; *Lady Thynne* v. *Earl Glengall*, 2 H. L. Cas. 131; 2 Pom. Eq. Jur. § 558.

The doctrine of *ejusdem generis* is now practically a thing of the past.

1. Pom. Eq. Jur. § 564; *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Lady Thynne* v. *Earl Glengall, supra;* 1 Pom. Eq. Jur. § 557; *Hauberger* v. *Root*, 5 Pa. 108; *Richards* v. *Humphreys*, 15 Pick. 133; *Van Houton* v. *Post*, 32 N. J. Eq. 709; *Wallace* v. *Du Bois*, 65 Md. 153; *Snell* v. *Tuttle*, 44 Hun, 324.

Were we dealing merely with a devise and a subsequent advance of real property, complainant ought nevertheless to have a decree.

2 Bl. Com. 491, 493, 500; *Lansing* v. *Haynes*, 95 Mich. 16; *Hansbrough* v. *Hoge*, 12 Leigh, 316, 37 Am. Dec. 659; *Thomas* v. *Capps*, 5 Bush, 273; *Marshall* v. *Rench*, 3 Del. Ch. 239.

The fact that the defendants get their title by will, and that the trust is not expressed in the will, is no reason why the same should not be enforced.

Sellack v. *Harris*, 5 Vin. Abr. 521; *Stickland* v. *Aldridge*, 9 Ves. Jr 516; *Podmore* v. *Gunning*, 7 Sim. 644; 1 Lewin, Tr. *61, 62, and notes.

Such a trust may be established by proving the transaction out of which it is implied, and such proof may be by parol testimony.

Ripley v. *Seligman*, 88 Mich. 179; How. Anno. Stat. § 6182; *Forster* v. *Hale*, 3 Ves. Jr. 696, 5 Ves. Jr. 308; *Tawney* v. *Crowther*, 3 Bro. Ch. 161, 318; *O'Hara* v. *O'Neill*, 7 Bro. P. C. 227; Lewin, Tr. 63; Roberts, Stat. Fr. 101, 102.

When there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted to show the trust under which he actually holds the estate.

Browne, Stat. Fr. p. 110, § 111; *Cripps* v. *Jee*, 4 Bro. Ch. 472; *Hutchins* v. *Lee*, 1 Atk. 447; 2 Sugden, Vendors, 7th Am. ed. 911; Hill, Trustees, 62; *Wright* v. *Wright*, 99 Mich. 170, 23 L. R. A. 196.

Mr. **Charles A. Kent,** for appellees:

The subject of advancements is regulated wholly by statute, and the decisions in England and the United States are all based on a construction of the various statutes.

1 Am. & Eng. Enc. Law, p. 220; 2 Woerner, American Law of Administration, p. 1224; 2 Wms. Exrs. pp. 1285, 1287, note *b; Power* v. *Power*, 91 Mich. 587; *Beebe* v. *Estabrook*, 79 N. Y. 246.

The Michigan statutes provide for deduction of advancements only in the case of intestate estates.

How. Anno. Stat. § 5777*a; Thompson* v. *Carmichael*, 3 Sandf. Ch. 120; *Kent* v. *Hopkins*, 86 Hun, 611; *Marshall* v. *Rench*, 3 Del. Ch. 239.

No doubt the deduction of advances may be provided in a will, or advances may be made in the manner provided by statute and a will subsequently made. But in such cases the

NOTE.—In connection with the above case as to the ademption of legacies by gift, see Richardson v. Eveland (Ill.) 1 L. R. A. 203, and a considerable number of other cases in *note* thereto.

rights of the parties depend entirely on the construction of the will.

Re Turner's Estate, 48 Mich. 369, 52 Mich. 398; *McClintock's Appeal*, 58 Mich. 152.

There is no evidence that the testator intended his gifts as advances. The statute provides the only admissible evidence of advancements.

How. Anno. Stat. § 5780; *Power* v. *Power*, *supra*; *Bigelow* v. *Poole*, 10 Gray, 105; *Weatherhead* v. *Field*, 26 Vt. 665.

A court of equity has no jurisdiction of a suit concerning advances. Such a matter belongs to the probate court.

How. Anno. Stat. § 5978; *McClintock's Appeal*, *supra*; Woerner, American Law of Administration, § 552; *People*, *Campau*, v. *Wayne County Circuit Ct.* 11 Mich. 393, 83 Am. Dec. 754; *Holbrook* v. *Campau*, 22 Mich. 288; *Hughes's Appeal*, 57 Pa. 179; *Ashford* v. *Ewing*, 25 Pa. 213; *Springer's Appeal*, 29 Pa. 208.

The conveyance of real estate after the making of a will is held not a satisfaction of any legacy in whole or in part, even though that was the clear intent of the testator.

Woerner, American Law of Administration, p. 978; 13 Am. & Eng. Enc. Law, p. 98; *Burnham* v. *Comfort*, 108 N. Y. 535; *Swails* v. *Swails*, 98 Ind. 511; *Allen* v. *Allen*, 13 S. C. 512, 36 Am. Rep. 716; *Arthur* v. *Arthur*, 10 Barb. 9; *Marshall* v. *Rench*, *supra*.

No intention of the testator, unless shown in the way the statute requires, could make that change in his will which complainant seeks to enforce.

Lansing v. *Haynes*, 95 Mich. 16.

Though a legacy may, a devise of real estate cannot, be adeemed by the conveyance of a portion during the testator's lifetime.

Davys v. *Boucher*, 3 Younge & C. Exch. 397.

No general provisions of a will, whether a devise or a legacy, can be changed by any conveyance of property during the lifetime of the testator.

Burnham v. *Comfort*, *Arthur* v. *Arthur*, and *Lansing* v. *Haynes*, *supra*.

Hooker, J., delivered the opinion of the court:

The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that: "Second. All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. . . . Third, I hereby authorize and empower my hereinafter named executors to sell and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise investing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first class, unincumbered real-estate mortgages, or in United States bonds or Michigan state bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will. And lastly I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother in-law William P. Bridgman, of Detroit, and my son in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made." Mr. Pulling died in July 1890, and the will was probated August 19, 1890. Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of $65,000, that there was due to him upon land contracts $45,000, that he owned other personal property to the amount of $30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth $14,000, and that received by Mrs. Lathrop said to be worth $10,000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however, gave to her money from time to time, for her support, which aggregated $1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed to Mrs. Lloyd and Mrs. Lathrop before the tes-

tator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as ademption or a satisfaction *pro tanto* of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters' legatees, although they may have been also devisees as to the real estate if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator. If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee *in loco parentis*. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-writers have severely condemned the rule. See Story, Eq. Jur. §§ 1110–1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, although it has met with approbation from other high authorities." Wms. Exrs. 1332. Story's condemnation of it is strong, but he adds, "We must be content to declare it a *lex scripta est*. It is established, though it may not be entirely approved." And Worden, J., in *Weston* v. *Johnson*, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence." *Shudal* v. *Jekyll*, 2 Atk. 518; 2 White & T. Lead. Cas. in Eq. 4th ed. p. 741; *Van Houten* v. *Post*, 33 N. J. Eq. 344; *Ex parte Pye*, 18 Ves. Jr. 140. With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation; but the rigor of this rule has been relaxed, and cannot now be said to be the law. *Ex parte Pye, supra; Pym* v. *Lockyer*, 5 Myl. & C. 29, 55; *Montague* v. *Montague*, 15 Beav. 565; Wms. Exrs. 1333; *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; *Wallace* v. *Du Bois*, 65 Md. 153, 159. See cases cited 1 Pom. Eq. Jur. § 555, note 3. There are cogent reasons in support of the rule stated,—*i. e.* that payment to a son adeems the legacy,—which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. *Suisse* v. *Lord Lowther*, 2 Hare, 427. While the authorities are a unit that a legacy by one *in loco parentis* will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. *Freemantle* v. *Bankes*, 5 Ves. Jr. 85; *Clendening* v. *Clymer*, 17 Ind. 155; Story, Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full. *Pym* v. *Lockyer*, 5 Myl. & C. 29; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93. Again, it was held that it could not be applied unless the advancement was *ejusdem generis* with the legacy. See 2 Story, Eq. Jur. § 1109. Counsel for the defendant contends that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, even though that was the clear intent of the testator," and he cites several authorities to sustain the proposition. In *Arthur* v. *Arthur*, 10 Barb. 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation, or satisfaction, of a devise of other lands to the grantee. But if the conveyance be of a portion of the same land, that is a revocation *pro tanto*." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it. The court of appeals considered the subject in *Burnham* v. *Comfort*, 108 N. Y. 535. In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express un-

derstanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that to sustain such claim they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter" of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and not applicable to devises of realty." After discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented. The supreme court of South Carolina, in the case of *Allen* v. *Allen*, 13 S. C. 512, 36 Am. Rep. 716, had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said: "It would seem that upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate and in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb the distribution of his property which he thought was proper and just to his descendants. For while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law." Attention is also called to the case of *Swails* v. *Swails*, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, *viz.:* 60 acres to J., the son; and 40 acres to N., a grandson. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the devisor does not stand *in loco parentis*. The case followed *Weston* v. *Johnson*, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in *Campbell* v. *Martin*, 87 Ind. 577, it is said: "But we know of no reason whatever for the extension of the doctrine, and making it applicable to devises of real estate." In *Marshall* v. *Rench*, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy,—*e. g.* where the conveyance to the devisee is of the same land,—because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except *Arthur* v. *Arthur*, hereinbefore discussed. We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely, except the South Carolina case, and in that case the claim of ademption was sustained as to the legacies. 2 Woerner, American Law of Administration, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that "specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And for the same reason real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See *Hansbrough* v. *Hooe*, 12 Leigh, 316, 37 Am. Dec. 659.

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to deprive a devisee of title to land willed to him, but it is claimed that the presumption that a bequest to a son is satisfied *pro tanto* by a gift is not to be applied where the gift is of land instead of money, or other personal property *ejusdem generis*. In *Richards* v. *Humphreys*, 15 Pick. 140, will be found the following *dictum* of Shaw, Ch. J.: "We have seen that ademption depends solely on the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect." It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction *pro tanto* of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is

upon the legatee. *Ford* v. *Tynte*, 2 Hem. & M. 324. A gift to a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent. There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, *e. g.* where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine *ejusdem generis* is its effect upon the presumption. The doctrine that the property conveyed must be *ejusdem generis* appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction *pro tanto*. It has been said in early cases that "when the gift by will and the portion are not *ejusdem generis*, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." *Bellasis* v. *Uthwatt*, 1 Atk. 428; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Rep. in Ch. 159; *Lady Saville* v. *Saville*, 2 Atk. 458; *Grave* v. *Earl Salisbury*, 1 Bro. Ch. 425. But see *Bengough* v. *Walker*, 15 Ves. Jr. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see *Pym* v. *Lockyer*, 5 Myl. & C. 44. But all agree that ademption is a matter of intent. In *Jones* v. *Mason*, 5 Rand. (Va.) 577, 16 Am. Dec. 761, the court said: "The whole class of cases depends upon the intention." In *Hoskins* v. *Hoskins*, Prec. in Ch. 263, it is said: "I answer, it still shows that intention is everything; *ejusdem generis* nothing." In *Chapman* v. *Salt*, 2 Vern. 646, it was said, "showing that intention is everything." Again: "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention." *Rickman* v. *Morgan*, 1 Bro. Ch. 63, 2 Bro. Ch. 394. In *Bengough* v. *Walker*, *supra*, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of $2,000, when it was so intended. See also *Gill's Estate*, Pars. Sel. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of *ejusdem generis*. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that the conveyance of real estate will not be held a satisfaction of any legacy in whole or in part, even though the intent of the testator is clear." We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proved in the manner provided by our statute for the revocation of wills, *e. g.* by the destruction of the will, or the making of a new will." How. Anno. Stat. § 5793; *Lansing* v. *Haynes*, 95 Mich. 16. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (*i. e.* payment) is shown. The will is not overturned or revoked. It is satisfied.

We think *the prayer of the bill should be granted*, and the record should be remanded to the Circuit Court for the County of Wayne, in chancery, for further proceedings. Decreed accordingly.

The other Justices concur.

Rehearing denied.

CONNECTICUT SUPREME COURT OF ERRORS.

FISHER, BROWN, & COMPANY
v.
William I. FIELDING, *Appt.*

(67 Conn. 91.)

1. An allegation that a foreign judgment was "duly adjudged" is sufficient to show jurisdiction and notice to the defendant and the fact that a hearing or trial was had.

2. Service on a foreigner temporarily in the country, made on the eve of his departure, is sufficient to give jurisdiction to render judgment against him, although the cause of action did not arise within the jurisdiction.

3. An averment that plaintiffs well

NOTE.—*Conclusiveness of judgment rendered in a foreign country.*

Since the *note* on this question with the case of Dunstan v. Higgins (N. Y.) 20 L. R. A. 668, was made, the Supreme Court of the United States has very fully considered the subject in the case of Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95.

In a very elaborate opinion by Mr. Justice Gray the authorities are reviewed and the conclusion reached that an executory judgment rendered in a foreign country in favor of a citizen or resident thereof against a foreigner is not in all cases conclusive against the latter in an action brought in his own country to enforce the judgment. The court adopts the rule of reciprocity as a part of international jurisprudence with respect to foreign judgments. It holds that a judgment rendered in a foreign country should have the same effect only

knew that defendant was not indebted to them and that the only claim they could have was one against a corporation of which he was an officer is not sufficient to show such fraud as will make a foreign judgment against him reviewable on its merits.

4. An English judgment rendered by default against a citizen of Connecticut after personal service made on him while temporarily in England and upon the eve of his departure is conclusive as to the merits, in the absence of fraud, although the cause of action did not arise in England.

5. Extrinsic evidence is admissible to identify the plaintiffs in an action on a foreign judgment in favor of a partnership as those to whom the description of the judgment creditors in the record by partnership name properly applies.

(Hamersley, J., dissents.)

(December 16, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in favor of plaintiff in an action brought to enforce payment of a judgment which plaintiff had recovered against defendant in England. *Affirmed.*

The complaint alleged that on April 3, 1889, at Birmingham, in the Kingdom of Great Britain, the high court of justice, queen's bench division, Birmingham district registry, in an action therein pending between plaintiffs and defendant, duly adjudged that defendant should pay to plaintiffs the sum of £293 13s 3d damages, and £4 14s costs. A demurrer was interposed on the ground that the complaint failed to contain proper allegations as to the jurisdiction of said court, or that defendant was summoned to appear, or did appear, or that there was any hearing or trial. The demurrer was overruled, and defendant answered by general denial. Three special defenses were also pleaded, and, on demurrer, held insufficient.

Mr. **Frank L. Hungerford,** for appellant:

Our government owes it to all its citizens to see that they have at least one fair opportunity to try their causes at such times, in such places, and under such circumstances that justice—not necessarily justice according to the idea of the nation in whose tribunals the cause has been tried, but justice according to the American idea—has been done.

It is no part of our policy to restrict legislation in the world generally. In the case where a foreign judgment is set up as conclusive, we have not as yet afforded the one fair opportunity to litigate the question upon its original merits, which it is the obligation of government to furnish.

Schibsby v. *Westenholz*, L. R. 6 Q. B. 155; *Turnbull* v. *Walker*, 67 L. T. N. S. 767; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351;

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as the courts of that country allow to judgments of the country in which the judgment in question is sought to be executed. Therefore, it holds that a judgment rendered in France against a citizen of this country is only prima facie evidence of the justice of the plaintiff's claim, in the absence of any statute or treaty on the subject, when suit is brought in this country, since by the laws of France judgments of other countries are reviewable upon the merits.

But while such French judgment is allowed to be re-examined upon the merits, it is held that it is not sufficient ground for impeaching it that plaintiff was allowed to testify without being sworn or cross-examined, if this was in accordance with the laws of the country. It is further held that, in the absence of anything to show prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of nations should not allow it full effect, the foreign judgment ought not to be re-examined upon the merits as on a new trial or appeal upon the mere assertion that it was erroneous in law or in fact, if it was rendered upon regular proceedings after opportunity for a full and fair trial before a court of competent jurisdiction and after due citation or voluntary appearance of the defendant under a system of jurisprudence likely to secure an impartial administration of justice between citizens and foreigners.

The effect of a judgment rendered in Canada when suit upon it is brought in this country is also considered by the Supreme Court of the United States in Ritchie v. McMullen, 159 U. S. 235, 40 L. ed. 133, where it is held that a judgment rendered in Canada by a competent court against a citizen of the United States is conclusive as to the merits in the absence of fraud in procuring it or other special ground for not allowing it full effect, since by the law of England prevailing in Canada any judgment rendered by an American court under like circumstances would be allowed full and conclusive effect.

Other recent cases as to conclusiveness of judgments in foreign countries are as follows:

By a circuit court of the United States it is held in Carlsbad v. Kutnow, 68 Fed. Rep. 794, that an English decision granting an application for the registry of a trademark can have no effect in another jurisdiction, even as against a party who opposed the application.

The rule in Canada respecting the judgment of foreign courts is declared in Law v. Hansen, 25 Can. S. C. 69, by giving such judgments the same force in Canada as *res judicata* that they have in the foreign country. It is held that a defendant in Nova Scotia who brought an unsuccessful action in a foreign court against the plaintiff cannot invoke the provision of N. S. Rev. Stat. 5th Series, chap. 104, that evidence of a judgment recovered in a foreign country shall not be conclusive in Nova Scotia of its correctness in an action upon such judgment.

In Manitoba it is held that defendant in an action on a foreign judgment cannot set up a defense which might have been made to the original cause of action if it had been brought in that country but which could not be raised in a foreign court under Man. Rev. Stat. chap. 1, § 39, allowing any defense which might have been pleaded to the original cause of action. British Linen Co. v. McEwan, 8 Manitoba L. Rep. 99.

The decree of a foreign court of admiralty as to the distribution of the surplus from the sale of the cargo of a wrecked vessel after payment therefrom of a salvor's claim is held not to be conclusive if notice of the proceedings was not served upon the owner of the vessel and cargo and those claiming liens thereon. China Mut. Ins. Co. v. Force, 142 N. Y. 90.

And it is held that an action upon a foreign judgment is not defeated by the pendency of an appeal from it, although execution may be stayed until the appeal is determined. Howland v. Codd, 9 Manitoba L. Rep. 435.

B. A. R.

General Steam Nav. Co. v. *Guillou*, 11 Mees. & W. 877; *Voinet* v. *Barrett*, 55 L. J. Q. B. N. S. 39.

Whether or not a foreign judgment will be held to be conclusive will depend upon the circumstances under which it was obtained.

2 Freem. Judgm. 4th ed. ¶ 597; *Hilton* v. *Guyott*, 42 Fed. Rep. 249.

The plaintiffs in the English suit, Fisher, Brown, & Co., had no just claim against the defendant, and they knew it; they took advantage of the defendant's temporary presence in England to obtain a judgment to which they knew they were not entitled; their object in suing him in England was to embarrass him and to prevent his having a fair opportunity to resist an unjust demand; they sought to obtain an unjust and unfair advantage over the defendant, and the judgment thus obtained is the one that this court is asked to hold conclusive. Such a judgment cannot be recognized here.

Abouloff v. *Oppenheimer*, L. R. 10 Q. B. Div. 295.

Mr. **John H. Kirkham** also for appellant.

Messrs. **Henry G. Newton** and **Livingston W. Cleaveland,** for appellees:

The forms under the practice act clearly establish the sufficiency of the complaint.

2 Swift, Dig. 494; *Hatch* v. *Spofford*, 22 Conn. 501, 58 Am. Dec. 433.

A complaint on a foreign judgment need not allege jurisdictional facts.

Gunn v. *Peakes*, 36 Minn. 177; 2 Black, Judgm. § 835; *Horton* v. *Critchfield*, 18 Ill. 133, 65 Am. Dec. 701; *Robertson* v. *Struth*, 5 Q. B. 941; Van Fleet, Collateral Attack, § 919; *Phelps* v. *Duffy*, 11 Nev. 80; Freem. Judgm. § 453; *Bruckman* v. *Taussing*, 7 Colo. 561; *Crake* v. *Crake*, 18 Ind. 156; *Lathrop* v. *Stuart*, 5 McLean, 167.

All the cases of relief against judgments where the court has jurisdiction contain some deceit practiced upon the defendant.

United States v. *Throckmorton*, 98 U. S. 64, 25 L. ed. 94; *Pearce* v. *Olney*, 20 Conn. 555; *Moffat* v. *United States*, 112 U. S. 24, 28 L. ed. 623; *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929; *Greene* v. *Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Price* v. *Dewhurst*, 8 Sim. 279; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 2 Black, Judgm. § 921; Bigelow, Estoppel, 5th ed. 307; *Ward* v. *Quinlivin*, 57 Mo. 425; *Hilton* v. *Guyott*, 42 Fed. Rep. 249; 1 Swift, Dig. 753; 2 Swift, Dig. 138; Van Fleet, Collateral Attack, §§ 558, 586.

Foreign judgments are conclusive and *nil debet* cannot be pleaded to them.

Hatch v. *Spofford*, 22 Conn. 500, 58 Am. Dec. 433; *Wood* v. *Watkinson*, 17 Conn. 504, 44 Am. Dec. 562; 1 Swift, Dig. 753; *Dunstan* v. *Higgins*, 138 N. Y. 70, 20 L. R. A. 668; *Bank of Australasia* v. *Nias*, 16 Q. B. 729; *Tafford* v. *Blanc*, L. R. 36 Ch. Div. 600; *Glass* v. *Blackwell*, 48 Ark. 50; *Ferguson* v. *Oliver*, 99 Mich. 161; *Baker* v. *Palmer*, 83 Ill. 568; *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Silver Lake Bank* v. *Harding*, 5 Ohio, 545; Van Fleet, Collateral Attack, §§ 848–851; 2 Black, Judgm. §§ 825–829.

If an Englishman were, in the same way, served with process here, would a judgment by default be held conclusive by our courts if he should afterward return to this state and be sued upon the judgment? Clearly it would.

Hart v. *Granger*, 1 Conn. 154; *Bishop* v. *Vose*, 27 Conn. 1; *Hatch* v. *Spofford*, 22 Conn. 485, 58 Am. Dec. 433; *Wood* v. *Watkinson*, 17 Conn. 500, 44 Am. Dec. 562; *Bradford* v. *Bradford*, 5 Conn. 131.

Surely our courts will acknowledge the validity in England of the practice which we have adopted here.

Pearce v. *Olney*, 20 Conn. 555; *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 812, 19 L. ed. 829.

The presumption of law is conclusive that all the regular prior proceedings were had in the case until the contrary appears.

Freem. Judgm. § 452; *Lathrop* v. *Stuart*, 5 McLean, 167.

Plaintiffs were not obliged to prove that there was such a partnership as Fisher, Brown, & Company, and that they were members of the partnership.

Wright v. *Fire Ins. Co.* 12 Mont. 474, 19 L. R. A. 215; *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404, 15 L. ed. 451; Van Fleet, Collateral Attack, § 857.

Baldwin, J., delivered the opinion of the court:

The plaintiffs' complaint was drawn in the form authorized by the Practice Book (No. 169, p. 107) in actions on a foreign judgment. In actions on a domestic judgment the authorized forms (Practice Book, Nos. 166, 167, pp. 106, 107) state the fact, but not the manner, of its recovery; but in declaring on the judgment of a foreign court the approved averment is that such court, "in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs" the sum in question. No court can "duly" adjudge such a payment except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution and nature of the action, given (unless this be waived), if he be a nonresident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice. *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572. In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint. The practice act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint on the ground that it did not allege that the high court of justice, queen's bench division, Birmingham district registry, had jurisdiction of the action or of the parties or of the subject matter, nor that the defendant had notice of its pendency or was summoned to appear, was therefore properly overruled. These facts were the indispensable

conditions of a due adjudication by the foreign court, and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due adjudication implied that there was a fair opportunity for a hearing, and the defendant could not complain that he did not avail himself of it.

Three special defenses were pleaded, and, on demurrer, held insufficient. The second of these set up that the defendant was served with the process in the English action while transiently stopping at an hotel in Birmingham, and when he was about to take his departure for home, and that such service was so made and timed for the purpose of embarrassing him and obtaining an unjust and unfair advantage, by preventing his having a fair opportunity to make his defense unless he prolonged his stay abroad indefinitely. The rights of sovereignty extend to all persons and things, not excepted by some special privilege, that are within the territory of the sovereign. An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance. Story, Confl. L. §§ 18, 22, 541; *Carlisle* v. *United States* 83 U. S. 16 Wall. 147, 154, 21 L. ed 426, 429. The fact that the defendant was a foreigner, making but a brief stay in the country, and on the point of leaving it for his own, did not deprive the courts of England of all jurisdiction over him. The Roman maxim, *Actor sequitur forum rei*, if it has any force in English or American jurisprudence, operates as a permission, rather than a command. A man who is absent from his domicil can still be sued there, but he can also be sued wherever he is found, if personally served with legal process within the jurisdiction where the plaintiff seeks his remedy. The action must be brought, indeed, in a court to which the defendant is subject, and subject at the time of suit; but, unless protected by treaty stipulation or official privilege, he is subject to every court within reach of whose process he may enter. The Roman law allowed a nonresident to be sued where he had established a temporary seat of business, and, in some cases, where he had simply contracted a single obligation. Dig. V., 1, *De judiciis, et ubi quisque agere vel conveniri debeat*, 2, 19, 24. The common law, so far as concerns the enforcement of a pecuniary liability, goes further, and operates alike upon every private individual who may be found, however transiently within the territory where it is in force. Whart. Confl. L. § 653. An English court will take cognizance of an action on a contract, wherever made, and between whatever parties. Holland, Jur. 5th ed. 349. So the courts of this state have always regarded transitory actions as following the person, and entertained them against foreigners found within our jurisdiction, whether brought by a foreigner or a citizen. *Place* v. *Lyon*, Kirby (Conn.) 404–406; *Potter* v. *Allin*, 2 Root, 63. 66, 67. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country." *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670, 683. The several states of the United States are, as respects their relations to each other, excepting only such of these as are regulated by the Costitution of the United States, independent and foreign sovereignties. *Buckner* v. *Finley*, 27 U. S. 2 Pet. 586, 590, 7 L. ed. 528, 530; *Pennoyer* v. *Neff*, 95 U. S. 714, 722, 24 L. ed. 565, 568. The effect in one of them of a suit brought or judgment rendered in another is precisely the same as if the latter were a foreign country, except so far as art. 4, § 1, of the Constitution of the United States may have established a different rule. *Hatch* v. *Spofford*, 22 Conn. 485, 498, 58 Am. Dec. 433; *M'Elmoyle* v. *Cohen*, 38 U. S. 13 Pet. 312, 324, 10 L. ed. 177, 183; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457, 461, 21 L. ed. 897, 899. Notwithstanding that provision of the Constitution, and the statute passed to enforce it (U. S. Rev. Stat. § 905), the jurisdiction of a state court whose judgment is brought in question in another state is always open to inquiry. In that respect, every state court is to be regarded as a foreign court. *Hall* v. *Lanning*, 91 U. S. 160, 165, 23 L. ed. 271, 273; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287, 294, 298, 34 L. ed. 670, 671, 673.

The courts of this state have never before had occasion to pass directly upon the defenses which may be open here to an action upon a judgment of a court of a foreign country, but they have often been called to consider the effect of legal proceedings instituted in one of the United States against a citizen of another; and the right to secure jurisdiction over a nonresident, who is served with process while transiently in the state, has been uniformly upheld. *Hart* v. *Granger*, 1 Conn. 154. 165, 173; *Wood* v. *Watkinson*, 17 Conn. 500, 504, 44 Am. Dec. 562; *Hatch* v. *Spofford*, *supra*; *Bishop* v. *Vose*, 27 Conn. 1, 11, 12; *Duryee* v. *Hale*, 31 Conn. 217, 223; *Easterly* v. *Goodwin*, 35 Conn. 273, 278; *O'Sullivan* v. *Overton*, 56 Conn. 102, 103. These decisions are based on what has been deemed an accepted principle of international law, applicable between the states, on no other ground than that they are, as to such a question, in the position of foreign nations to each other. *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, *supra*; *Lazier* v. *Westcott*, 26 N. Y. 146, 154, 82 Am. Dec. 404.

The English court having, then, jurisdiction of the parties, and presumably of the action and the subject-matter, as to which no question has been made, there is nothing in the defense now pleaded that the suit was brought, as it was and when it was, "for the purpose of embarrassing and impeding the defendant, and to prevent his having a fair opportunity to defend said suit unless he prolonged his stay indefinitely at said Birmingham, and thereby said plaintiff sought to obtain an unjust and unfair advantage over said defendant." Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance. *McCune* v. *Norwich City Gas Co.* 30 Conn. 521, 524, 79 Am. Dec. 278; *Occum Co.* v. *A. & W. Sprague Mfg. Co.* 34 Conn. 529, 540. *Nullus videtur dolo facere, qui suo jure utitur.* The act complained of

having been fully stated, and being one which the law permitted, whatever advantage it gave the plaintiffs could be neither unjust nor unfair; and these epithets are therefore of no effect. *Middletown* v. *Boston & N. Y. Air Line R. Co.* 53 Conn. 351, 359. They had the right to sue the defendant where they found him, or at his domicil in Connecticut, and, in the choice of the forum, were free to consult their own convenience, without regard to any loss he might sustain from "the law's delays." *Lovell* v. *Hammond Co.* 66 Conn. 500, 512.

The demurrer to the second defense also admitted that the defendant, when served with the process of the foreign court, was president of the National Wire Mattress Company, a Connecticut corporation, and "was in no wise indebted to the plaintiffs in said suit, all of which was well known to said plaintiffs, but any claim that they had, or may have had, in which the defendant was in any way interested was a claim against said National Wire-Mattress Company, all of which was well known to said plaintiffs." By this, and by the third defense, is raised the question as to how far a foreign judgment for a sum of money, rendered against one of our citizens by a competent tribunal, acting within its jurisdiction, should be held conclusive in a suit brought here for its collection. It is the settled rule in England, that in an action instituted there on a foreign judgment rendered by a court of competent jurisdiction, the proceedings before which were not so conducted as to be clearly contrary to natural justice, the defendant cannot be allowed to go into the merits of the original cause of action, which were tried in the foreign court, unless it be necessary in order to support a claim that the judgment was procured by fraud. In such case the merits may be retried, not to show that the foreign court came to a wrong conclusion, but that it was fraudulently misled into coming to a wrong conclusion. If the triors are convinced that the foreign judgment should have been rendered, on the merits, the other way, but still do not find that there was fraud, the defense fails. *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295, 302; *Vadala* v. *Lawes*, L. R. 25 Q. B. Div. 310, 316, 319. Judge Story in his work on the Conflict of Laws, concludes a discussion of this subject, which is referred to in terms of commendation by this court in *Hatch* v. *Spofford*, 22 Conn. 501, 58 Am. Dec. 433, with the remark that the principle of reciprocity may not improperly be applied, and foreign judgments treated as conclusive in any country, if rendered in another where like effect is conceded to judgments of the courts of the former. "This," he observes, "is certainly a very reasonable rule, and may, perhaps, hereafter work itself firmly into the structure of international jurisprudence." Story, Confl. L. § 618.

What is termed the "comity of nations" is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions. The effect to be given to a foreign judgment *in personam*, for a money demand, must be determined either by the comity of nations, the rule of absolute reciprocity, or the personal obligation resting upon the defendant. *Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95. Whichever test may be adopted, the result would be the same where the question arises between the courts of England and those of an American state which was once an English colony. They are engaged in administering the same system of jurisprudence, and are bound together by common institutions and modes of thought, no less than by sharing the same language and the same history. The close and extensive commercial intercourse, also, between the United States and England, and across the long Canadian frontier, makes it especially important that the many controversies to which it must give rise should be promptly brought to a final settlement. When an American voluntarily places himself on English soil, he comes under a local and temporary allegiance to its sovereign, which makes it his duty to respect any summons with which he may there be served, to appear before the courts of the country. The process served upon the defendant gave him full notice of the character and items of the plaintiffs' claim. He was bound either to enter an appearance, or submit to the consequences of a default. He put himself under the power of the court, the moment he entered the territory which was subject to its authority. Nor did he put himself under its power simply in the sense that it could issue process and render judgment against him, which would be of force within the limits of that territory. To that extent its judgments might be valid, though rendered without any personal service, upon a simple attachment of goods, or by publication. But they would be mere expressions of the will of the sovereign, and impose no personal obligation which other sovereigns could recognize or enforce. *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 812, 19 L. ed. 829. Judgments rendered against a foreigner who is personally served, when personally present, stand on a ground wholly different. These, and these only, so far as actions for money damages are concerned, are entitled to full respect in the courts of other countries, by the principles of international law. As between the United States and Great Britain, it may be fairly assumed that every citizen of either, while within the territory of the other, assents to the jurisdiction of its courts of justice over all pecuniary controversies to which he may be duly made a party before them. This doctrine that presence confers jurisdiction may not be one recognized in Roman law, or the modern civil law. Dig. XLII., 1. *De re judicata*, etc., 53; Story, Confl. L. §§ 611–617; Wharton Confl. L. § 653; Mourlon's Répétitions Ecrites sur le Code Civil, tom. III., § 1469.

The Romans viewed law as personal rather than territorial, in its operation. The traveler carried with him the shield of his own law; and on the same territory there might be, even for its permanent inhabitants, two systems of jurisprudence of equal force, each governing a different race. Such principles of government find no place in the common law of England and of Connecticut. With us the law of the

land protects all who stand upon it, and whenever a right has been violated, gives a remedy, without regard to the nationality of the offender.

In our opinion, the queen's bench division of the high court of justice had full jurisdiction to decide the original controversy between the parties to this action. The defendant accepted the forum when he voluntarily placed himself on English soil, and so came under an implied obligation to respect such legal process as might be served upon him there, to the extent of satisfying any resulting judgment duly rendered for a pecuniary demand. The law raises this obligation because the interests of human society require it, and it is not escaped by departing from one country into another, except so far as a judicial sanction may be withheld because reciprocity is refused. The maxim, *Interest reipublicæ ut sit finis litium*, is not restricted in its application to controversies or suits originating in the state before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted under an orderly establishment of legal procedure. No one who has been, or could have been, heard upon a disputed claim, in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to controversies than to decide them justly.

The defenses in question do not, in terms, charge the plaintiffs with fraud. The averments that they well knew when they brought their suit that the defendant was in no wise indebted to them, and that the only claim they had, or might have, in which he was in any way interested, was one against the corporation of which he was an officer, do not, standing alone, import that they attempted to impose, and did impose, upon the court. Fraud is never presumed. The claim against the corporation may have been such that the defendant could be held collaterally liable upon it, although it remained the debt of the corporation only. It may have been contracted by him in behalf of the corporation, but without its authority. It may have arisen from a transaction that was *ultra vires*, but which he had falsely represented to be within its powers. If he was in no way liable to the plaintiffs, the place to show it was in the English court. A state of facts quite similar to that here alleged was set up, and established by proof, in one of the leading cases in our Reports. A citizen and resident of Connecticut, while transiently in New York, was served with process from one of her courts, in an action based upon a contract made by the plaintiff with a Connecticut corporation, but which, in his declaration, he had, as the defendant asserted, "falsely assumed" to have been made by the latter personally, and on his own personal credit. The defendant entered no appearance, and judgment by default was rendered against him for the sum demanded, to collect which suit was instituted against him here. He thereupon brought a bill in equity for an injunction, and, in addition to what has been already stated, alleged and proved that the plaintiff's attorney assured him, after the service of the process, that a mistake had been made in suing him individually, instead of the corporation, and thereupon agreed that nothing further should be done in relation to the action without previous notice to him, in consequence of which assurance he had omitted to enter an appearance. The injunction was granted on this last ground, but that founded on the false averments in the declaration in the New York suit was rejected as untenable, in these words: "A suit was commenced in New York against the present plaintiff, by virtue of which, and of the process thereon, he was arrested, and such proceedings were had that a judgment for about $600 was obtained against him, on a cause of action founded wholly on a contract, with which, personally, he had nothing to do; but which was entered into by him, as the agent of the Norwich Foundry Company, a corporation with which the plaintiff in that suit had had previous dealings, and was well known to him, at the time, as the party with whom he was contracting. If this was all, the plaintiff would have no remedy, however unjust it might be, to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defense in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect." *Pearce* v. *Olney*, 20 Conn. 544, 555; *Embry* v. *Palmer*, 107 U. S. 3, 12, 13, 27 L. ed. 346, 349, 350. The doctrine of *Pearce* v. *Olney* is not less applicable to the case at bar because the judgment in question there was one of a sister state, while here it emanates from the court of a foreign country. It is true that fraud in procuring it is no defense at law to an action on a judgment of the former description. *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475. It is, however, an equitable bar to its enforcement, just as it is in case of a domestic judgment. A judgment may be good at law, and yet equity may deem it against conscience for the plaintiff to stand upon his legal rights. In such a case it is because the judgment is good at law that equitable relief is granted. In *Pearce* v. *Olney* these principles governed the decision. An injunction was granted on account of a fraud as to a matter which could not have been put in issue in the New York suit. An injunction was refused on account of a fraud as to a matter which could have been put in issue in the New York suit. In the case at bar, by the force of the practice act, equitable defenses could be pleaded by way of answer; but the defendant had no equity, because the question of his indebtedness to the plaintiffs, if it was to be contested, should have been put in issue before the English court. *Bank of Australasia* v. *Nias*, 16 Q. B. 735, 4 Eng. L. & Eq. 252. Nor did the case of *Pearce* v. *Olney* rest on any special duty of a citizen of one of the United States, as such, to submit himself to the jurisdiction of a court of another state before which he may be duly summoned. The conclusiveness of a judgment rendered in one state, when relied on in another, is in no man-

ner dependent on the citizenship of the parties to it. It has equal weight whether they are Americans or foreigners. The Constitution of the United States secures to the citizens of each of them certain privileges and immunities as respects every other state, but it imposes upon them no particular duties in return. It places the citizen of one state, who enters the territory of another, no more under the power of its courts than if he were an alien visitor. See *Bonaparte* v. *Baltimore City Appeal Tax Ct.* 104 U. S. 592, 595, 26 L. ed. 845, 846. It follows that the judgment in suit was conclusive as to the merits of the cause of action, and that the several special defenses, so far as they sought a retrial of them, were properly overruled. The defendant had already had his day in court.

The present action was brought by two individuals, described as partners doing business under the firm name of Fisher, Brown, & Co.; and the English judgment was alleged in the complaint to have been recovered by "the plaintiffs" on April 3, 1889. Upon the trial of the issue closed upon the first defense, they offered in evidence a copy of the record in the English suit, in which the plaintiffs were named throughout simply as Fisher, Brown, & Co. They also offered at the same time certain depositions tending to prove that the plaintiffs constituted, during the whole of the year 1889, the copartnership of Fisher, Brown, & Co., and as such recovered the judgment in question, and that, by the laws and rules of court in England, any persons claiming as copartners could sue in the name of the firm of which they were members at the time of the accruing of the cause of action. The defendant objected to all this evidence on the ground that the record offered varied from that alleged, and did not show whether Fisher, Brown, & Co. was a corporation or copartnership, or, if a copartnership, that the plaintiffs were members of it, and could not be helped out by parol, and also claimed that the depositions did not show that the plaintiffs were members of such a firm when the original cause of action arose. The court committed no error in overruling these objections and claims, and admitting the evidence. The law and practice determining the form of judicial proceedings in a foreign court may always be shown, and shown by parol. The testimony that the plaintiffs were the members of a firm styled Fisher, Brown, & Co. throughout 1889, and as such recovered the judgment in suit, gave an intelligible meaning to the words "Fisher, Brown, & Co.," as used in the record of the high court of justice, and, in connection with it, tended to show that they were also copartners when the cause of action accrued; for else they could not have been entitled to such a judgment, under the rules governing suits by copartners in the copartnership name. Wherever a judgment on a partnership demand can lawfully be given in favor of the copartnership, without stating the names of the copartners, it is, in effect, a judgment in favor of such copartners, described by their copartnership name, and may properly be declared on as such in any proceedings subsequently brought to enforce it. This is merely describing it according to its legal effect. The defendant admitted that he was the person against whom the English judgment was rendered, but put the plaintiffs on proof that they were the parties by whom it was recovered. Extrinsic evidence of this was therefore required, and the depositions were clearly admissible to identify particular individuals as those to whom the description of the judgment creditors in the record, by a partnership name, properly applied.

There is no error in the judgment appealed from.

Andrews, Ch. J., and **Torrance** and **Fenn**, JJ., concurred.

Hamersley, J., dissenting:

The action on a foreign judgment is an action at common law, sanctioning an obligation legal by force of the common law. Our law on this subject depends on the common law of England as it stood at the date of our independence. The authority which lies at the foundation of that law is *Sinclair* v. *Fraser*, 20 How. St. Tr. 468, 469, decided by the House of Lords in 1771. The judgment creditor sued his debtor in Scotland. The court of sessions refused to give any effect to the foreign judgment, and held the party bound to prove the nature and extent of his demand. The House of Lords, upon appeal, reversed this decision, upon the ground, as stated in the order of reversal, "that the judgment of the court of Jamaica ought to be received as evidence prima facie of the debt, and that it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained." In *Walker* v. *Witter*, 1 Dougl. 1, decided in 1778, it was held that an action of debt would lie for the collection of a foreign judgment, because *indebitatus assumpsit* would lie, but in a declaration in debt the plea of *nul tiel record* was bad, because the action was not on a specialty, but for recovery of a simple-contract debt; and Lord Mansfield said that the doctrine of *Sinclair* v. *Fraser* was unquestionable. "Foreign judgments are a ground of action everywhere, but they are examinable." And Ashurst, J., indicates the ground of the right when he says, "In *indebitatus assumpsit* on a foreign judgment, the judgment is shown as a consideration." In *Galbraith* v. *Neville*, 1 Dougl. 6, note, decided about 1781, there was apparently an attempt to set up a defense on the ground that the foreign judgment offered in evidence was wrongly decided on the merits; and Buller, J., expressed an opinion based on his understanding of a reported saying of Lord Hardwicke, that the foreign judgment was not conclusive upon the merits of the questions actually adjudicated while Lord Kenyon took a different view; but the case was decided in favor of the judgment, as all the judges were of opinion that no evidence had been adduced to impeach it. In *Philips* v. *Hunter* (1795) 2 H. Bl. 402, 410, a *dictum* of Eyre, Ch. J., supports the suggestion of Ashurst, J., in *Walker* v. *Witter*, and asserts that as a ground of action a foreign judgment is treated, "not as conclusive, but as matter *in pais*, as consideration prima facie sufficient to raise a promise; we examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what

the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive." And the suggestion of Ashurst, J., is further supported by Best, Ch. J., in *Arnott* v. *Redfern* (1826) 3 Bing. 353, 357. He says: "It has been decided by the highest authority, in the case of *Sinclair* v. *Fraser* that 'foreign judgments are prima facie evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to show that they are irregularly or unduly obtained.' This is founded on a plain and obvious principle of natural justice." The common law as established by *Sinclair* v. *Fraser* and *Walker* v. *Witter*, is the law adopted by this state. 1 Swift, Dig. 573; *Aldrich* v. *Kinney*, 4 Conn. 380, 382, 10 Am. Dec. 151. The same law has generally been adopted by other states as their common law. *Bissell* v. *Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Taylor* v. *Phelps*, 1 Harr. & G. 492; *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411; *Burnham* v. *Webster*, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 304, 18 L. ed. 475, 479. This law declares that, when a judgment is rendered by a foreign court, that fact may be the source of a legal obligation between the parties to such judgment, which can be enforced in our courts through the ancient form of an action on the case. But beyond this the law is not clear. The nature and ground of such obligation are not defined. The defenses to such action are not settled. In respect to these matters, in this state, and generally with American courts, the field is an open one,—not to make law by arbitrarily recognizing or rejecting a defense, but to declare the law resulting from established principles.

In the present case the second defense alleges, sufficiently for the purpose of this decision, that the judgment was rendered by a court of Great Britain upon default of appearance; that the defendant is a citizen of the United States, never a subject of the queen nor resident within her dominions; that he was served with the notice to appear while casually in England, and on the eve of departure; that he was absent from the Kingdom at the time he was required to appear, and during all subsequent proceedings; that the cause of action on which the notice to appear in court was based did not arise in England, and did not concern any conduct, act, or contract of the defendant done or entered into within the dominions of the Queen. This defense was held insufficient by the trial court, and my associates reach the conclusion that such facts do not constitute a good defense to the action. I must dissent from that conclusion. I believe it cannot be supported, except on the theory that our courts have at common law the power to authorize the execution of the will of a foreign sovereign, signified in a judgment, and to set the conditions on which such execution will be granted. I believe such theory to be inconsistent with established principles of common law; that the power of authorizing such execution of the will of a foreign sovereign belongs, not to the judicial, but to the executive or legislative, department; and that it would be against public policy to exercise the power, under such conditions as exist in this case, even if it were vested in the court. A defense cannot be intelligently passed upon unless the nature of the obligation it is claimed to negative is clearly defined. What is this common-law obligation, whose violation was originally enforced by the common-law action on the case? It clearly does not arise from a tort, nor does it arise from a contract. Although a judgment is sometimes spoken of as in the nature of a contract, such language must be confined to certain analogies not affecting the essential character of a judgment. *Rae* v. *Hulbert*, 17 Ill. 572; *Todd* v. *Crumb*, 5 McLean, 172, Fed. Cas. No. 14,073; *Wyman* v. *Mitchell*, 1 Cow. 316, 320; *Kramer* v. *Rebman*, 9 Iowa, 114, 117. When the clause in the Federal Constitution prohibiting states from passing any law impairing the obligation of a contract was appealed to as protecting judgments, the appeal was denied by the United States Supreme Court on the ground that a judgment is in no sense a contract or agreement between the parties, even when founded upon a contract: citing Lord Mansfield in *Bidleson* v. *Whytel*, 3 Burr. 1545: "A judgment is no contract, nor can be considered in the light of a contract; for *judicium redditur in invitum.*" *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 169, 36 L. ed. 925, 929. An obligation which is neither *ex contractu* nor *ex delicto* must spring from the relation of the parties to some event, under such circumstances that a legal duty arises. Our common-law obligation, therefore, belongs to those miscellaneous obligations arising from facts which are not conventions, nor yet wrongs, but nevertheless are causes of obligations, which, for want of a better name, are classed as "quasi contracts." The principal fact from which the obligation arises is a rendition of final judgment by a foreign municipal court; and the main difficulty in defining that obligation is found in the particular character of a judgment, which is not only a fact that may, in connection with other facts, raise an obligation between the parties, transitory in its nature and so cognizable in our courts, but is also an act of the foreign sovereign, imposing an obligation of obedience, which, as such, can only be put in execution within the territory subject to that sovereign. This double aspect of a judgment is distinctly recognized and established in our common law, although it has been obscured by using in some cases the form of an action to put in execution a domestic judgment. So our first step towards ascertaining the nature of the common-law obligation which may arise between the parties to a foreign judgment is to make clear this distinction established by our law between that obligation, and the obligation of obedience imposed by a domestic judgment, and sometimes enforced through the form of an action.

The final judgment of a court of competent jurisdiction puts an end to all further litigation between the parties in respect to the specific cause of action adjudicated between them, and decided and settled by the judgment, and the original obligation which the action was brought to enforce no longer exists. Gaius notes the application of such rule in the early Roman law. *Tollitur adhuc obli-*

gatio litis contestatione, si modo legitimo judicio fuerit actum. Gai. III., § 180. See also Id. § 181. And Austin demonstrates that the extinction of the original cause of action by the rendition of final judgment results from fundamental principles of jurisprudence. The obligation has been violated, the right of action arising from that violation has been exercised, and the sanction prescribed by law has been administered. Austin, Jur. *passim*. Such judgment, therefore, is a declaration of the sovereign, through his court, that a legal obligation has been violated, and is a final determination of the penalty imposed by him for that violation. This result is commonly, and perhaps somewhat inaccurately, expressed by the phrase, "The original right of action is merged in the judgment." But this act of the sovereign not only satisfies and puts an end to the original obligation; it also imposes a new obligation on the subject of the judgment, and this obligation implies a corresponding right in the person to whom the subject of the judgment is commanded to pay its amount. Such corresponding right is a right to the execution of the command by which it was created; and the remedy given by our law is the execution, or process by which the property of the delinquent may be distrained, or his person imprisoned, until the obligation is satisfied. This remedy may be granted on application, as in the case of a capias, or after notice to the delinquent, as in the case of a scire facias. A remedy is also given by means of the action of debt on judgment. As now permitted, this remedy is an anomalous proceeding. Blackstone says: "This method seems to have been invented when real actions were more in use than at present, and damages were permitted to be recovered thereon, in order to have the benefit of a writ of capias to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of Stat. 25 Edw. III., chap. 17), but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions, instead of one." 3 Bl. Com. 159, 160. Coke says that the remedy was provided by common law, as the only method (prior to Stat. Westm. II., authorizing a writ of scire facias for that purpose) of reviving a judgment dormant by reason of the failure to sue out a writ of execution within a year and a day, and of obtaining execution thereon. Coke, Litt. § 290. Whether the remedy was originally "invented" to provide a more effective writ of execution in a peculiar action, or as a means of reviving a dormant judgment, so that execution might issue after the time fixed by law for its issue had expired, it is certain that its purpose was to provide a method of obtaining execution of the original judgment in cases where the law regulating the issue of execution was defective. The use of the action of debt on judgment, when the remedy by execution is complete, which was occasionally permitted at common law, is therefore anomalous. It was discouraged by the courts, and, by statute (44 Geo. III.), costs were not allowed on such action, unless by special order of court. The court of king's bench, taking advantage of an act reconstituting the county courts and making some cumulative provisions as to the issue of executions, held that the act, by making new provisions, restricted the remedy to the writ of execution, and that debt on the judgment of a county court would not lie. The motive of the decision is indicated in the expression of Campbell, Ch. J.: "I rejoice that we are able to come to this conclusion by the established rules of law; for there can be no doubt that it is most desirable that such actions should not lie." *Berkeley* v. *Elderkin* (1853) 1 El. & Bl. 805, 809. This decision was followed the same year by the court of exchequer. *Austin* v. *Mills*, 9 Exch. 288.

In this state the right of a judgment creditor to execution was not limited to a year and a day after the judgment was entered; and the English common law, permitting an action of debt on judgment when the remedy by capias was adequate, was not regarded as adopted in this particular. The common understanding of the profession, and the weight of authority, so far as the question had been before the courts, was stated by Judge Swift in his Digest (vol. 1, p. 573, original edition): "In this state an execution can be prayed out at any time during the life of the parties, and debt on judgment is not sustainable unless one of the parties is dead, or some new object is to be obtained." But in 1822, in the case of *Denison* v. *Williams*, 4 Conn. 402, a majority of the court held that the English common law, in this particular, must be regarded as in force here.

We find, therefore, that a domestic judgment is an exercise of the power of the state over its citizens, by which the obligation sought to be enforced in the action resulting in the judgment ceases to exist, and a new obligation to pay the amount of the judgment is imposed. This latter obligation, unlike one arising from the agreement of parties between themselves, is not transitory; the rule, "*Debitum et contractus sunt nullius loci*" (1 Saund. 74), does not apply. The obligation or debt created by the act of the state is enforceable by the state only within its own limits. "Judgment creates a debt all over the kingdom." Gilbert, Debt. 392. The appropriate remedy given to one holding the right corresponding to this obligation is not by action calling for judicial adjudication, but by writ of execution. This writ is granted on application, or after notice, and when such remedy is defective a peculiar action is authorized, whereby the right to execution may be made effective; and, by an anomaly in the law, this action may lie when the reasons for its use do not exist. But under all circumstances such action is, in its essential characteristics, not an adjudication between the parties, in any ordinary sense of the word, but simply a method of verifying the command of the state, signified in the judgment, and of enforcing by writ of execution that command. *Williams* v. *Cable*, 7 Conn. 119. It follows that the obligation arising from a domestic judgment enforceable in our courts differs materially from any ordinary obligation arising from the acts of the parties, whether *ex contractu* or quasi *ex contractu*; that it is imposed directly by the state,

and is an obligation of obedience, not simply of the law in general, but of this particular command; and that the corresponding right is a right to the process of the state for the execution of the judgment. The fact that an action of debt may be resorted to, instead of a capias or scire facias to obtain execution of the judgment, does not affect its essential nature. "The form of procedure cannot change their [its] character." *Meriwether* v. *Garrett*, 102 U. S. 514, 26 L. ed. 205. It also follows that this peculiar obligation of obedience, *ex vi termini*, has no existence beyond the limits of the state which imposed it. That these conclusions are settled by the common law cannot be questioned. When a foreign state has ascertained the violation of any obligation between parties, and, by judgment of its court, has put an end to the obligation whose violation is thus ascertained, and fixed its punishment, creating a new obligation to obey the command of the state by submission to that penalty, our law is settled that such an exercise of sovereign power cannot operate beyond the limits of the state where the judgment is rendered. This principle is commonly expressed by the saying: "The original cause of action is not merged in a foreign judgment." It is true, the judgment may be shown as a fact which, under our law, may be material in establishing the allegations of plaintiff or defendant (a subject which will be considered directly); but the act of the foreign sovereign in putting an end to the obligation has no force within our territory, and the original obligation remains subject to the adjudication of our courts as truly as if the judgment had not been rendered. This is in accordance with well-recognized principles of international law. "Since a judgment is merely an act of sovereign power, it can, of itself, have no extraterritorial effect. The officers of the state in which it is pronounced must carry it into execution, whether with or without the intervention of any further formalities, but it can convey no authority, to the officers of another state." Westlake Private International Law, *361; Story, Confl. Laws, 278. And is thoroughly established as our municipal law. Bigelow, Estoppel, 246; *Smith* v. *Nicolls*, 7 Scott, 147; *Hall* v. *Odber*, 11 East, 118, 124; *Wood* v. *Gamble*, 11 Cush. 8, 59 Am Dec. 135; *Bank of Australasia* v. *Harding*, 19 L. J. C. P. 345, 2 Smith, Lead. Cas. *702. And the law is so clear that the action to recover the amount of a foreign judgment is an action concurrent with that on the original cause of action, that the forms given in Chitty's Pleading, for an action on the judgment, all contain the instruction, "add counts for the original debt;" and the practice of trying the right in the original cause of action, as well as the right to the amount of the judgment in the same proceeding, has always prevailed, and continues under the new method of procedure in England, so that a verdict may be given on both issues. And herein is found the radical distinction between the obligation of obedience imposed by a domestic judgment (and by a foreign judgment within the territory of the foreign sovereign) and the common-law obligation which may arise between the parties to a foreign judgment. The latter cannot involve the right to the execution of the judgment. It must be consistent with the continued existence of the original cause of action. It cannot depend on the mere rendition of the judgment, but requires certain relations of the parties to the fact of the judgment, which may not exist in respect to every such judgment.

Our next step in ascertaining the nature of this common law obligation is to fully recognize the established principle that such obligation must depend upon the municipal law, and cannot result from any rule of international law, nor yet from the application of any so-called rule of "comity." It is unnecessary to repeat or extend the argument which demonstrates that by international law a judgment has no force beyond the territory of the state where it is rendered It cannot be executed in a foreign state unless by authority of that state. No rule of international law requires the exercise of such authority. In fact it has been exercised absolutely by no nation. It is rarely exercised at all, except by force of an express treaty, or the implied treaty of reciprocity, and then only upon conditions fixed by the laws of the nation where execution is sought. There being no international law in respect to the execution of foreign judgments, it is certain that the common law obligation arising from the relation of parties to the fact of such judgment cannot be the result of any rule of international law. I believe, indeed there is no nation, unless possibly Denmark, whose municipal law recognizes (as our common law does) as legal and enforceable by action in its courts any obligation arising between the parties to pay the amount of a foreign judgment. Such obligation—as distinguished from the obligation of a subject to obey the specific command of his sovereign—is peculiar to the English common law, and depends wholly upon our municipal law.

It is equally clear that such obligation cannot result from any rule of comity of nations, so called. Such "comity" implies a general practice of all nations. There is no such general practice. On the contrary, the action of other nations in respect to foreign judgments indicates that there is not even a generally prevailing opinion which it would be practicable to make the basis of any rule of comity. In examining the law of other countries we should keep in mind the tendency to overlook the essential distinctions, clearly indicated in our own law, between a foreign judgment as a ground for asking the issue of process to put the judgment in execution,—as a ground for the application of the law of estoppel on the principle of *res judicata*,—and as a ground for a civil action between the parties to the judgment. In England, if recent cases can be treated as not altering the common law which once prevailed there, the law in respect to foreign judgments is the same as our own; but among the dependent states of England marked differences exist. Among other nations there is an almost uniform rejection of any right in a foreign judgment creditor as against the judgment debtor to enforce any obligations arising from their relations to such judgment. There is an almost equally uniform rejection of any right to demand of the government process by which a foreign judgment shall be put in execution. Where such execution is granted

at all, it is granted on conditions that are governed by no common principle. The nearest approach to a common principle is found in the general refusal to grant any execution, unless in pursuance of an express treaty, or the implied treaty of recognized reciprocity of action. Sweden and Norway refuse any recognition of foreign judgments. Russia also refuses, unless bound by a treaty. Germany refuses except in cases where reciprocity is guaranteed. The law of Austria is similar. France and Belgium practically refuse, for consent is given only after inquiry into the merits of the judgment. A similar rule prevails in Portugal and Spain. The refusal to execute any judgment on default against one of its own subjects is general. Besides the different rules of conduct established by special treaties, the various conditions upon which execution of a foreign judgment may be granted, include the following: That the judgment is satisfactory in the discretion of the executive; that it is satisfactory in the discretion of the court; that it is rendered in a country which guarantees reciprocity; that it meets various conditions specified by the local law; that it is not rendered on default; that it is shown to be just upon examination of its merits. The only government which unqualifiedly treats a foreign judgment (excluding, however, one which has been rendered on default of appearance) as a domestic one is the republic of Liberia. See collation of laws in Piggott on Judgments, 357 *et seq.* It is evident that such action furnishes no ground for claiming an existing "comity of nations." It rather indicates that the wished for uniformity of action must be secured through international treaties. The only countries where the duties arising between the parties to a foreign judgment can be enforced by civil action are those where the common law is administered, and it may well be doubted if a more desirable and practicable basis for an international agreement on this subject can be found than is furnished by the analogies of that common law. It was in view of this condition of the usage of nations that Lord Blackburn, in *Godard* v. *Gray*, L. R. 6 Q. B. 139, 148, stated so emphatically: "It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal;" and in *Schibsby* v. *Westenholz* repudiated the suggestion that the principle on which foreign judgments were enforced was that which is loosely called "comity."

Closely connected with what has been said in respect to the office of a judgment is the specious claim that the voluntary presence of a person within the territory of a state implies an obligation to respect such legal process as may be served on him there, to the extent of satisfying any valid resulting judgment; and that such obligation is the one recognized by our common law as enforceable by a civil action in our courts. Such "implied obligation" is admittedly one due from a person to the state; *i. e.* to respect the process of the state,—to obey the mandate of its judgment. To call such an obligation "implied" is but another form of expressing the old fancy of the social compact,—that all laws are binding by reason of an implied obligation. This fancy cannot affect the fact that the lawfully expressed will of the sovereign directly imposes a legal obligation on the subject and on all within his lawful power. This is an obligation of obedience resulting from positive law. Within the limit of the sovereign's power over an alien, the obligation due from such alien is the same as that due from a native subject. So, whatever obligation is due from the alien to respect the process and obey the judgment of the sovereign in whose territory he may be, is not implied (unless for the purposes of speculation) but is directly imposed by positive law, binding within, but not without, the territory of that sovereign. Such an obligation cannot be the one enforced by our common-law action, because our law distinctly pronounces it invalid. If the obligation is valid, the judgment must be valid throughout. If it binds one party to obedience to the mandate of payment for injury done, it must bind the other to obedience to the mandate of extinction of the original cause of action. Our common law says the original cause of action is not extinguished and the obligation of obedience cannot be enforced in our courts. By this process of exclusion we are enabled to mark the limits of the obligation legal by our law, enforceable in our courts, which arises from the relation of the parties to the fact of a foreign judgment, so that its real nature can be ascertained with adequate accuracy. It is not the obligation of obedience imposed by the command or sovereign act signified in the mere rendition of the judgment. Still less is it the "implied obligation" which the votaries of the social compact fancy to be the origin of all law. It is not imposed by any rule of international law, nor by any existing "comity of nations." All such grounds of obligation are excluded by the settled principles of common law.

The only remaining ground of obligation must be found in the principle, well established and of constant application in our law, that when the relations of the parties to a fact or facts are such that the ties of natural justice require the performance of certain acts, such duty may be a legal obligation, enforceable in our courts by an appropriate action. This principle is far from countenancing the claim that a mere moral duty must be a legal obligation. To come within the operation of the principle, the duty must be such as our law has recognized as legal, or at least be clearly and strictly analogous to recognized legal duties. Our common law, in respect to the principle of *res judicata* and its application, distinctly recognizes as legal a duty resulting from the ties of natural justice, to accept as true, in future proceedings, the facts established in a judicial contention when the parties have participated in such contention, and submitted the controverted facts to such adjudication. In speaking of the principle of *res judicata*, I do not mean the fiat of the state which compels obedience to a final judgment, and forbids the parties to again contest the cause of action extinguished by that judgment (although such meaning is properly expressed in the broad use of the term), but I confine the term to its expression of the principle by which the parties are bound in other proceedings by the facts once submitted by them to a final adjudication.

In examining the relation of this principle of *res judicata* to a foreign judgment, we must remember that there is a vital distinction between a foreign judgment *in rem* and the ordinary foreign municipal judgment *in personam*. It is true that to a certain extent the principle of *res judicata* applies in the same manner to both, but there is a principle which controls judgments *in rem* that has no application to municipal judgments. This principle most clearly appears in the case of courts of admiralty administering justice in accordance with international law. The principle is that certain courts, by the law of nations, exercise a jurisdiction co-ordinate with that of other like courts throughout the world, and that their judgments in determining the status of certain things and persons are adjudications to which all the world are parties, and have in every nation a binding force equivalent to the judgments of the courts of that nation. As early as 1674 this principle was outlined in *Hughes* v. *Cornelius*, 2 Show. *232, and was developed in the judgment announced by Lord Mansfield in *Bernardi* v. *Motteux*, 2 Dougl. 575. In *Roach* v. *Garvan*, 1 Ves. Sr. 157, Lord Hardwicke declares that the principle results "from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain." This principle has been affirmed by our Federal courts. In *Croudson* v. *Leonard*, 8 U. S. 4 Cranch, 434, 2 L. ed. 670, Justice Johnson rests the principle, in the case of a court of admiralty, on considerations of necessity and the impropriety of revising the decisions of the maritime courts of other nations whose jurisdictions are co-ordinate throughout the world; and in *The Mary*, 13 U. S. 9 Cranch, 126, 3 L. ed. 678, Chief Justice Marshall states that these reasons given by Justice Johnson must be taken as the unanimous opinion of the court. The principle was recognized in *Stewart* v. *Warner*, 1 Day, 142, 2 Am. Dec. 61, and was fully sanctioned by an unanimous judgment of this court in 1810. Chief Justice Swift, in delivering the opinion, based the conclusion distinctly on "our acknowledgment of the law of nations." *Brown* v. *Union Ins. Co.* 4 Day, 179, 186. The law of nations was adopted by the legislature as a rule of adjudications in our courts of admiralty in 1776. 15 Col. Rec. 281. The same principle extends, with some modifications, to courts exercising a peculiar jurisdiction in respect to the status of marriage and of universal succession. *Roach* v. *Garvan*, 1 Ves. Sr 157; *Tompkins* v. *Tompkins*, 1 Story, 547, 553, Fed. Cas. No. 14,091; *Holcomb* v. *Phelps*, 16 Conn. 127.

While judgments of this class have a legal effect in all nations which recognize international law as a part of their municipal law, judgments *in personam* of municipal courts have no extraterritorial effect by virtue of international law; so that language used in discussing one class of judgments may produce confusion if applied unqualifiedly to the other. The principle of *res judicata* found its earliest application in a technical effect given to the document called a "record," containing a portion of the proceedings of a superior common law court. This technical rule was, in its inception, applied only to records of those courts whose proceedings were kept in this peculiar manner. It did not extend to inferior courts, nor to the high court of chancery. A similar technical rule applied, as between the parties to the recitals of a deed. The "record" and the deed, as between the parties, was treated as importing an absolute verity which could not be attacked collaterally. Every one was estopped from making such attack. And so the principle of *res judicata* has been treated as belonging to the law of estoppel, and shared in early days the odium pertaining to a technical rule which closed the gates of justice to the entrance of truth. But this technical rule, although still recognized, is not the ground on which the principle of *res judicata* rests. Its real foundation must be sought in principles which pervade all jurisprudence; in the considerations of public policy, which recognize that the adjudications of courts cannot serve their legitimate purpose unless final; in the universal law of equity and justice, which forbids parties who have once submitted their differences to the final decision of a court of competent jurisdiction to question a result induced by their own act; and so the protection of *res judicata* does not depend upon the mere contents of court documents kept in a particular manner, but also in some cases, upon the question whether the matter in dispute has in fact been submitted by the parties to a court; has in fact been heard, determined, and finally decided by that court. The estoppel involved in the establishment of such facts is more than the old technical estoppel of record; it rests on matter *in pais*, and partakes of the nature of an equitable estoppel. *Supples* v. *Cannon*, 44 Conn. 424, 429; *Sargent* v. *New Haven S. B. Co.* 65 Conn. 116, 126. It is evident that while an estoppel dependent on the particular form of a document peculiar to certain courts must of necessity be confined to the judgment of those courts, the estoppel involved in the principle of *res judicata* must of necessity apply to the judgments of all courts exercising a competent and final jurisdiction. The principle, broadly stated, is this: A claim once submitted by the parties to a court of competent jurisdiction, fully heard, determined, and decided by that court, shall not thereafter be controverted between the same parties. This principle is entirely distinct from the right, given by law to a party to a judgment, to ask the state to exercise its sovereign power in compelling obedience to that judgment. It is simply a principle of jurisprudence firmly established in our municipal law, and based on considerations so general in their application, so clearly equitable and essential in any administration of justice, that it may fairly be called a universal principle of jurisprudence. The principle does not, and from its very nature cannot, depend upon the particular court whose judicial action has been invoked, so long as its jurisdiction is competent, and its judgment final. It applies wherever the parties have so submitted their claims to a final decision by a court of competent jurisdiction, whether that court be inferior or superior, of law or of equity, domestic or foreign. The only difference between a domestic and a foreign judgment in respect to the application of this principle is a question of evidence. Can

the laws of a foreign country, which prove that the foreign court was in fact a court of competent jurisdiction, and that the controverted claim was in fact submitted by the parties, heard, determined, and finally settled by the court, be admitted in accordance with the rules of evidence established by our municipal law? If the foreign laws are admitted in evidence, the fact proved by them must have like effect with a similar fact proved in the case of a domestic judgment. The admissibility of proof of foreign laws for the purpose of establishing the judicial character of a court, and the legal effect of its acts, as well as the legal effect of all acts done in a foreign country under the laws thereof, is thoroughly established as a part of our municipal law. Whether we call this law a rule of comity of nations is immaterial to the matter in hand. It is a part of our law, and derives its force from that fact; and foreign laws, as conclusive evidence of the legal effect of acts done under them, are received by virtue of our law, but with the vital qualification stated by Story, "unless they are repugnant to its policy, or prejudicial to its interest." Story, Confl. Laws, § 38.

It may avoid some confusion to call attention here to the practical distinction between the admission in evidence of the acts and laws of a foreign sovereign and the recognition of the necessary effect of such acts and laws in the determination, as between parties, of the result of their agreements or conduct while within the operation of such foreign law; and the putting in execution within our territory of the command of a foreign sovereign. The former results from a principle of our municipal law deemed essential to the administration of justice. In assuming that the real obligations of the parties are controlled by the fact that they arose or were undertaken with reference to the law prevailing where their acts were done, our courts do not assume to execute a foreign law, although the obligation they enforce as legal under our own law may also find its ultimate source in the command of a foreign sovereign. They treat the foreign law as a fact essential, in connection with other facts, to ascertain what the parties really meant by what they have done; and if, in receiving and weighing such fact, they may also theoretically enforce the will of a foreign sovereign, it is only as an incident to the exercise of the judicial power vested in the courts, and does not offend the sovereignty of the state, where such law may be proved as a fact. But the execution of a foreign law, as ordinarily understood, is practically a very different thing. It cannot be authorized by the judicial department, and is an offense to our sovereignty, unless permitted by special legislation. This distinction is clearly marked in the case of a foreign judgment, which is merely an act or special command of a foreign sovereign. Its execution within our dominion is an offense to our sovereignty; is forbidden by our law. Our courts deny such execution, both by refusing to recognize any extinction of the original cause of action by the judgment, and by refusing to issue process to enforce the obligation of obedience to its command. But when obligations between the parties, other than the mere obligation of obedience, may arise from or be supported by the fact of such foreign judgment, it is admitted in evidence as a fact material to the determination of such obligations.

The principle of *res judicata* as stated, and its application to conditions resulting from a foreign as well as from a domestic judgment, subject to the rule of evidence as stated, is a firmly established principle of our common law. In its earliest application to foreign judgments some doubt was entertained as to its equal conclusiveness in such cases, as appears from the arguments of counsel in the *Duchess of Kingston's Case* [20 How. St. Tr. 355], but such doubts arose from a confusion of principle with a question of evidence, and never received judicial sanction. The principle cannot now be questioned. *Bissell* v. *Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Taylor* v. *Phelps*, 1 Harr. & G. 492; *Konitzky* v. *Meyer*, 49 N. Y. 571; Story, Confl. Laws, § 598; Chief Justice Eyre, in *Philips* v. *Hunter*, 2 H. Bl. 402; *Aldrich* v. *Kinney*, 4 Conn. 380, 10 Am. Dec. 151. "It is an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent, as those of our own courts." Gould, J., in *Griswold* v. *Pitcairn*, 2 Conn. 85, 92. But the principle is based in part on the universal law of justice and equity which binds one to submit to a final decision resulting from his own acts, and should not be extended beyond the limits of its foundation. Where, in fact, both parties to the controverted claim have not been heard, and judgment has not been rendered upon a claim contested and adjudicated, but the only adjudication between the parties is a mere legal fiction, for a penalty imposed for a disobedience of process issued by the court, while such judgment may be enforced as the command of the state, binding on its citizens, this particular foundation of *res judicata* does not exist. The distinction between the principle of a judgment as a bar to recovery in a cause of action which has been extinguished by the judgment and this principle of *res judicata* is indicated in *Smith* v. *Sherwood*, 4 Conn. 276, 10 Am. Dec. 143. The former controls when the estoppel is what was formerly called "estoppel by judgment;" the latter where it was called "estoppel by verdict." The former is founded on the supremacy of a sovereign within his own territory; the latter is a universal principle of jurisprudence, and can only apply to a fact "tried and found between the parties." This distinction was affirmed in *Bradford* v. *Bradford*, 5 Conn. 127, 132. The defendant, in pursuance of notice under the general issue, offered in evidence as bar to the action a judgment by default; and the court said, "No estoppel is created by a default." (Hosmer, Ch. J., in his opinion, assumed that the judgment by default involved the same legal consequences as if there had been a verdict under the general issue, the record not disclosing the ground of the verdict, and added, "there existing no solid distinction between a title confessed and one tried and determined." This saying applies only to the effect of a judgment by default in respect to the special cause of action it determines It does not assert that a judgment by default is an adjudication between the parties, within the meaning of *res judicata;* an assertion which is

expressly negatived by the opinion. And the saying is not strictly accurate under our practice. It was used by the English judges in respect to the old action of ejectment, at a time when judgment by default could only be rendered after the appearance of the defendant, when his neglect in open court to deny the allegations of the plaintiff was treated as a confession [*Aslin* v. *Parkin*, 2 Burr. 665]; the settled principle of our law being that a common-law court has no jurisdiction for the purpose of adjudication until both parties appear in court and submit to the jurisdiction. In the modern practice of judgment by default this principle is evaded through a legal fiction. 1 Reeve, Eng. Law, 452. 3 Bl. Com. 279.) "A judgment by default determines nothing except the plaintiff's right to recover in that action." *Lord* v. *Litchfield*, 36 Conn. 116, 131, 4 Am. Rep. 41. In *Cromwell* v. *Sac County*, 94 U. S. 351, 356, 24 L. ed. 195, 199, Waite, Ch. J., in illustrating the principle that an est ppel by judgment in a former action on a different cause exists only where the controverted claim was in fact litigated and adjudicated, says: "A judgment by default only admits, for the purpose of the action, the legality of the demand or claim in suit. It does not make the allegations of the declaration or complaint evidence in an action upon a different claim." In a recent case in England, where a judgment by default of appearance in a French court was set up as a bar to the claim, the court held that such a judgment did not come within the rules of *res judicata* which calls for a judgment on the merits, and a judgment in default of appearance is one on a matter of form only; and Sir Robert Phillimore, delivering the opinion of the court, says: "The foreign judgments not having been given on the merits of the case, but on matters of form only, cannot be set up as a bar to a decision on the merits." *The Delta*, L. R. 1 Prob. Div. 393; *Frayes* v. *Worms*, 10 C. B. N. S. 148.

As the principle of *res judicata* established and administered by our common law is based not only on considerations of public policy, but in part upon the obligation arising from ties of natural justice, it recognizes as legal the duty arising between parties who have contested a controverted claim before a judicial tribunal thereafter, as between themselves, in a judicial proceeding, to accept as true the facts adjudicated upon such contest. This principle may be invoked by plaintiff or defendant, to defeat or support an action. As it depends in part upon the equities arising from the relation of the parties to the fact of adjudication, and not wholly on the form of a judgment or its effect in compelling obedience to a particular command, it applies in the case of any final judgment, whether rendered by a superior or inferior court, whether foreign or domestic. This legal duty to accept as true such adjudicated facts in subsequent judicial proceedings necessarily involves the duty to pay any sum the facts so adjudicated conclusively prove to be due. The obligation is not like the one arising from the mere command of a foreign state, intraterritorial; but, as in the case of many transactions outside our territory which give rise to an obligation legal under our law, and not illegal by the law of the place, it is transitory in its nature and enforceable in our courts. *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4; *Scott* v. *Lord Seymore*, 32 L. J. Exch. 61.

The necessary result of established principles discloses the real nature of the obligation in question. It was recognized by the ancient common law, but it did not come within the few specific forms of action. It did not come within the action on the case established for the enforcement of all rights not within those specific forms, including obligations arising from the ties of natural justice. 14 Hen. VIII. chap. 31. The convenient fiction of *indebitatus assumpsit* was applied to this obligation on the same principle that it was applied to the obligation to pay money in the hands of the defendant; not by reason of any contract or of any delict, but under such circumstances that it equitably belonged to the plaintiff. *Moses* v. *Macferlan*, 2 Burr. 1005, 1008. Controlled by this fiction, the foreign judgment stood for the consideration of the promise. *Walker* v. *Witter*, *supra*. It was treated as the prima facie cause of action (*Phillips* v. *Hunter*, *supra*; *Houlditch* v. *Donegall*, 2 Clark & F. 470); *i. e.* the fact of the consideration or judgment established the plaintiff's case unless the defense set up facts which impeached the consideration,—that is, such facts as proved the judgment to have been rendered under circumstances that negatived any obligation between the parties. *Russell* v. *Smyth*, 9 Mees. & W. 810; *Williams* v. *Jones*, 14 L. J. Exch. 145; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Schibsby* v. *Westenholz*, Id. 155 The fictitious character of the action first used to enforce this obligation has been the cause of confusion which has now no excuse. The fictions of the remedy removed, the essence of the obligation clearly appears. It is this: When a valid and final judgment has been rendered in respect to controverted claims tried and determined upon their merits, there arises a quasi contract obligation as between the parties to such judgment, which binds them in future proceedings to admit the facts so adjudicated to be true, and to pay over money whose ownership, as between themselves, has been established by such adjudication. This obligation exists in the case of every judgment rendered under the conditions described. It might be enforced, if there were occasion, in the case of a domestic judgment. It has not been so enforced, because the wider and more effective obligation of obedience has excluded its consideration. The remedy by execution, whether with or without the intervention of other formality, is so complete that there has been no occasion to resort to the quasi contract obligation. But in the case of a foreign judgment the obligation of obedience does not exist. No remedy by execution direct or indirect exists. The only obligation enforceable in our courts is the one arising between the parties to any judgment when there has been an adjudication to which the equitable principle of *res judicata* applies. The determination of the nature of the obligation simplifies the problem of defenses. "Anything which negatives the existence of that legal obligation, or excuses a defendant from the performance of it, must form

a good defense to the action." *Godard* v. *Gray* and *Schibsby* v. *Westenholz*, *supra*. If in fact the judgment is a mere expression of sovereign will, which does not involve any actual adjudication of claims put in issue by the parties and tried and determined by the court, the particular principle of *res judicata* essential to the right of action does not apply, and such fact must negative the obligation of which the judgment is considered as prima facie evidence. If the adjudication resulted from the fraud of the plaintiff, such fraud of necessity vitiates the foundation of the obligation. *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295; *Vadala* v. *Lawes*, L. R. 25 Q. B. Div. 310. But if, in fact, the final result of the adjudication was not justified by the evidence produced on the trial, such fact cannot constitute a defense. The obligation sought to be enforced is not concerned with the merits of the controversy submitted to adjudication. It arises solely from the fact of such adjudication under the required conditions. The original controversy is not in issue. The trial court has no power to determine that question, nor to review by way of appeal or error the judgment of a foreign court. *Messina* v. *Petrocochino*, L. R. 4 P. C. 144. The fact of the judgment and the conditions under which it was rendered are in issue, but not the merits of the controversy adjudicated. Upon the invalidity of such a defense the actual results of decided cases are practically uniform. In all the recent American cases where the courts have refused to receive evidence upon the merits the defendant had appeared in the foreign court and defended. *Lazier* v. *Westcott*, 26 N. Y. 146, 151, 82 Am. Dec. 404; *Dunstan* v. *Higgins*, 138 N. Y. 70, 20 L. R. A. 668; *Baker* v. *Palmer*, 83 Ill. 568; *McMullen* v. *Richie*, 41 Fed. Rep. 502, 8 L. R. A. 268. (Since this opinion was written, the opinions in *Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, and *Richie* v. *McMullen*, 159 U. S. 235, 40 L. ed. 133, have been filed. In these cases, also, the defendants had appeared in the foreign court, and there had been an actual adjudication upon the claims presented. Whether the exhaustive examination made of the history of this action justifies the theory advanced by a majority of the judges, and whether a theory so novel to English and American law will hereafter control the treatment of defenses by the Federal courts, may be doubtful.) There is a defense which depends rather on a question of evidence. Our municipal law admits in evidence a foreign judgment and foreign law, unless repugnant to the policy of our law, or unjust, and prejudicial to our own subjects. A judgment obnoxious to this exception might not be admissible as evidence, and so the action might be defeated. In *Castrique* v. *Imrie*, 30 L. J. C. P. 177, the distinction in this respect between a judgment *in rem* and *in personam* was noted. In *De Brimont* v. *Penniman*, 10 Blatchf. 436, Fed. Cas. No. 3,715, a demurrer was sustained in an action brought to enforce an obligation between the parties arising in France under French law and established by a French judgment, after full contest by the parties, on the ground that the foreign law and judgment was repugnant to the policy of our law, and did violence to the rights of our citizens. The claim that evidence of a foreign judgment may be rejected because the courts of the state where the judgment was rendered do not receive in evidence our own judgments, would fall under this defense. The object sought by such a claim seems more political than judicial. It is not so much to administer justice in the case on trial as to compel other nations to administer justice in other cases. It may be doubtful whether the accomplishment of such an object by such means fairly comes within the province of a court. Reciprocity is not a principle to be weighed in the scales of justice. It is rather a weapon to be wielded by the executive. The other defenses are the invalidity of the judgment, which must be determined by the law of the state where rendered; payment, release, etc.

In the present case the facts alleged in the second defense conclusively show that no obligation can be predicated in respect to the judgment produced, except that of obedience, imposed by the act of a foreign sovereign, which has no extraterritorial force, and cannot support this action; that the facts technically established by the judgment are conclusive only for the purposes of the action in which it was rendered, and within the limits of the foreign state; that the conditions which, under our law, support a legal obligation between the parties arising from the equities of the case and the ties of natural justice, have no existence. The operation of the principle of *res judicata* upon facts actually adjudicated, and the equities involved by some actual participation in such adjudication, are essential to the quasi contract obligation this action is brought to enforce. These conditions are negatived by the allegations of the second defense. The demurrer to that defense should, therefore, have been overruled.

The conflict of *dicta*, and even of results reached in adjudged cases, is such that it is impossible to explain any principle as the real ground of this action without running counter to some general language of courts or text writers. Lord Campbell said, in *Bank of Australasia* v. *Nias*, 16 Q. B. 717, 734: "We do not think there would be any advantage in going over the authorities attempting either to reconcile or to contrast them." The conflict which has induced most comment is that between the cases holding that a foreign judgment is prima facie evidence only, and those holding that it is conclusive on the merits of the claim adjudicated. This conflict is substantially reconciled when the true ground of the action is considered. Lord Hardwicke, Chief Justice Eyre, Lord Mansfield, and others, cited in support of the former *dictum*, were speaking of the judgment when produced as the cause of action, as the ground of a common law obligation; and as such it is only prima facie evidence,—that is, the conditions necessary to raise the obligation do not attach to every foreign judgment. Lord Campbell and others, cited in support of the latter *dictum*, were speaking of the effect of the judgment when its conditions are such that the common-law obligation is raised. In such case it is conclusive. The merits of the controversy adjudicated cannot be tried in an action to enforce the obligation arising from the fact of that adjudication. But the expressions used when a

foreign judgment on default has been under discussion are more variant and less clear and for the most part they have not as yet received practical application. So far as results are concerned, an action has never been sustained by this court, and I believe by no American court, in the case of a foreign judgment rendered on default of appearance, and has rarely been sustained in England. The principal English case is *Douglas* v. *Forrest*, 4 Bing. 686. A Scotchman, absent beyond the seas, was summoned to court by the peculiar process called "horning," which consisted, I believe, in blowing a horn at the cross of Edinburgh. Not responding to the summons, judgment against him was rendered. An action was brought in England to recover the amount of this judgment, and sustained. If the court acted on the theory that the division between the jurisdiction of Scotch and English courts was one imposed by an imperial government in respect to subject provinces, and not the division existing between the courts of foreign and alien states,—a distinction drawn by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] 2 A. C. 670,—its decision is explicable. On that theory it might well treat the judgment as, in effect, an English judgment, and entitled to execution. Such was the real condition, and forty years later an act of Parliament (the judgment extension act of 1868) recognized its existence, and provided for the execution of Scotch judgments in England and English judgments in Scotland, upon registration. But if the court regarded the action as one to enforce the obligation that arises in respect to a judgment strictly foreign, its conclusion can only be supported on the theory that by force of the ties of allegiance a subject is present for all purposes of adjudication in the courts of his sovereign when commanded to be present, and that this fiction may be treated in such case as the equivalent of an issue actually presented by the parties, tried and determined by the court, and so support an action based upon an obligation arising from such actual adjudication. The court is careful to expressly limit its judgment to "a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time the judgment was given, protected;" and when the debt was contracted in the country of the judgment while the debtor resided in it. It is evident that the adoption of such fiction would modify the principle which supports our action on a foreign judgment. Whether any such modification can consistently be recognized, and, if so, to what extent, has not been considered by our courts. This much is certain (and that is enough for the present case): no modification can be so extended as to destroy the principle. It is plain that no action can be sustained in the case of a judgment rendered on default of appearance against one of our own citizens whose only connection with the foreign sovereign was that of a mere passenger through his territory, without wholly ignoring the principle on which the action is based. The proceeding would no longer be a civil action to enforce a common-law obligation, but would be a mere form of obtaining from the court a writ of execution on a foreign judgment. And so the questions which have been discussed in several cases subsequent to *Douglas* v. *Forrest*, in respect to the international jurisdiction of a municipal court,—meaning a jurisdiction conferred by a sovereign, and recognized by international law, as distinguished from a jurisdiction so conferred, and not recognized by that law,—were both induced and obscured by an uncertainty as to what the action on a foreign judgment really is. If it is an action to enforce an ordinary obligation arising from the participation of the parties in an adjudication resulting in a valid final judgment, the question of jurisdiction is not a troublesome one. It is settled for most purposes of the action (as in other cases where foreign law is admitted in evidence) by the law of the country where judgment is rendered. But if the proceeding is not an ordinary civil action, but, like debt on a domestic judgment, is a mere form for procuring from our government the issue of an execution on a foreign judgment, then the speculations on the jurisdiction of municipal courts internationally considered, as it is phrased, may be useful, but only as guiding the discretion of the court; for nothing is more fixed than that a municipal judgment cannot receive execution in a foreign country unless by permission of the government of that country; and nothing is more certain than that the conditions of such permission are controlled by no international law or custom, but are determined by the views of public policy held by the authority exercising the sovereign power in granting the permission. The rule is the same whether that authority is judge or king. If our courts assume the power of the government to put in execution within our territory the judgments of foreign sovereigns, they must assume the duty of the government in fixing the conditions on which such executions shall issue. These conditions, of necessity, must be controlled by views of public policy. The duty of the court in this particular is not strictly a judicial one. There is no settled law which dictates the policy. There are variant opinions as to what the international law in respect to the execution of foreign judgments ought to be, supported by reasoning useful in developing a sound theory of jurisprudence; but there is no international law except the universally admitted law that execution can only be granted at the will of the sovereign in whose territory it is sought. The nearest approach to an international rule is the one laid down by Lord Selborne in one of his last opinions: "The plaintiff must sue in the court to which the defendant is subject at the time of the suit (*Actor sequitur forum rei*) which is rightly stated by Sir Robert Phillimore (International Law, vol. 4, § 891), to lie at the root of all international, and of most domestic, jurisprudence on this matter." *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, *supra*. It is true, our municipal law adopts the policy (possibly questionable) of offering our courts for the litigation of the whole world, assuming jurisdiction of any defendant who comes within the range of our process. Within our own limits, such policy is the law. But the adoption by one nation, in the administration of its municipal law, of a policy differing from that on

which established international law is based, does not of itself abrogate that law; much less can such municipal policy have the force of international law.

The more important consideration, however, is that there is no international law which recognizes the right of one nation to conclusively determine the legal duties of the subject of another nation who may be temporarily within its limits, in respect to transactions occurring at his own domicil, and not related to any act or conduct within the foreign territory. Territorial jurisdiction, or the right of might to exercise its own will on all persons within its territory, asserted by each independent nation, is countered by the right of protection of its citizens while guests of foreign governments, asserted by every civilized nation. This right of protection is maintained in unmistakable terms by our own government: "The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations." 2 Whart. Dig. International Law, p. 434. All jurists affirm that the power over the person of a friendly alien who is a mere passenger through a nation's territory is limited to matters relating to his acts and conduct while within that territory. Phillimore emphasizes the warning that the distinction between domiciled persons and visitors or passengers is never to be lost sight of. 2 Phillimore, Interna ional Law, *4. An alien has no legal right, enforceable by action, to enter foreign territory (*Musgrove* v. *Chun Teeong Toy* [1891] A. C. 272); but if he is permit ed to enter he carries with him his allegiance to his own country, and is still bound by the laws of that country (*Philips* v. *Hunter*, 2 H. Bl. 402; *Henderson* v. *Staniford*, 105 Mass. 504). He carries with him the protection of that country, and owes no duty or quasi allegiance to the foreign sovereign which can support the conclusive jurisdiction of his courts, unless in respect to conduct while there, or acts there done. Story, Confl. Laws, § 613

The adjustment of territorial jurisdiction as based on the brute force of might to the principle of protection as based on the reciprocal duties between sovereign and subject, which exist wherever the subject may be, is now making international law It is still within the range of diplomacy. But it is enough for present purposes that there is no international law by which a citizen of London or New York, traveling in Turkey or Morocco, can be compelled, by reason of the mere fact of his casual presence in the foreign country, to there litigate controversies arising at his own domicil. When our court, in the exercise of its assumed power, is asked to grant execution of a judgment based on the right of such compulsion, its decision on the question of policy is controlled by no rule of international law. And certainly there can be no doubt that public policy demands the refusal of execution in such case. It can hardly be claimed that the interests of our own citizens, or friendly intercourse with other nations, will be served by encouraging the establishment of a sort of international syndicate for promoting the collection of home debts through foreign courts, so that each traveler shall be compelled to run the gauntlet of such litigation under threat of snap judgments, upon which his own government must issue execution on his return. Such a policy would offer premiums to scavengers of sham and stale claims at every center of travel, breeding a class of process firers to lie in wait for their game at docks and railway stations. It is certainly significant that since the first case on this subject was reported no English or American court has in fact sustained an action on a foreign judgment, rendered on default against one of its own citizens, in respect to a cause of action arising at his domicil, and that no nation, so far as can be ascertained, has ever suffered such a judgment to be put in execution within its territory. It seems clear to me, notwithstanding some *dicta* entitled to the highest respect may support a contrary view, that if this proceeding is, as I have attempted to prove, a common law action to enforce a common-law obligation, the facts set up by the defendant constitute a good defense; and if it is—as some general language used by courts, especially of late years, seems to imply—a mere form for procuring the issue of execution on a foreign judgment, the facts set up are conclusive against the issue of execution on the judgment produced.

The argument from analogy, much pressed by counsel, has been substantially disposed of in reaching the conclusions stated. The argument is: (1) A judgment on default obtained in Connecticut against a nonresident, served with process while transiently in the state, is valid and will be enforced in this state. (2) Under the Constitution of the United States, such judgment has the same effect and will be enforced in every other state. (3) Some analogy exists between the relation of the states to each other under the Constitution, and the relation of independent and foreign nations to each other; *ergo*, such a judgment obtained in a foreign nation will be enforced in the United States. The gap between the premises and the conclusion is patent, and impassable if the essential premise omitted is supplied,—*i. e.*, the sovereign power signified in the judgment of a state court extends, by force of the United States Constitution, to all subjects of the one nation throughout its whole territory; while the sovereign power signified in a foreign judgment does not extend beyond the limits of that nation, and can be recognized elsewhere only by the grace of some other nation. The character of a state judgment as representing the sovereignty of the nation as well as of the state, and so unalterable by state action, is well settled. *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475. Justice Clifford says such judgment is "equally binding and may be executed in every state. The established rule is that, so long as the judgment remains in force, it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment." Such fanciful analogies as the one alleged between the effect of a state and foreign judgment, when produced for execution within the sovereignty of the United States, are unsafe as well as unreal.

There was a clear analogy between the relations of the several states to each other, and the relations of foreign nations, from the opening of the Revolution to its final consummation in the adoption of the Constitution of 1787, and the establishment of the new "composite republic," as it has been aptly termed by Austin. But these analogies were then radically disturbed. The nation and the government established was new, absolutely unique, and cut loose from the traditions and analogies that had formerly prevailed. And so the division of sovereign powers between the people as citizens of one nation and as citizens of its component parts, the relations of such governments to each other, the relations of citizens to the state and to the general government, in their double and not inconsistent capacity of citizens of the United States and of the several states: in short, the new and intricate conditions involved in the establishment of the "indissoluble union of indestructible states,"—must be settled in accordance with the law and circumstances which called the new nation into existence, which law, of necessity, is peculiar to itself. It is only by acknowledging the fact that the relation of our citizens to their government and its several parts are to be determined by a law peculiar to that government, and necessarily distinct from that controlling the relations of foreign governments and their citizens, that we can distinguish between the constitutional law which controls the relations of all states and citizens within the scope of the Federal Constitution, and the international law which controls the relations of foreign nations and their citizens, and be able to accurately apply each law to its appropriate subject. The United States Constitution declares that the act of sovereignty signified in a judgment of one state shall receive execution in every state. International law declares that such act of one nation is not entitled to execution in any other; and the law of this state forbids such execution. The defense in this case brings into sharp contrast the two views of this action which have apparently influenced courts, especially in their discussion of defenses. One view recognizes a common-law obligation arising from facts proved; the other a governmental duty, called into action by the verification of the act of a foreign sovereign. The defenses under one turn on questions of law, under the other on questions of policy. It is therefore essential for the application of any principle to cases as they arise that one or the other view should be frankly adopted, and its logical consequences accepted. For the reasons stated, I believe the view which regards this proceeding as a common-law action to enforce a common-law obligation to be the only one consistent with the established principles of our municipal law, and that such obligation is expressly negatived by the defense in this case. If, however, the other view can be maintained, I believe the defense is sufficient, although for different reasons.

I think there is error in the judgment of the superior court.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Frederick W. BROWN, Petitioner,
v.
Charles Theodore RUSSELL, Jr., *et al.*, Civil Service Commissioners.

(.....Mass.....)

1. The compulsory appointment of veterans, if they desire to be appointed, whenever they make a sworn statement of qualifications with the certificate of three citizens of good repute in the community, which Stat. 1895, chap. 501, §§ 2 and 6, attempt to provide for, is inconsistent with the Declaration of Rights, especially art. 7, declaring that government is for the common good "and not for the profit, honor, or private interest of any one man, family, or class of men," and art. 6, declaring that no man, corporation, or association shall have any other title to exclusive privileges than what arises from the consideration of services rendered to the public.

2. Members of the detective department of the district police force, under Pub. Stat. chap. 103, and amendments, who have the powers of police officers and constables, except the service of civil process, are public officers and not merely employees of the commonwealth.

3. The consideration of services rendered to the public within the meaning of art. 6 of the Declaration of Rights, denying any other title than such services to exclusive privileges, has reference to services to be rendered to the public thereafter, and not to past services.

(April 25, 1896.)

REPORT from the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of mandamus to compel respondents to remove from the eligible list for appointment under the civil service laws of the name of a veteran which had been placed there without compelling him to submit to a competitive examination. *Writ granted.*

The case sufficiently appears in the opinion.

Messrs. **Joseph B. Warner** and **J. J. Feely,** for petitioner:

If the purpose of the act is not a public purpose the act is not authorized by the Constitution.

No presumption in favor of the public motives of legislators or the validity of their enactments can save the act from being tried by the courts, with a close scrutiny of its probable

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NOTE.—The constitutional equality of privileges, immunities, and protection is the subject of a *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579.

As to constitutional provisions respecting civil service examinations, see People, McClelland, v. Roberts (N. Y.) 31 L. R. A. 809.

See also 34 L. R. A. 58; 35 L. R. A. 447; 37 L. R. A. 809.

consequences in operation, and these consequences must determine its real purpose.

Watertown v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Talbot* v. *Hudson*, 16 Gray, 417; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389; *Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed 205; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; Cooley, Taxn. 104.

The elaborate provision for a careful selection of public servants, the safe guards of examinations, tests of strength, requirements of age, height, and weight, the arrangements of registration, selection, and impartial decision, all disappear the moment a veteran appears and asks for a place. The condition of things as it existed before the act of 1884, when places were often given to inefficient men, as it was charged for political reasons, is made vastly worse for now favoritism is not only permitted, but is required, and no officer having the power of appointment is permitted to make any inquiry into fitness or use any judgment or discrimination in selection.

Such a law paralyzes the service within; it brings it into open contempt without; efficiency and industry go for nothing, capacity is despised, reward of well doing is impossible; responsibility of superior officers for the work of subordinates so forced upon them is out of the question; glaring incapacity, even grotesque physical disability, may stare one in the face anywhere; the ideal of public duty is displaced by that of legalized plunder, and the whole conception of the state is distorted. Surely this law is the destruction of the civil service.

The rewarding of meritorious persons is not such a public purpose as will support, without other public purpose, an act of the legislature. The persons to be rewarded by this act are so many ascertained individuals. These individuals do not make a class, in the sense in which that word is used in cases where a law, passed for a public purpose, and not for the benefit of individuals, nevertheless applies only to a portion of the community, but to that portion as a part of the public. In such laws where valid two things occur: First, a distinct and positive public purpose; second, a class, indefinite as to members though limited by description.

Lowell v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Chicago, B. & Q. R. Co.* v. *Cutts*, 94 U. S. 155, 24 L. ed. 94; *Woodard* v. *Brien*, 14 Lea, 520; *McAunich* v. *Mississippi & M. R. R. Co.* 20 Iowa, 338; *Humes* v. *Missouri P. R. Co.* 82 Mo. 221, 52 Am. Rep. 369; *Iowa Railroad Land Co.* v. *Soper*, 39 Iowa, 112; *Missouri P. R. Co.* v. *Haley*, 25 Kan. 35; *Little Rock & Ft. S. R. Co.* v. *Hanniford*, 49 Ark. 291, 1 Inters. Com. Rep. 580.

Classification for legislative purposes must have some reasonable basis upon which to stand.

State v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789.

This act cannot be justified as one intended simply to assist a deserving class, for that is unquestionably not a public purpose.

Lowell v. *Boston*, *supra*.

Nor as a charity, for the state cannot be charged with the support of the poor unless as paupers, unable to support themselves.

State, *Griffith*, v. *Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *State*, *Tieman*, v. *Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223.

The act must be taken as passed to confer a pecuniary reward upon individuals and for their benefit on account of meritorious service rendered by them thirty years ago.

Such a purpose is not a public purpose.

Mead v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255, 11 L. R. A. 123; *Philadelphia Asso. for R. of D. F.* v. *Wood*, 39 Pa. 73.

Taxes laid to assist individuals, however numerous, are invalid.

Lowell v. *Boston*, *supra*; *Feldman* v. *Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *State*, *Griffith*, v. *Osawkee*, *supra*; *Citizens' Sav. & L. Asso* v. *Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Parkersburg* v. *Brown*, 106 U. S. 487, 27 L. ed. 238; *Cole* v. *La Grange*, 113 U. S 1, 28 L. ed. 896; *Mather* v. *Ottawa*, 114 Ill. 659; *Coates* v. *Campbell*, 37 Minn. 498; *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185; *Brewer Brick Co.* v. *Brewer*, 51 Me. 62, 16 Am. Rep. 395.

The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object.

Lowell v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Freeland* v *Hastings*, 10 Allen, 570.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates one of these rights is unconstitutional and void even though the enactment of it is not forbidden.

Com. v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *Holden* v. *James*, 11 Mass. 396, 6 Am. Dec. 174; *Re Picquet*, 5 Pick. 65; *Hampshire County* v. *Franklin County*, 16 Mass. 76; *Warren* v. *Charlestown*, 2 Gray, 84; *Freeland* v. *Hastings*, *supra*; *White* v. *White*, 105 Mass. 325, 7 Am. Rep. 526; *Opinion of the Justices*, 107 Mass. 604; *Opinion of the Justices*, 160 Mass. 586; *Atty. Gen.* v. *Old Colony R. Co.* Id. 62, 22 L. R. A. 112; *Larcom* v. *Olin*, 160 Mass. 102.

The raising of money by taxation for the maintenance of offices which are to be bestowed as gifts is as repugnant to principle as raising it for the support of schools which are in part subject to private control.

Jenkins v. *Andover*, 103 Mass. 94.

The offices of the government do not belong to the legislative department to dispose of on any conditions it may choose to impose.

Re Curtis, 106 U. S. 371, 27 L. ed. 232; *Barker* v. *People*, 3 Cow. 686, 15 Am. Rep. 322; *People* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen.* v. *Detroit*, 58 Mich. 213, 55 Am. Rep. 675; *Black* v. *Trower*, 79 Va. 123; *Com.* v. *Plaisted*, 148 Mass. 375, 2 L. R. A. 142.

An office is a public station or employment conferred by the appointment of government.

Conner v. *New York*, 5 N. Y. 285; *Smith* v. *New York*, 37 N. Y. 518; *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385, 18 L. ed 830.

The courts have declared laws partially exempting veterans to be unconstitutional, on the ground that the Constitution contemplated an examination and some standing on the list, and that the legislature cannot give a preference beyond that given by the Constitution.

Re Sweeley, 12 Misc. 174; *Re Keymer*, 89 Hun, 292.

No laws for the benefit of individuals, at least in matters where the public at large is to remain governed by a different rule, are countenanced.

Holden v. *James*, 11 Mass. 396, 6 Am. Dec. 174; *Hampshire County* v. *Franklin County*, 16 Mass. 76; *Re Picquet*, 5 Pick. 65; *State* v. *Pennoyer*, 65 N. H. 113, 5 L. R. A. 709; *Evansville* v. *State, Blend*, 118 Ind. 426, 4 L. R. A. 93; *Durkee* v. *Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *People* v. *Gillson*, 109 N. Y. 389; *Norwich Gaslight Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Re Jacobs*, 98 N. Y. 99, 50 Am. Rep. 630; *Butchers' Union, S. H. & L. S. L. Co.* v. *Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *Kuhn* v. *Detroit*, 70 Mich. 534; *Budd* v. *State*, 3 Humph. 483, 39 Am. Dec. 189; *Park* v. *Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599; *Tate* v. *Bell*, 4 Yerg. 202, 26 Am. Dec. 221; *Brown* v. *Haywood*, 4 Heisk. 357; *Bank of the State* v. *Cooper*, 2 Yerg. 599, 24 Am. Dec. 517; *Wally* v. *Kennedy*, Id. 554, 24 Am. Dec. 511; *Lewis* v. *Webb*, 3 Me. 326; *Durham* v. *Lewiston*, 4 Me. 140; *Roberts* v. *Boston*, 5 Cush. 198; *Ward* v. *Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Lehew* v. *Brunnell*, 103 Mo. 546, 11 L. R. A. 828; *Com.* v. *Huntley*, 156 Mass. 236, 15 L. R. A. 839; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34.

Special laws which undertake to regulate particular branches of industry in matters affecting fundamental rights, and thus to impose on them burdens not borne by other branches, are held invalid as infringing liberty and impairing equality.

Com. v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 12 L. R. A. 340; *Godcharles* v. *Wigeman*, 113 Pa. 431; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Hancock* v. *Yaden*, 121 Ind. 366, 6 L. R. A. 576; *State* v. *Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359.

Messrs. **Hosea M. Knowlton,** *Attorney General*, and **George C. Travis,** for respondents:

The intent of the legislature prior to the statute now drawn in question was to declare that military or naval service in time of war was a qualification for appointment or employment in the civil service.

This act was pronounced constitutional by this court.

Opinion of the Justices, 138 Mass. 601; *Opinion of the Justices*, 145 Mass. 587.

The Constitution of Massachusetts, art. 4, chap. 1, § 1, in prescribing the powers of the general court provides among other things that it is authorized "to name and settle annually or provide by fixed laws for the naming and settling all civil officers within said commonwealth the election and constitution of whom are not hereafter in this form of government otherwise provided for."

In the exercise of this power the legislature has the right to prescribe the qualifications of all officers and servants of the public not provided for in the Constitution.

Opinion of the Justices, supra.

The statutes say that officers, such as ballot commissioners, registrars of voters, and police commissioners, shall be of certain political party affiliations, and the court says that it is "for the legislature to determine whether such a qualification is wise."

Com. v. *Plaisted*, 148 Mass. 375, 2 L. R. A. 142.

The Constitution by no means implies that all men are necessarily to receive and have the same civil and political powers and duties. It only signifies that the rights of all under the law are equally entitled to the consideration and protection of the law for their maintenance and security.

Roberts v. *Boston*, 5 Cush. 198.

Many laws in their effect and operation necessarily confer benefits more or less exclusive upon individual citizens or classes of citizens; but when this is not the design of the law, but only an incident in the exercise of the proper functions of legislative authority, it is not a violation of the spirit of the Constitution.

Com. v. *Blackington*, 24 Pick. 352; *Hewitt* v. *Charier*, 16 Pick. 353; *Williams* v. *Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Com.* v. *Whipps*, 80 Ky. 270.

The purpose of the Declaration of Rights was to announce great and fundamental principles, to govern the action of those who make and administer the law, rather than to establish precise and positive rules of action.

Foster v. *Morse*, 132 Mass. 354, 42 Am. Rep. 438.

Field, Ch. J., delivered the opinion of the court:

In determining the principal question in this case, it is necessary to consider the statutes relating to the civil service, and particularly Stat. 1895, chap. 501. The previous statutes on the subject are Stat. 1884, chap. 320; Stat. 1887, chap. 437; Stat. 1889, chap. 352; Id. chap. 473; Stat. 1891, chap. 140; Stat. 1893, chap. 95; Id. chap. 253; Stat. 1894, chap. 267; and Stat. 1895, chap. 376. The justices of this court heretofore have had occasion to consider some of these statutes, in an opinion given to the house of representatives on February 24, 1885, and in one given to the governor and council on September 22, 1887. See *Opinion of the Justices*, 138 Mass. 601; Id. 145 Mass. 587.

By Stat. 1884, chap. 320, § 2, the civil service commissioners to be appointed under the act were authorized to prepare rules not inconsistent with existing laws or with the provisions of the act, and adapted to carry out the purposes thereof, for the selection of persons to fill certain offices in the government of the commonwealth, and of the several cities thereof, which are required to be

filled by appointment, and for the selection of persons to be employed as laborers or otherwise in the service of the commonwealth and of the several cities thereof, and the rules were made subject to the approval of the governor and council; and by § 14 the rules were to be given a general or limited application. The commissioners have prepared rules with reference to what is called the "official service of the commonwealth," and of the several cities thereof, and with reference to the labor service, and these rules have been approved by the governor and council. Under the classification of the services made by the rules, there are included in the 1st division, Schedule A, clerks and other persons rendering service as copyists, etc., and, in Schedule B, persons employed in the prison, police, and fire departments, and some other offices. The 2d division includes the labor service. Section 15, Stat. 1884, as amended by Stat. 1893, chap. 95, describes the offices which, under existing laws, cannot be made subject to the civil service rules. It is obvious that the civil service statutes and rules relate only to subordinate offices and employments which have been created by the legislature. None of them is an office or employment of which the duties, tenure, or qualifications are prescribed by the Constitution.

In the present case the petitioner is not a veteran, and, after examination, was placed at the head of the list of candidates eligible for certification and appointment to a position on the detective force of the district police of the commonwealth; and he remained at the head of the list until July, 1895, when the commissioners placed one Edward D. Bean at the head of the list, and reduced the petitioner to the second place. Bean had made application as veteran, under Stat. 1895, chap. 501, § 2, and, having been found to be a veteran, was, without examination, placed first upon the list; and so far as appears, he is the only veteran on the list. The district police are appointed by the governor of the commonwealth, and are subject to removal by the governor. Pub. Stat. chap. 103, § 1. If the governor makes requisition upon the commissioners for a candidate for appointment to the office of a detective upon this police force, it is made the duty of the commissioners, by Stat. 1895, to certify the name of Edward D. Bean for appointment, and of the governor to appoint him, if he appoints anybody. The governor, perhaps, may refuse to appoint anybody, if he is of opinion that Bean is not qualified to perform the duties of a detective on this force, or he may wait until more veterans than one are on the list of persons eligible to such an appointment, and make his selection from them, or he may appoint Bean, and remove him if he finds him incompetent. But then, if Bean is continued on the list and is the only veteran on it or if his application is considered as exhausted by one certification and he makes a new application, the statutes, literally construed, make it the duty of the commissioners to put his name again at the head of the list for appointment, and, on requisition by the governor, again to certify him for appointment, and so on, *toties quoties*, so long as he remains on the list.

It is to be noticed that the class of veterans as defined by the statutes is not a class which anybody can become qualified to enter by any services which he may perform, or by any attainments which he may acquire, but it is a class fixed and determined by services which were rendered a long time before any of the statutes were passed. It is also to be noticed that the fact of having been a veteran, within the meaning of the statute, in and of itself, has little tendency to show that the applicant is specially qualified to perform the duties of many of the offices to which the civil service statutes and rules relate. The principal purpose of exempting veterans from submitting to an examination must be that veterans sometimes may be appointed to an office or employment who would be found, on examination, not qualified to perform the duties of the office or employment which they seek. One, and perhaps the chief, purpose of the exemption must be to reward veterans for their services in the war of the Rebellion. The reward is not in the nature of a pension or payment of money, but of an office or employment, the salary or pay of which the veteran is to receive. The provisions of the statutes exempting veterans are general in their nature, and relate to all the offices or employments that have been, or may be, included within the civil service rules. From the earliest times, most nations have conferred honors and emoluments upon those persons who have rendered distinguished services to the state, particularly in war. These honors and emoluments have been conferred upon persons voluntarily selected by the legislative body or the sovereign power; and pensions and rewards sometimes have been given to whole classes of persons, of which the statutes of the commonwealth relating to the "aid to soldiers and sailors and to their families," and the statutes of the United States relating to pensions, are well-known examples. But the statute of 1895, under consideration, affords the first instance, so far as we know, in this commonwealth, where the appointing power has been compelled to appoint persons of a certain class to office, in preference to all other persons, whether they are or are not thought to be qualified for the office by the appointing power, or by some public officer, or some impartial and disinterested board of officers or persons invested by law with the power and responsibility of determining the qualifications of the persons to be appointed.

The legislature, in establishing offices not provided for by the Constitution, has often required that the persons, or some of the persons, to be appointed, shall possess certain qualifications, or that some of them shall be women, and some men; but in all cases, so far as we are aware, the qualifications required bear such a relation to the duties imposed that they tend to secure that kind and degree of knowledge, experience, and impartiality which are requisite for the satisfactory performance of the duties, and it is open to any person to acquire the qualifications required. When women are to be

appointed, there is a satisfactory reason, in the nature of the office or employment, why this should be done. In every such case some discretion usually has been left to the appointing power, in the selection of the particular persons to be appointed. The peculiarity of the civil service statutes and rules, if Stat. 1895, chap. 501, §§ 2, 6, be enforced, is that very little is left to the discretion of the appointing power in the selection of persons, if there are veterans who wish to be appointed. The civil service commissioners, in making up the list, and in certifying the persons to be appointed, must proceed in a certain way, designated by the statutes and the rules; and the appointments must be made, if at all, from the persons so certified. Before the passage of Stat. 1895, chap. 501, it was in the discretion of the appointing power whether veterans who had been put upon any list without an examination, pursuant to Stat. 1887, chap. 437, should or should not be certified for appointment by the commissioners; and it was also in the discretion of the appointing power whether, if such veterans were certified, they should be appointed. But if veterans make application, under Stat. 1895, chap. 501, § 2, they are to be preferred "for certification and appointment in preference to all other applicants not veterans, except women;" and, as separate lists are made up for the different offices and employments, appointments from each list must be made from veterans, if any man is appointed, and there are veterans on the list.

It ought, perhaps, to be considered whether it is intended that veterans who make application for employment in the service under Stat. 1895, chap. 501, §§ 2, 6, shall not only file a petition in accordance with § 6, but shall also conform in their application to the requirements of the 2d section of rule 12 of the civil service rules, pursuant to § 2. We are of the opinion that it was the intention of the statute that the application, under this statute, of a veteran who does not wish to submit to an examination, should be made in accordance with the requirements of both the 2d section of rule 12 of the civil service rules, and § 6 of the Statute. See opinion in 145 Mass. 587.

It may perhaps be doubted whether it is the intention of Stat. 1895 that, if a veteran makes application pursuant to § 2, his application shall be taken to be conclusively true, or that the commissioners shall inquire into the truth of the statements contained in the application. Stat. 1891, chap. 140, gives the commissioners ample power to make investigation in all cases requiring it, and the only question is, What is the intention of Stat. 1895? The commissioners must of necessity inquire and determine whether an applicant is a veteran, according to the meaning of this statute; otherwise he has no right to make the application, under § 2. We have, however, found it unnecessary, in the present case, to determine whether the commissioners may also inquire into the truth of the statements made in the application, to the effect that he has not suffered loss of limb, or other physical impairment which incapacitates him from performing the duties of the position which he seeks; that he is a citizen of the United States; that he does not habitually use intoxicating beverages to excess, and is not a vender of intoxicating liquor, and has not been convicted within one year of any offense against the laws of the commonwealth. Whether they can make these inquiries or not we are unable to see in the statutes any indication that the legislature intended that the commissioners should examine a veteran who makes application under Stat. 1895, chap. 501, §§ 2, 6, with reference to his moral character, or his mental acquirements and capacity to perform the duties of the position which he seeks. If the commissioners were to do this, and were to certify to the appointing officer only such veterans as they found to be of good moral character, and mentally as well as physically qualified to perform the duties of the position which they seek, there would be little difference, under this statute, between the position of veterans who desire an appointment without having passed any examination, and that of those who submit themselves to an examination. We think the intention of Stat. 1895 is that the sworn statement of the applicant that he is qualified to perform the duties of the position which he seeks, accompanied by a certificate from three citizens, of good repute in the community, that they know said applicant to be fully competent to perform such duties, is to be taken by the commissioners for the purpose of certification to the appointing power, and by the appointing power as conclusive upon the mental and moral qualifications of the applicant. The certificate of three citizens is not required to be under oath, and it may be made by any three persons of good repute whom the applicant may select. It is not made under any sense of official responsibility, and the persons making it are not required to be impartial or disinterested. They may be the friends or relations or servants of the applicant. Stat. 1895, chap. 501, § 2, provides "that the age limit now established by the civil service rules with regard to appointments in the police and prison service and fire department may be applied to" appointments under this section; but this seems to be the only clear provision that the commissioners may exclude from certain offices and employments veterans who make the requisite application, accompanied by the requisite statement and certificate, and the exclusion can be made only on account of age, in accordance with the age limit established by the civil service rules when Stat. 1895, chap. 501, took effect.

It is the contention of the petitioner that the privileges given to veterans by Stat. 1895, chap. 501, §§ 2, 6, are in violation of the principles which underlie our system of government, implied in the Constitution of the commonwealth, and also are in violation of certain express provisions of the Constitution. The express provisions relied on are found in articles 6 and 7 of the Declaration of Rights, and reference is also made to article 9. It is not contended that article 9 in terms is applicable to the present case. This article

is as follows: "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected for public employments." This article relates to elections, and to inhabitants who have such qualifications as are established by the frame of government. The civil service statutes do not relate to elections, or to any offices, the qualifications for which are established by the Constitution; but the article, so far as it extends, does declare the principle that all persons having the requisite qualifications have an equal right to elect, and to be elected, to public office.

Article 7 is as follows: "Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men. Therefore, the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform alter, or totally change the same when their protection, safety, prosperity, and happiness require it." This article is declarative of the end of the institution of government. It may be said to be fairly within the intent of this article that public offices, which are the instrumentalities of government, ought not to be created or filled for the profit, honor, or private interest of any one man, family, or class of men, but only for the protection, safety, prosperity, and happiness of the people, and for the common good.

Article 6 is as follows: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural." From the conclusion of this article, it is manifest that it is mainly directed against hereditary offices and privileges, but it is contended that this is not its whole purpose. It is said that the mention of corporations and associations of men shows that hereditary privileges were not solely intended, because corporations and associations of men have no heirs, although they may be perpetual. We think it obvious that, whatever may be the advantages of particular and exclusive privileges mentioned, they may include advantages and privileges for life, or a definite period of time as well as hereditary advantages and privileges. We think, for example, that a peerage for life, with the privileges which attach to a peerage by English law, cannot be conferred, in this commonwealth, upon any person, any more than can an hereditary peerage. It has been argued, on the one hand, that the words, "other than what arises from the consideration of services rendered to the public," mean or include services which have been rendered to the public in the past, and that if a man, corporation, or association of men has rendered services to the public in the past, it is consistent with this article that he may obtain advantages or particular and exclusive privileges in consideration of those services. On the other hand, it is argued that it is only in consideration of services to be rendered to the public therefor that a man, corporation, or association of men may obtain advantages, or particular and exclusive privileges. This provision is said to have been taken from the Declaration of Rights in the Constitution of Virginia of 1776, § 4, where it reads as follows: "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary." In our opinion, the meaning of these words in this article, so far as they are applicable to public offices, is that only in consideration of services to be rendered to the public therefor can a man, corporation, or association of men obtain advantages or particular and exclusive privileges distinct from those of the community. A person may obtain the advantages or privileges attached to a public office in consideration of his performing the duties of the office. It is for the purpose of rendering service to the public in a public office that advantages and privileges distinct from those of the community may be obtained. The meaning of this article was somewhat considered in *Hewitt* v. *Charier*, 16 Pick. 353, and it was held that Stat. 1818, chap. 113, was not in violation of the article. It was there held that the leading purpose of that statute was to guard the public against ignorance, negligence, and carelessness in the practice of physic and surgery, and that the exclusive privileges granted to such persons as shall have been licensed by the officers of the Massachusetts Medical Society, or have been graduated doctors of medicine from Harvard University, were only incidental to the leading purpose of the statute. In that case, as in others where a license is required before any one can engage in certain professions or pursuits, a service is rendered to the public by the exercise on the part of those licensed of the skill, knowledge, and experience required to obtain a license, and by the exclusion of ignorant and incapable persons from the profession or pursuit. But it may be questioned whether this article of the Declaration of Rights was intended to apply to private pursuits and employments, and whether it is not to be confined to political and civil rights and privileges.

The original statute of 1884, chap. 320, concerning the civil service, required that the rules should provide "for giving preference in appointments to office and promotions in office (other qualifications being equal) to applicants who served in the army or navy of the United States in time of war and have been honorably discharged therefrom." Id. § 14. It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the disci-

pline of service in war; and it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state shown in the public service. These things, we assume, the legislature may take into account, in providing for appointments to office, where the qualifications are not prescribed by the Constitution. Stat. 1887, chap. 437, provides that veterans may be preferred for appointment to office or employment in the service of the commonwealth, or the cities thereof, without having passed an examination under the civil service rules. This statute only gives a discretion to the appointing power, which it may or may not exercise, according to the needs of the public service. See also Stat. 1889, chap. 473. Stat. 1895, chap. 501, § 1, amending Stat. 1884, chap. 320, § 14, makes compulsory the certification and appointment of veterans who have been examined and found qualified for the positions they seek, in preference to all other persons, but they must submit to the same examination as other persons. The constitutionality of this section of the statute is not now before us. The purpose of Stat. 1895, chap. 501, §§ 2, 6, is to make the appointment of veterans compulsory, if they desire to be appointed, whether the appointing power of the commissioners think they are or are not qualified to perform the duties of the office or employment they seek. Section 6 requires a sworn statement of the applicant that he is qualified to perform the duties of the position he seeks, but it is notorious that persons the least qualified to perform the duties of an office often are the readiest to believe that they are qualified to perform them, and this provision cannot be seriously taken as a reasonable and adequate method of ascertaining the qualifications of applicants for office or employment. Probably it was because the legislature felt that this requirement was not adequate that the certificate of three citizens of good repute was also required. But the obvious defect in this requirement is that the applicant may select the three citizens, and they are not required to have any knowledge of the qualifications required, or to be disinterested or impartial, or to act under any sense of public responsibility. A man cannot properly be a judge in his own case, or make his servants and agents the judges. Such a certificate cannot be regarded as a reasonable, impartial, and adequate method of determining the qualifications of applicants for appointment to office or employment, if it be necessary, under the Constitution, that all persons appointed to office or employment should be adjudged by somebody to be qualified to perform the duties of the office or employment.

The principal question of law in this case, broadly stated, is therefore as follows: Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments? If such legislation is not constitutional as regards public offices, the question incidentally may arise whether a distinction can be made between public offices, and employments by the public which are not offices. Public offices are created for the purpose of effecting the ends for which government has been instituted which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government, it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare. In offices which are created by the legislature, where the method of appointment is not prescribed by the Constitution, the legislature can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards, or upon the inhabitants of cities, towns, or districts; but we think that it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class, in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices.

There are many employments by the commonwealth, or by the cities and towns of the commonwealth, which do not constitute the employee a public officer. The work of the commonwealth and of the cities and towns must be done by agents or servants, and much of it is of the nature of an employment. It is sometimes difficult to make the distinction between a public office and an employment, yet the title of "public office" is one well known to the law, and it often is necessary to determine what constitutes a public office. Every copying clerk or janitor of a public building is not necessarily a public officer. With reference to such and similar employments, it may be suggested that, if the legislature can give pensions to veteran soldiers and sailors, it may grant them on condition that the pensioners shall render such service to the commonwealth, or to its cities and towns, as they can; that they may be employed and paid wages or a salary, partly in consideration of the services they render, and partly in recognition of, and as a reward for, the services which they have rendered to the commonwealth in the past. We have not found it necessary, however, in the present case to consider the authority of the legislature to grant pensions or pecuniary rewards for past services to the state, whether the pensions and rewards be absolute, or conditional upon the rendering of some service, because, in our opinion, the persons appointed to the detective department of the district police force of the commonwealth,

under Pub. Stat. chap. 103, and the acts in amendment thereof, are public officers, and not merely employees of the commonwealth. They are appointed by the governor for the term of three years, subject to removal by the governor, and they "have and exercise throughout the commonwealth all the powers of constables (except the service of civil process), police officers, and watchmen, and may be transferred from one district to another, in the discharge of their duties; and the governor may at any time command their services in suppressing riots and in preserving the peace." They give bonds to the treasurer of the commonwealth, and receive a stated salary from the treasury of the commonwealth. They have and exercise some of the powers of the government. We are of opinion that §§ 2, 6, Stat. 1895, chap. 501, so far as they purport absolutely to give to veterans particular and exclusive privileges, distinct from those of the community, in obtaining public office, cannot be upheld as enactments within the constitutional power of the general court. The result is that the commissioners were not authorized by Stat. 1895, chap. 501, §§ 2, 6, to place, without an examination, the name of Edward D. Bean at the head of the list to be certified for appointment upon the detective force of the district police of the commonwealth, in preference to all other applicants not veterans or women, and that they should be commanded to strike his name from the list.

Mandamus to issue accordingly.

MISSISSIPPI SUPREME COURT.

COLUMBUS BUGGY COMPANY, *Appt.*,
v.
TURLEY & PARKER.

(.....Miss.....)

1. **Indorsers for one doing business in his own name who are compelled to pay** the note are creditors within the protection of Code 1892, § 4234, making property used or acquired by such person in his business liable for his debts, and they may secure themselves by taking a bill of sale of such property.

2. **Goods sold to a trader for resale** under a contract retaining title in the vendor until they are paid for and making the purchaser agent for their sale are required or used in his business within the meaning of Code 1892, § 4234, making such property of one doing business under his own name without disclosing his principal or partner liable for his debts.

(February 24, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court of Adams County in favor of defendants in an action brought to recover possession of certain personal property which defendants had purchased of J. M. Smitha but which plaintiff alleged belonged to it. *Affirmed.*

Appellant delivered to Smitha some buggies under a written contract, he paying part cash and giving a note for the balance of the purchase price. Under the contract Smitha was to hold the goods and their proceeds as agent for plaintiff until they were paid for in full and in making sales he was to act as agent for plaintiff.

Further facts appear in the opinion.

Messrs. **Martin & Conner,** for appellant:

An agent can act only within the scope of his authority or in accord with the usage of trade; and whenever the property of a party has been wrongfully misapplied by his agent or a trust fund converted into another species of property if the identity can be traced it may be followed by the owner or held in its new form liable to his rights.

Evans, Principal & Agent, bk. 3, chap. 7, § 3; Story, Agency, § 60; 2 Kent, Com. (original) p. 625; Smith, Mercantile Law, 3d ed. chap. 5, § 4, p. 178; Tiedeman, Sales, § 317; *Warner* v. *Martin*, 52 U. S. 11 How. 209, 13 L. ed. 667.

This was an agreement, to the knowledge of both parties, that the transfer should be made in consideration of the extinguishment of an antecedent debt of Smitha; it was a transaction involving property which Smitha held only as agent; it was done far out of the usual course of trade; it was done under circumstances and with such knowledge on the part of appellees as the law terms "notice;" under circumstances where a reasonable man of ordinary prudence would, and appellees, with every facility and perfect ease, could and should, have made inquiry which would have revealed the rights of appellant.

Warner v. *Martin*, *supra*; *Journey* v. *Priestly*, 70 Miss. 584.

An agent holding property of his principal for sale may make a valid sale thereof in market overt or in the usual course of his employment, but cannot transfer or dispose of the same in payment of his own debts, and this whether the transferee or pledgee was ignorant of the rights of the principal.

Smith, Mercantile Law, 3d ed. chap. 5, § 4, p. 178; Evans, Principal & Agent, bk. 3, chap. 7, p. 480, § 3; Tiedeman, Sales, § 317; *Warner* v. *Martin*, *supra*.

In sales of personalty where the prepayment of the price is made a condition precedent, no title passes to the vendee. Especially is this the case where title is expressly reserved by the vendor.

Benjamin, Sales, 4th Am. ed. § 320, and notes; Tiedeman, Sales, §§ 85-87, 203, 206, 325, p. 526; *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. ed. 339; *Fosdick* v. *Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 344; *Warner* v. *Martin*, *supra*; *Bowden* v. *Gray*, 49 Miss. 550; 21 Am. & Eng. Enc. Law, title *Sales*, subtitle *Conditional Sales*, and note.

NOTE.—As to the effect of reserving title on a bailment for sale as against creditors, see *note* to Barnes Safe & L. Co. v. Bloch Bros. Tobacco Co. (W. Va.) 22 L. R. A. 850.

If personal property is sold upon condition precedent, as the prepayment of the purchase price, and title is impliedly or expressly reserved to the vendor, no title passes to the vendee; the vendor may follow the property in the hands of innocent third persons who have acquired the same for value or of seizing creditors of the vendee.

Benjamin, Sales, Bennett's Notes, 4th Am. ed. § 320, and notes; Tiedeman, Sales, § 203, pp. 303, 305, 317, 325, 525–529; 21 Am. & Eng. Enc. Law, title *Sales*, subtitle *Conditional Sales; Fosdick* v. *Schall*, and *Warner* v. *Martin*, *supra; Ketchum* v. *Brennan*, 53 Miss. 596; *Duke* v. *Shackleford*, 56 Miss. 552; *Gayden* v. *Tufts*, 68 Miss. 691; *Tufts* v. *Stone*, 70 Miss. 54; *Journey* v. *Priestly*, Id. 584.

Where the purchase price is payable in instalments, and a portion of the same has been paid, the vendor may retake the property without tendering back the money received by him.

Dederick v. *Wolfe*, 68 Miss. 500, *Duke* v. *Shackleford*, *supra;* Tiedeman, Sales, § 325, p. 529.

Annotated Code, § 4234, known as the "business sign" section, does not apply to the sale involved in the case at bar.

The object of this statute was to prevent the assertion of secret rights that would operate as fraud upon innocent parties.

It is not pretended that appellant had any right or interest in Smitha's business other than that of persons who might have sold him property under similar circumstances or of his general creditors. The bulk of the commercial business of this country is done upon terms of credit. On account of the losses to creditors many of them adopted the plan of reserving in themselves title to their goods until paid for, and the majority of the courts of the union have decided that such sales were perfectly fair, equitable, and legitimate.

If a fraud were committed upon any one in such a case, would it not be upon the owner of property who on the faith of the security given him by the established law of a state should part with the possession of his property on terms of security theretofore sufficient for his protection, and then be told that his security is worthless?

Notice did not affect a creditor asserting his rights.

Gumbel v. *Koon*, 59 Miss. 266; *Wolf* v. *Kahn*, 62 Miss. 814.

Section 4234 makes no difference in the priority of creditors.

Dodds v. *Pratt*, 64 Miss. 126; *Gayden* v. *Tufts*, 68 Miss. 691; *Kinney* v *Paine*, Id. 258; *Tufts* v. *Stone*, 70 Miss. 54.

Messrs. **Proby & Clinton** for appellees.

Woods, J., delivered the opinion of the court:

The following excerpt from the agreed statement of facts found in the transcript will demonstrate that appellees were creditors of Smitha in the sum of $1,700, *viz.:* Smitha, being "insolvent, and in failing circumstances, and owing the banking house of Britton & Koontz the sum of $1,700 upon notes dated February 27, 1894, and January 11, 1895, shortly falling due, on which the said defendants, Turley & Parker, were accommodation indorsers, proposed to the said defendants that as he (Smitha) would be unable to meet said notes at maturity, and as they would have them to pay, that if they (Turley & Parker) would take up said notes and assume certain other obligations owing by said Smitha, that he (Smitha) would make them a bill of sale to the property hereafter mentioned; that the said defendants did take up said notes by the payment of the $1,700, and assumed the payment of $600, due by said Smitha for rent in arrears; whereupon the said Smitha, on the 16th day of February, 1895, in consideration of a receipt in full for the $1,700 paid by the defendants, and the assumption of the payment of said $600, sold his said business, including horses, carriages, buggies, harness, book accounts, etc., to the said defendants, Turley & Parker." It thus appearing that appellees were creditors of Smitha, under the authority of *Howe* v. *Kerr*, 69 Miss. 311, they are clearly entitled to be protected by the sale to them by their debtor to the extent of the $1,700. Section 4234, Code 1892 (Code 1880, § 1300), protects the rights acquired by appellees under the sale to them from their debtor to the extent indicated. The agreed statement of facts shows that Smitha transacted the business of a livery and sales stable, including the sale of carriages, buggies, etc., and that the only sign used at the place of such business was one with the words, "J. M. Smitha, Proprietor," and that the property in this litigation was used and acquired in that business. As to Smitha's creditors, the property was liable for his debts, and was in all respects to be treated as his property in favor of his creditors. As was said in *Howe* v. *Kerr:* "They [the creditors] might have subjected it [the property in controversy] to their demands by proceeding at law to judgment and execution, and what the law would have done it was permissible for the parties to do." As to the debt of $600, due by Smitha for rent, and assumed by appellees, § 4234, Code 1892*, has no applicability. To the extent of this $600 Turley & Parker were purchasers.

This brings us to the remaining contention, *viz.:* Can the purchasers be protected in their title to the property thus acquired from Smitha against the claim of appellants, Smitha's vendors, who by their written contract with Smitha, retained title to the property conditionally sold him until the purchase price should be paid Smitha being a trader actively engaged in the business of livery and selling carriages and buggies, and having authority in the contract itself to sell? The propounding of the proposi-

*That section was as follows:

Section 4234 (Code of 1880, § 1300): Business sign, and what to contain. If any person shall transact business as a trader or otherwise, with the addition of the words, "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property.

tion discloses features which distinguish the case from those where the conditional sale is made of articles for the use and consumption of the buyer, or when the property is not sold to a trader presumptively for resale, but for the use of the buyer. The books, including our own state reports, abound in cases of these characters, and the rule is well settled with us that here, in such cases, the title of the conditional sale will be protected. The present case is wholly unlike any heretofore decided in this court, and must be determined independently of former adjudications. In the case before us the vehicles were presumably sold to Smitha for resale. The course of business and common observation would, perhaps, raise that presumption. But no resort need be necessarily had to presumption. The seller has, in its contract, expressly authorized a resale by its vendee. True, the contract shows a retention of title in the seller until payment fully made, but, true also is it, the seller has authorized the buyer to resell. To resell was one of the two purposes had in view by both parties to the contract. Now, what effect shall be given to these conflicting and inconsistent terms of the contract? And especially what effect shall be given to these inconsistent terms when the buyer is not only apparently clothed with all the indicia of ownership, but when by the contract itself, the *jus disponendi* is unequivocally conferred on the buyer? It would seem that only one answer can be returned to these questions. To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title, and at the same time authorize the buyer to resell, would operate as a fraud upon innocent purchasers. This case falls within a well-recognized exception to the general rule that no one can convey to another any better title than he himself has. Benjamin in his work on Sales (§§ 448, 449) states with perspicuity this exception. In § 448, vol. 1, 4th Am. ed., the author uses this language: "The seller may be estopped from claiming title, as against a bona fide purchaser from the buyer in possession, by giving the buyer evidence of title or authority to sell." And in the succeeding section an elaborate citation from *Leigh Bros.* v. *Mobile & O. R. Co.* 58 Ala. 165, is made, in which the exception to the maxim, *Nemo dat qui non habet*, is strongly presented. Said Brickell, Ch. J., in that case: "If the person intrusted with the possession of the goods, and with the indicia of ownership, or of authority to sell, or otherwise dispose of them, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner." To the same effect the following cases will be found: *Wilder* v. *Wilson*, 16 Lea, 548; *Winchester Wagon Works & Mfg. Co.* v. *Carman*, 109 Ind. 31, 58 Am. Rep. 382; *Ludden* v. *Hazen*, 31 Barb. 650; *Fitzgerald* v. *Fuller*, 19 Hun, 180; *Cole* v. *Mann*, 62 N. Y. 1; *Armington* v. *Houston*, 38 Vt. 448, 91 Am. Dec. 366; *Rogers* v. *Whitehouse*, 71 Me. 222; *Burbank* v. *Crooker*, 7 Gray, 158, 66 Am. Dec. 470; *Haskins* v. *Warren*, 115 Mass. 514; *McMahon* v. *Sloan*, 12 Pa. 229, 51 Am. Dec. 601.

The only case seen by us in direct conflict with the view which we adopt as the second one is that of *Lewis* v. *McCabe*, 49 Conn. 41, 44 Am. Rep. 217. But that opinion seems to have rested largely upon the idea that the contract in that litigation was made upon and induced by the spirit and drift of the former Connecticut decisions in similar, though not identical, cases. Near the conclusion of that opinion this language is employed: "Possession, with the *jus disponendi* added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent without regard to the real intent of the parties. Bump, Fraud. Conv. 123, and cases there referred to. We concede that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions as they may have induced the making of such contracts." Many states have of late years enacted statutes requiring the recordation of contracts in which title is retained in the vendor, and many adjudications may be found under such statutes; but the cases cited by us were decided independently of statute, and, as it appears, before the enactment of statutes.

Affirmed.

YAZOO & MISSISSIPPI VALLEY RAILWAY COMPANY, *Appt.*,

v.

J. C. DAVIS *et al.*

(.....Miss.....)

1. **Whether an obstructed bayou was a watercourse** or not may be upon the evidence a question for the jury.

2. **The fact that overflows of surface water and water from a river** and streams upon low land are somewhat deepened and somewhat more prolonged when they occur on account of the construction of a railroad embankment with large and numerous trestles to provide for the passage of the water does not make the railroad company liable where there is nothing to show that trestles in lieu of the embankment would be as economical or make as safe and proper a roadway.

(March 2, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Leflore County in favor of plaintiffs in an action brought to recover damages for the alleged wrongful obstruction by defendant of water flowing over plaintiffs' land. *Reversed.*

The facts are stated in the opinion.

Messrs. **Mayes & Harris** and **Rush & Gardner** for appellant.

Messrs. **Coleman & Somerville** for appellees.

NOTE.—On the question, What is surface water? including the subject of overflowing river banks, see *note* to Cairo, V. & C. R. Co. v. Brevoort (C. C. D. Ind.) 25 L. R. A. 527.

Cooper, Ch. J., delivered the opinion of the court:

In *Sinai* v. *Louisville, N. O. & T. R. Co.* 71 Miss. 547, we held that under circumstances a railroad company whose roadbed obstructed surface water, and threw it back upon the lands of the adjoining owner, would be liable to him for the damages thereby inflicted. In *Kansas City, M. & B. R. Co.* v. *Smith*, 72 Miss. 677, 27 L. R. A. 762, we also held that under circumstances a railroad company would not be liable to an adjoining owner for obstructing the flood waters of a stream, which were flowing in an unbroken current along the course of the stream, and which would ordinarily, under the rules of the common law, be considered and dealt with as a part of the stream. We need not state the facts of those cases, nor repeat at length what was therein said of the legal principles on which the decisions rest. In the present appeal the facts are substantially these: The appellees own a tract of land near the junction of Big Sand creek and the Yallobusha river. The river flows from the northeast to the southwest, and the general course of the appellant's road is parallel with the river, and from a mile to a mile and a half east thereof. Big Sand creek comes in from the southeast, flowing to the northwest, until near the appellees' land when it is turned to the northeast, and, after passing a mile or more in that direction, turns to the north, and then, running nearly west, empties into the river. After leaving the lands of appellees, and before reaching the river, Big Sand creek receives the waters of Teoc creek, a stream flowing from southeast to northwest. In the irregular parallelogram between the river and the creek the roadbed of the defendant runs at a distance of a mile or more from the river, and of a half mile, more or less, from the creek. Running out from the Big Sand creek, and in the direction of the river, at its nearest points, are several bayous, with clearly defined, but not deep, channels. These bayous continue as such beyond the line of the railroad, and some of them—possibly all—lose their character, and are merged into the basin east of the river. When the waters of the creek are high, and those of the river are low, the water from the creek, and the overflowing waters, and surface waters run down through these bayous to, or towards, the river. But when the waters of the river are at flood, they run eastward through the bayous to the creek. This was the condition of things before the railroad was built, and from this it appears that the lands of the plaintiffs, situated between the creek and the river, are in a sort of basin, which have in a greater or less degree been always subject to overflow; the waters of the Big Sand creek overflowing them from east to west when the river was low and the creek high, and the waters from the river overflowing them from west to east when the river was at flood. East of the creek are other lands of the plaintiffs, and damages in this action are sought for the injury done to the lands, both east and west of the creek. When the railroad was constructed, in the year 1886, much of it, for the first mile or two, south of the point where it crossed Big Sand creek, was built upon trestles. In the year 1892 the company filled up a large portion of these trestles with earth, forming, when filled, a solid roadbed; but, as appears from a map used on the trial of the cause, and made a part of this record, there yet remains about 1,800 feet of trestlework (including the bridge of 300 feet across the Big Sand) from the point where the road crosses the creek to the first bayou south of and adjoining plaintiffs' land, and of these trestles nearly 1,000 feet are over the bayous and along the lowlands of the plaintiffs' farms. The plaintiffs allege: That their "said lands are situated in what is known as the 'Yazoo and Mississippi Delta,' and are almost level. That there are occasional elevations into ridges of slight elevation, and occasional depressions of slight extent, which latter at certain seasons overflowed. That the streams passing through and near to said lands are very shallow, and their waters flow very sluggishly. That the beds and banks of the streams are incapable of containing the waters in the rainy seasons, but they are bordered by low or overflowed lands, which at such times assist in carrying off the excess. That all of the small streams, bayous, and sloughs, and creeks draining the said lands flow in a westerly direction, and empty into the Yallobusha river, which river flows in a south-westerly direction, but with a winding course, about 2 miles distant from their lands. Said lands are about 3 or 4 miles distant from what is known as the 'Hills,' where the surface of the earth rises abruptly into hills of great elevation and dimensions; that there is a gradual slope in the earth's surface westward from the foot of the hills to the Yallobusha river, and the usual and ordinary waters passing through and near to the lands aforesaid from the east found egress in a harmless course, by the two creeks, Big Sand and Teoc, into the river. That in the rainy season, which annually occurs in the spring of the year, as well as at other times of heavy rainfalls, quantities of water rush down from the high lands, and, overflowing the two creeks, passed into the adjacent low and overflowed lands, and were conveyed from off the lands of the plaintiffs by four streams or bayous, to wit, Sand Bayou and a prong of Sand Bayou, Stump Bayou, and a prong of Stump Bayou." The declaration further alleges that when the railroad was built trestles of sufficient sizes were left for the passage of the waters, but that the defendant, without due regard to the rights of the plaintiffs, in the year 1892 filled up a large part of the trestles, obstructed the bayous, and left insufficient escape for the waters, thus throwing them back upon plaintiffs' lands, increasing the depth of the water upon the lands that were accustomed to overflow, overflowing other lands, and materially prolonging the period for which the overflows remained on the lands.

Stating the case, as found, most favorably for the plaintiffs, it may be said that their property consists of what is known as "low lands," subject to overflow in great part by ordinary floods, with a few ridges, of not

great extent, parts of which were above ordinary overflows, and possibly a small part not subject to overflows even in exceptionally high water; that the construction of the road and the filling in of the trestles has to some extent deepened the overflows from the surface water and the waters from Big Sand creek, where the Yallobusha river is low, and subjected to overflow on the whole body of the land, from 30 to 100 acres, which, but for the roadway, might have been brought into cultivation; that no additional land is subject to overflow from the Yallobusha river, but that overflows from that river as well as from the Big Sand are somewhat prolonged in time when they do occur. There is no evidence that the road is improperly constructed, except as may be inferred from the foregoing facts; and there is nothing to show that to construct and mantain trestles would be as economical as to make the roadbed, or that, when constructed, they would form as safe or proper roadway. It is affirmatively shown that the trestles or bridges at the creek and at all of the bayous, except one, are of far greater capacity than the bayous and the creek, and it is not shown that any appreciable or ascertainable injury has resulted from obstructing that bayou, the water flowing through that having been turned southward along the railroad, and emptying now into Stump Bayou. The peremptory instruction prayed by the defendant was properly refused, for the reason that, whether this obstructed bayou was a water course was, under the evidence, a question for the jury; and if it was, the defendant was liable to the plaintiffs for such injury as they sustained by its obstruction, and if no injury could be proved to nominal damages. *Chapman* v. *Copeland*, 55 Miss. 476. In all other respects the course of the trial,—the instructions given and refused,—proceeded along radically erroneous lines.

The fundamental error which colored and controlled the whole case was that the defendant company was under the duty of so constructing its roadway as to afford exit for all except "unprecedented" overflows, and in treating the filling of its trestles on lowlands as obstructions of a water course. Nature failed to afford sufficient exits for the waters which are the source of the plaintiffs' injury, and it is not the law that the defendant was under the duty of so constructing its roadway as to preserve the land of the plaintiffs from all injury by reason of water to which it would not have been subject in its natural state. The plaintiffs' farm is so situated as to be subject to a sort of ebb and flow inundation, sometimes from the eastern waters of Big Sand creek, at others from the western waters of the Yallobusha river. Through this basin, the company, either by contract or condemnation, obtained a right to locate its roadway. Power was conferred upon it by the legislature to build the road, on condition only that by contract or condemnation proceedings it should compensate the owners whose property was to be taken. This it has done, and is the owner of the land, with the right to use it as such, for the legitimate purposes for which it was secured. For all injuries flowing from the lawful and proper construction of its roadway it has already paid. In condemnation proceedings, all special damages, present and prospective, to the owners of land, resulting or to result from properly constructing and maintaining its road, constitute, as to such owner, a single indivisible cause of action, and it is conclusively presumed that the commissioners in making their award in cases of condemnation have considered and awarded damages for all such injuries; and, if the way has been secured by contract with the owner, that he has demanded and received full compensation therefor. And if it may reasonably be supposed that a proper construction of the road will subject adjoining land to overflow, or obstruct its drainage, such damages should be estimated and allowed for. *Sullivan* v. *Lafayette County Supers.* 58 Miss. 790; *Yazoo-Mississippi Delta Levee Comrs.* v. *Harkleroads*, 62 Miss. 807; *Richardson* v. *Levee Comrs.* 68 Miss. 539; *Ohio & M. R. Co.* v. *Wachter*, 123 Ill. 440; *Barnes* v. *Michigan Air Line R. Co.* 65 Mich. 251; *Bell* v. *Norfolk Southern R. Co.* 101 N. C. 21; *Moss* v. *St. Louis, I. M. & S. R. Co.* 85 Mo. 86.

It is evident that to construct a road on lands situated as were the plaintiffs would inevitably, to some extent, obstruct the body of vagrant water, composed of both overflow and surface water, to which, in a state of nature, the plaintiffs' lands were subject. The roadway, except where it crosses the defined banks of the streams and bayous, is in no proper sense within a water course. The alluvial lands of the Yazoo and Mississippi delta were all built up by the deposits from the rivers. In a state of nature it is all subject to overflow, and if the roads in that country are to be so constructed as to preserve the nearest possible approach to a natural condition of the waters, they must be placed upon trestles from one end of the valley to the other. We withdraw nothing of what we said in *Sinai* v. *Louisville, N. O. & T. R. Co.* 71 Miss. 547.

A company having the right to construct its railroad may not, in disregard of the rights of adjoining proprietors, so construct its roadbed as to destroy the value of the lands of third persons, even though the injury be occasioned by turning back surface water upon such lands, if, with due regard to the duty it owes to the public, and in the reasonable use of its own property, and at no undue expense, it can avoid it, by putting in trestles, culverts, or other openings, through which such water may safely be allowed to escape. But that is not this case. On the contrary, to require the company to refrain from building its roadway by putting up embankments necessary to raise its line above the periodical floods, where large and numerous trestles are provided to give vent to the surrounding waters, would be to subordinate its rights of property to the unfounded demands of the adjoining owner, who has already received full compensation for the injury of which he complains.

The judgment is reversed, and cause remanded.

NORTH CAROLINA SUPREME COURT.

W. S. HARVEY, Trustee, etc., *Appt.*,
v.
LINVILLE IMPROVEMENT COMPANY
et al.

(.....N. C.....)

1. **A pooling arrangement by which stockholders transfer their shares to trustees** to be voted as directed by holders of the majority thereof for the period of five years unless the holders of two thirds of such stock vote to put an end to the trust sooner is contrary to public policy and void as against the right of an assignee of some of the trustees' certificates to have the shares thereby represented issued to him in his own name and under his own control.
2. **Voting or controlling stock under a pooling arrangement** which is against public policy may be restrained by injunction at suit of the real owner of the stock.

(April 14, 1896.)

APPEAL by plaintiff from an order of the Superior Court for Caldwell County denying an injunction and other relief in a proceeding brought to restrain defendants from carrying out a pooling agreement for the voting of stock in a corporation. *Reversed.*

Plaintiff had purchased certain shares of stock in the Linville Improvement Company, and when he sought to obtain possession of them he found them in the hands of trustees under an alleged pooling contract by which a certain number of shares would be held and voted for the furtherance of certain interests of the owners. He instituted this suit to enjoin the execution of the agreement and to procure control of the stock. The pooling contract was as follows:

"Whereas the Linville Improvement Company is indebted to various persons in large sums of money, and is now in the hands of a receiver, appointed by a decree of the superior court of the county of Mitchell in the state of North Carolina; and whereas, the undersigned, who are stockholders, and some of whom are also creditors, of the said company, are desirous to extricate the company from its present financial embarrassment, pay off its debts, and enable it to resume its operations: Now, therefore, we, the undersigned stockholders of the Linville Improvement Company, have agreed, and do hereby agree, with each other as follows: That for the purpose herein set forth, we will pool all of the stock of the said company owned by us, respectively, and will transfer the same to John F. Divine, T. B. Lenoir, and Hugh MacRae, to be held by them and their successors upon the trusts and for the purposes herein declared. The said trustees shall give proper receipts for the stock so transferred to them. The said trustees shall have power to vote the said stock so transferred to them in all meetings of the stockholders of said company, to borrow money to pay off and discharge the present indebtedness of the company, and to pledge the stock so held by them, or any part of it, as collateral security for the money so borrowed. If any vacancy among the said trustees shall occur at any time, the same shall be filled by the votes of the holders of the majority of the stock represented in the agreement. And the holders of the majority of such stock shall have the right, whenever they see proper to do so, to instruct the said trustees how to vote upon matters arising or to arise in any meeting of the stockholders of said company. Any one or two of the said trustees may vote the entire stock so transferred to them in any meeting of the stockholders of said company, being so duly authorized in writing by the other or others. Any one or more of the said trustees, or of their successors herein, may at any time be removed, and their places filled, by a vote of the majority of the stock herein represented. All stockholders shall at once pay up all unpaid subscriptions owing to the company on the stock held by them. A meeting of the stockholders executing this agreement may be called by the trustees at any time upon —— days' notice, and shall be called by them upon like notice at any time, upon request of any three or more of the stockholders executing this agreement; and in all such meetings, a majority of the said stock being present in person, or by proxy, shall be a quorum; and any action taken by them shall be binding on all. This agreement shall be void if not executed by holders of the majority of all the stock of said company, but, when so executed, it shall be enforced and binding upon all who sign it for the period of five years from the date hereof, unless it be sooner determined and put an end to by a vote of the holders of two thirds of the stock represented herein. Upon the determination of this agreement, the trustees shall transfer to each of us the stock owned by us, respectively."

Messrs. **Davidson & Jones** for appellant.
Mr. **Junius Davis** for appellee.

Clark, J., delivered the opinion of the court:

At common law stockholders could not vote by proxy. *Taylor* v. *Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33, and other cases cited in Cook, Stock, Stockholders, & Corp. Law, § 610. This is now otherwise, but it is still held that each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy. *Cone* v. *Russell*, 48 N. J. Eq. 209. Various devices have been resorted to for the purpose of so tying up the stock that no one of the parties to the "pool" or combination can break the agreement. "Irrevocable" proxies to vote the stock have been given to a designated party, who acted as trustee or agent; but the courts held such proxies not irrevocable, and that they might be revoked at any time. Cook, Stock, Stockholders, & Corp.

NOTE.—As to voting trusts of corporate stock, see *note* to Clarke v. Central R. & Bkg Co. (C. C. S. D. Ga.) 15 L. R. A. 683.

See also 35 L. R. A. 309.

Law, §§ 610, 622; *Woodruff* v. *Dubuque & S. C. R. Co.* 30 Fed. Rep. 91; *Vanderbilt* v. *Bennett*, 2 Ry. & Corp. L. J. 409. Another plan was to place the stock of the various parties in the hands of trustees, with power to transfer the stock to themselves, and to hold and vote the same, trustee's certificates being issued to the various parties, specifying the amount of stock so deposited by them, and their interest in the pool; but the courts held that any holder of a trustee's certificate might at any time demand back his part of the stock. *Woodruff* v. *Dubuque & S. C. R. Co. supra*, and other cases cited in Cook, Stock, Stockholders, & Corp. Law, § 622. Another device was that the parties contracted together not to sell their stock for a specified time, or only to a purchaser acceptable to them all. It was held that notwithstanding such contract, any one of the parties might sell his stock to any one he pleased, and at any time. *Fisher* v. *Bush*, 35 Hun, 642; *Williams* v. *Montgomery*, 68 Hun, 416. Another plan was to restrict by a by-law the right to transfer stock, but this was held illegal. *Morgan* v *Struthers*, 131 U. S. 246, 33 L. ed. 132, and other cases cited in Cook, Stock, Stockholders, & Corp. Law, § 332. A provision that a purchaser of a certificate of stock who sold in violation of the agreement should be entitled to the dividends, but should receive no right to vote, was likewise held invalid. *Harper* v. *Raymond*, 3 Bosw. 29. Numerous decisions affirm the correctness of the above rulings, which are based upon the illegality, because against public policy, of permitting large blocks of stock to be irrevocably tied up for the purpose of being voted *in solido*, for the interest of a clique or section of the stockholders and not according to the judgment of each individual stockholder, for the benefit of the entire corporation. There are some few decisions trenching more or less upon the principles above stated, but we deem them contrary to sound principles of public policy, and hence not authority. In short, all agreements and devices by which stockholders surrender their voting powers are invalid. 5 Thomp. Corp. § 6404. The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy with power of revocation. The "pooling" arrangement admitted to have been entered into by the majority of stockholders in the present case is contrary to public policy and void (*Woodruff* v. *Dubuque & S. C. R. Co. supra*); and the plaintiff, assignee of certain of the trustee's certificates, is entitled to have his name entered as the owner and holder of the shares of stock represented by said trustee's certificates, and to have said shares issued to him, should the facts be found in accordance with his allegation, and to have the defendant restrained, till the hearing, from voting or controlling in any way the stock purchased by the plaintiff, or in any wise interfering with plaintiff's right to vote, control, or dispose of said stock.

Error.

Avery, J., did not sit on the hearing of this case.

UTAH SUPREME COURT.

F. E. GREGG, *Respt.*,
v.
Hyrum GROESBECK *et al.*, and Henry M. RYAN, *Appt.*

(11 Utah, 310.)

1. **An answer which is demurrable** may be invulnerable when assailed by a motion to strike out.
2. **An answer should not be stricken from the files** if its meaning can be discovered and the facts alleged present a defense.
3. **One whose name is indorsed on a note** cannot be held liable thereon by a transferee if prior to the transfer he had given instructions for the erasure of his name, which was known to the transferee although the instructions were not complied with.
4. **Parol evidence is admissible** to show that prior to the transfer of a note an indorser from whom payment is demanded had, with the knowledge of the transferee, given instructions for the destruction of the indorsement.
5. **An appeal on the judgment roll** will present the question of the correctness of the granting of a motion to strike out an answer.

(April 27, 1895.)

APPEAL by defendant Ryan from a judgment of the District Court for the Third Judicial District in favor of plaintiff in an action brought to recover the amount due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **Anderson & Anderson,** for appellant:

Gregg did not buy the indorsement of Ryan at all. He simply purchased the note without the indorsement, for the indorsement was to be erased, and for him to now claim that he has a contract of indorsement upon which Ryan should be held, because by the mistake and inadvertence of himself and Rasche the physical act of erasing Ryan's name was omitted to be done, although it was agreed that it should be done, is an attempt to perpetrate a fraud.

Where a party has knowledge of instructions limiting the authority of the agent such instructions are binding upon him.

Tiedeman, Com. Paper, § 81.

Parol evidence is admissible to prove these things against a written instrument.

1 Greenl. Ev. § 284; Tiedeman, Com. Paper, § 274; *Forsythe* v. *Kimball*, 91 U. S. 291, 23 L. ed. 352; *Breneman* v. *Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Hill* v. *Ely*, 5 Serg. & R. 363, 9 Am. Dec. 376; *Kirkham* v. *Boston*, 67 Ill. 599; *Lewis* v. *Dunlap*, 72 Mo. 178; *Hamburger* v. *Miller*, 48 Md. 325; Whart. Ev. §§ 1059, 1060; *Burke* v. *Dulaney*, 153 U. S. 228, 38 L. ed. 698.

NOTE.—As to parol evidence in respect to liabilities on a note, see Baxter Nat. Bank v. Talbot (Mass.) 13 L. R. A. 53, and *note*; also Fullerton v. Hill (Kan.) 18 L. R. A. 33, and *note*.

Messrs. **Frank B. Stephens** and **Benner X. Smith,** for respondent:

The appeal is taken on the judgment roll; there is no bill of exceptions whatever, the appeal is taken straight from the judgment. In order to review this question it would be necessary for appellant to have placed before the court a bill of exceptions containing the proceedings under the several motions.

Code, §§ 3413, 3646, p. 300, subd. 2; *Spence* v. *Scott*, 97 Cal. 181; *Sutter* v. *San Francisco City & County*, 36 Cal. 114; *McAvee* v. *Randall*, 41 Cal. 136; *Abbott* v. *Douglass*, 28 Cal. 295; *Dimick* v. *Campbell*, 31 Cal. 240; *Morris* v. *Angle*, 42 Cal. 236; *Nevada County & S. Canal Co.* v. *Kidd*, 43 Cal. 184; *Feely* v. *Shirley*, Id. 370; *Douglas* v. *Dakin*, 46 Cal. 49; *Emeric* v. *Alvarada*, 64 Cal. 594; *DePedrorena* v. *Hotchkiss*, 95 Cal. 636; *Hemme* v. *Hays*, 55 Cal. 337; *Strathern* v. *Dakin*, 63 Cal. 478; *Nash* v. *Harris*, 57 Cal. 242.

The answer stated no defense; the court properly struck it out as sham and frivolous, and rendered judgment on the pleadings.

The parol agreement is merged in the written contract, and evidence to vary or contradict it is inadmissible.

Martin v. *Cole*, 104 U. S. 30, 26 L. ed. 647; *Dale* v. *Gear*, 38 Conn. 15, 9 Am. Rep. 353.

A mutual mistake which will afford ground for relief means a mistake reciprocal and common to both parties, who alike labor under a misconception in respect to the terms of the written instrument.

1 Rice, Ev. 298.

An intended contract cannot be set up in place of one made.

Rice, Ev. p. 304; *Sanford* v. *Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Ames* v. *Brooks*, 143 Mass. 344; *Morris* v. *Robinson*, 80 Ala 291; 15 Am. & Eng. Enc. Law, p. 645; Pom. Eq. Jur. § 854; Tiedeman, Com. Paper, § 274; Dan. Neg. Inst. § 719; 2 Parsons, Notes & Bills, p. 21; *Fassin* v. *Hubbard*, 55 N. Y. 465.

There is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement.

Renner v. *Bank of Columbia*, 22 U. S. 9 Wheat. 587, 6 L. ed. 167; *Brown* v. *Wiley*, 61 U. S. 20 How. 442, 15 L. ed. 965; *Specht* v. *Howard*, 83 U. S. 16 Wall. 564, 21 L. ed. 348; *Falk* v. *Moebs*, 127 U. S. 597, 32 L. ed. 266.

That the words "without recourse" were by mistake omitted in making an indorsement could not be legally proved for the reason that it would be in contradiction of the legal effect of the indorsement.

Lee v. *Pile*, 37 Ind. 107; Randolph, Com. Paper, § 779; *Wilson* v. *Black*, 6 Blackf. 509; *Blair* v. *Williams*, 7 Blackf. 132; *Campbell* v. *Robbins*, 29 Ind. 271; *Courtney* v. *Hogan*, 93 Ill. 101; *Skelton* v. *Dustin*, 92 Ill. 49; *Mason* v. *Burton*, 54 Ill. 349; *Beattie* v. *Browne*, 64 Ill. 360; *Johnson* v. *Glover*, 121 Ill. 283; *Eaton* v. *McMahon*, 42 Wis. 484; *Charles* v. *Denis*, Id. 56, 24 Am. Rep. 383; *American Emigrant Co.* v. *Clark*, 47 Iowa, 671; *Kern* v. *Von Phul*, 7 Minn. 426, 82 Am. Dec. 105; *Doolittle* v. *Ferry*, 20 Kan. 230, 27 Am. Rep. 166; *Fassin* v. *Hubbard*, 55 N. Y. 465; *Altman* v. *Anton*, 91 Iowa, 612; *Bank of United States* v. *Dunn*, 31 U. S. 6 Pet. 51, 8 L. ed. 316.

King, J., delivered the opinion of the court:

Hyrum Groesbeck and Nicholas H. Groesbeck executed their promissory note in favor of Henry M. Ryan and Alexander Wood. Plaintiff, in his complaint, alleges that he purchased said note, after its indorsement by the payees and P. H. Rasche, for a valuable consideration, and before maturity, and that said indorsement was a part of the consideration inducing the purchase. Defendant Ryan filed a separate answer, the other defendants having defaulted, in which he averred that the defendant Rasche sold and transferred said note to plaintiff, but prior thereto the defendant Ryan specially ordered and instructed him, in case he should sell or transfer said note, that at or before making such transfer he should erase Ryan's name from the back, as an indorser; that Rasche expressly promised and agreed that he would do so, and would not transfer the note with Ryan's indorsement thereon; that, at the time of the sale and transfer of the note to the plaintiff, he was expressly informed of the agreement between Ryan and Rasche, and the said instructions given by the former to the latter; that the plaintiff then purchased and received said note understanding that the transfer was to be without recourse upon the defendant Ryan, and that the latter was not to be responsible as an indorser; and that the plaintiff purchased and took said note with this understanding and agreement. Defendant further avers that, owing to mistake and inadvertence of the plaintiff and Rasche, Ryan's name was not erased from the back of said note as was agreed and understood between them (plaintiff and Rasche). Plaintiff filed a motion to strike out the answer as sham, and for judgment on the pleadings, which was overruled. Afterwards he moved to set aside the order denying this motion, and for judgment on the pleadings, and upon this motion the court entered the following judgment: "It is therefore ordered and adjudged that the order of this court heretofore entered on the 17th day of February, 1894, overruling the plaintiff's motion for judgment on the pleadings, be set aside and vacated; that the answer of the defendant be stricken from the files as sham and frivolous. And it is further ordered and adjudged that the plaintiff do recover of the defendant Henry M. Ryan the sum of," etc.

The assignments of error relate to the action of the court in striking from the files defendant's answer, and present for determination the question of its efficiency as a defense. Respondent insists that, conceding the truth of the averments therein contained, no facts constituting a defense were presented, and no proof would be admissible under it, for the reason that it would tend to vary the terms of the written instrument upon which suit was brought. Appellant's contention is that the rule forbidding parol evidence to contradict written instruments has no application to this case.

The answer is very ambiguous and uncertain, and is clearly demurrable. There is some doubt as to the meaning of various allegations. But a demurrer is very different from a motion to strike a pleading from the files, although the practice is too often indulged in to substitute the latter for the former. An answer which may be subject to demurrer may be invulnerable when assailed by a motion to strike out. Upon a motion of this character the court is to be guided by the statute, which declares that, "in the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." 2 Comp. Laws, § 3228. Keeping in view this just statutory provision, let us ascertain what the answer means. In doing this it should be construed as a whole. Isolated sentences may convey an erroneous idea, and superfluous averments form no part of the pleading, and, upon a motion like that submitted in this case, may be disregarded, though they seem to be at variance with the material and substantial allegations therein. The meaning and intention of the pleader are the paramount considerations in determining the sufficiency of a pleading. Even if the meaning be obscure, and the language expressing it dark and uncertain, the court ought not to strike an answer from the files, if, by fair interpretation, the meaning can be discovered, and the facts alleged present a defense. While there are superfluous allegations in defendant's answer, and others are obscure, we think that, applying a just and liberal interpretation, the meaning of the defendant is obvious. It was to defend upon the ground that defendant Rasche was Ryan's agent, and as such was instructed by his principal (Ryan) to erase or destroy the latter's indorsement of the note prior to the sale, and the further ground that the plaintiff knew of this agency, and the instructions given to the agent, and purchased the note without the indorsement of the defendant. This, we think, is fairly deducible from the answer. Respondent contends that it contains no averments of agency, and that the only construction of which it is susceptible is that Ryan was not to be responsible as an indorser, but that the note was sold and transferred by Rasche with the indorsement thereon, and with the intention that it should remain, but with the understanding that the plaintiff took it without recourse upon Ryan. And one portion of the answer warrants this construction. But a consideration of the preceding allegations, and the one which follows, separated only by a semicolon, reveals the true meaning of the pleader. It is true that the answer contains no direct allegation of Rasche's agency, but it avers that instructions were given him. Agency may be well pleaded without employing the word "agent." But it is doubtful whether the question of agency is involved in this case. If Rasche were acting entirely for himself in vending the note, he had a right to erase Ryan's name prior to the sale; and if he were acting for appellant, and was instructed to destroy the indorsement before disposing of the note, it was his duty to do so. Placing the interpretation upon the answer which we think, in view of the motion, it was entitled to, the question is, Did it present any defense? With the general rule that indorsements in blank written on promissory notes constitute well defined contracts, and parol evidence cannot be admitted to contradict, vary, or explain them, we fully concur. Respondent relies on the case of *Martin* v. *Cole*, 104 U. S. 30, 26 L. ed. 647, in support of his position that no defense was stated by the answer. A broad distinction exists between that case and the one now under consideration. Martin sold and transferred, by indorsement in blank, the promissory note of one Webb to Cole, who sued Martin on his indorsement. Martin alleged in his answer that at the time he indorsed the note to Cole there was an agreement that Martin should not be held liable on the indorsement, but that his name was written as an indorser solely to enable Cole to sue the maker in his own name, and that without such agreement he would not have signed his name on the back. Evidence in support of these averments was rejected. There can be no doubt of the correctness of this ruling. Martin intended to indorse the note, and transferred it intending that his name should be on the note. Under such circumstances the law closes his mouth, and forbids testimony of an oral contemporaneous agreement *dehors* the indorsement. But if his indorsement was there by mistake, or if, prior to the transfer of the note, he attempted to erase it, but failed, and disposed of the note under the belief that the erasure had been consummated, and the purchaser was cognizant of such facts, and took the note in view of them, an entirely different case would have been presented.

Respondent's counsel discuss the case at bar upon the hypothesis that appellant designed the note to be transferred accompanied by his indorsement, but with an agreement of nonliability as an indorser. If such had been the case their position would have been impregnable. If Ryan's instructions to Rasche were that the note should be sold with his name thereon as an indorser, but with the understanding that the indorsee should take it without recourse, then the case would come within the rule announced in *Martin* v. *Cole*, and he would have no standing in court. The question presented is not what the parties intended the indorsement to mean, or what they designed the legal effect to be, but whether, as between the appellant and respondent, the former's indorsement had any existence whatever; in other words, Did the plaintiff purchase the note with the defendant's name thereon? If he did not purchase defendant's indorsement, he cannot recover, and the answer states a valid defense. And whether the failure to erase defendant's name resulted from fraud, or the negligence or mistake of Rasche, it is immaterial. So long as the note was in defendant's possession or under his control, he had the right to destroy his indorsement. If he trusted his agent to erase it, and he omitted to do so, but transferred after fully advising the transferee of

his instructions and the design of his principal, the purchaser takes the note without the indorsement, though the name appears thereon; and parol evidence is admissible, not to vary or contradict the indorsement, but to prove that there is no indorsement,—that the contract of indorsement was never consummated. A promissory note in the hands of the payee, or a holder with notice, may be shown by parol evidence to have been paid in full or in part. The written contract is not varied or changed, but it is shown not to have an existence, or that it has been wholly or partially annulled or destroyed as a contract. While not directly in point, the case of *Burke* v. *Dulaney*, 153 U. S. 228, 38 L. ed. 698, is in line with the views herein expressed. The court says: "In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not,—except in a named contingency,—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations." And in the case at bar parol evidence offered under the answer would prove that no contract of indorsement was ever concluded. It would destroy the prima facie evidence of the existence of an indorsement, but would not vary or contradict it, and would be of like character as evidence tending to show the "contingency never happened. . . . Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." *Pym* v. *Campbell*, 6 El. & Bl. 370. Parol evidence is admissible to prove that an indorsement upon a promissory note is not a consummated contract, and to relieve the indorser, where the note had been converted by the plaintiff, after indorsement, and he had paid the indorser, who was payee, the face of the same. *Haas* v. *Sackett*, 40 Minn. 53, 2 L. R. A. 449. Suppose a principal should execute a bill of sale of an animal, leaving a blank for the vendee's name, and include therein a warranty, and place the instrument and animal in the hands of his agent to dispose of, and, prior to the sale, instructs his agent to erase from the instrument the portion containing the warranty, and to deliver the bill of sale to the purchaser of the animal, and the agent, before the sale, informs the vendee of his instructions, and they agree that the warranty shall be eliminated, but it is neglected, can it be contended that the principal would be liable on the warranty, and, if sued, could not produce parol evidence that it never was consummated as a contract between them,—in other words, to destroy it? Again, suppose the payee of a note, through mistake, should indorse it, and thereafter, in ignorance of the fact, sell it to a person who was likewise ignorant of the indorsement, and dealt with the payee, and purchased it, relying alone on the maker, and, upon discovering the indorsement, should bring suit against the indorser, could it be seriously contended that parol evidence offered to show the agreement between the parties, and the manner in which the name was placed upon the note, would be inadmissible? It is unnecessary to advert to the well-settled rules permitting parol evidence, in cases of fraud, mistake, etc., as this case presents a different question. We are of the opinion that it was error to strike the defendant's answer from the files.

But respondent contends, even if the court erred, its action cannot be reviewed by this court, for the reason that the appeal was taken on the judgment roll alone, and "its proceedings under the several motions are not presented." It would be a work of supererogation, in view of the wealth of learning found in the decisions of California and other states having a procedure act similar to ours, and of the lucid provision of our Code, to discuss the province of bills of exception and statements on appeal. Of course, this appeal is to be determined solely upon the questions presented by the judgment roll. The Code of Civil Procedure provides "that the pleadings, a copy of the verdict of the jury or findings of the court or referee, all bills of exceptions taken and filed, and a copy of the order made on demurrer, or relating to a change of parties and a copy of the judgment" shall constitute the judgment roll. 2 Comp. Laws, p. 300. And, though a pleading is striken from the files, it is still a part of the judgment roll. *Abbott* v. *Douglass*, 28 Cal. 299. And an order of the court striking out any pleading or rendering judgment is "deemed to have been excepted to." 2 Comp. Laws, p. 291. In this case the judgment recites that the former order of the court was vacated, and that the defendant's answer was striken from the files as sham and frivolous. The error complained of clearly appears in the judgment roll. In order to consider the alleged errors of the trial court, nothing need be brought into the record except that which is not supplied by the judgment roll. What was the necessity of a bill of exceptions? It would only duplicate the record already before the court. "The judgment roll itself is a record for appeal" (*Wetherbee* v. *Carroll*, 33 Cal. 553), and there is not only no necessity for further record, but it would be superfluous, and incumbering the record, to supply matters appearing in the roll. In the case of *Zeile* v. *Moritz*, 1 Utah, 285, a demurrer to the answer had been sustained, and judgment rendered for the plaintiff. The appeal was taken upon the judgment roll. The court says: "The judgment in this case discloses the action taken by the court on the demurrer. The recitals in it bring before us all the facts necessary to enable the court to determine whether there was error or not; that is the sufficiency of the answer. They accomplished all that could be accomplished by a statement." Errors in pleading can be reviewed on appeal from the judgment upon the judgment roll. *Putnam* v. *Lamphier*, 36 Cal. 158; *Jones* v. *Petaluma*, Id. 232; *Smith* v. *Lawrence*, 38 Cal. 28, 99 Am. Dec. 344. In the case last cited a demurrer

to the complaint was sustained, and no exception taken. Upon appeal the court says, "Neither a bill of exceptions nor a statement is required, where the record already presents the question of law and the decision of the court. The case of *Abbott* v. *Douglass*, *supra*, cited by respondent's counsel, sustains the view we have announced. After witnesses had testified for plaintiff and defendants, the court "ordered that the answer of C. D. Douglass . . . be . . . stricken out; and that thereupon the default of said Doulgass be entered; and the plaintiff . . . have judgment against said defendant . . . for the sum of, etc. The appeal was taken from the judgment, and none of the grounds for striking out the answer were disclosed by the judgment roll. The court held, however, that the recitals in the judgment sufficiently indicated the errors complained of, and considered the case fully upon the merits of the pleadings, and held, among other things, that, the answer was not sham and frivolous, and reversed the case. The many cases collected in the respondent's brief, and relied on to vindicate his contention as to the abortiveness of the appeal, are clearly distinguishable from the case under consideration.

The judgment of the lower court is reversed, and the cause remanded, with directions that the defendant's answer be reinstated.

Bartch and **Smith**, JJ., concur.

NEW YORK COURT OF APPEALS.

Charles S. MOTT *et al.*, *Appts.*,
v.
William UNDERWOOD *et al.*, *Respts.*

(148 N. Y. 463.)

1. **A tenant in common of an oyster bed** cannot deprive his cotenants of their right to take natural oysters therefrom by dredging the land and placing oyster shells and seed oysters thereon, although these must be slightly disturbed by taking the natural oysters.
2. **An injunction will not be granted** when it will operate inequitably or contrary to the real justice of the case.

(February 18, 1896.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Suffolk County Circuit in favor of defendants in an action brought to recover damages for an alleged trespass upon plaintiffs' oyster beds. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. A. Spear,** for appellants:

Injunction is a proper remedy in this action. *Wright* v. *Syracuse, B. & N. Y. R. Co.* 49 Hun, 445, Affirmed 124 N. Y. 668; High, Inj. § 739.

Injunction will lie where a legal remedy is wholly inadequate.

Corning v. *Troy Iron & N. Factory*, 40 N. Y. 191; *Mulry* v. *Norton*, 100 N. Y. 424, 53 Am. Rep. 206; *Poughkeepsie Gas Co.* v. *Citizens' Gas Co.* 89 N. Y. 493; *New York C. & H. R. R. Co.* v. *Rochester*, 127 N. Y. 591.

Also to restrain a trespass where there is vexation from repeated or continued trespasses, and where the wrongful acts continued or threatened to be continued would occasion a multiplicity of suits to recover damages.

Mohawk & H. R. Co. v. *Artcher*, 6 Paige, 83; *Johnson* v. *Rochester*, 13 Hun, 285; *Meyer* v. *Phillips*, 97 N. Y. 485, 49 Am. Rep. 538; *Belknap* v. *Trimble*, 3 Paige, 577; *Pappenheim* v. *Metropolitan Elev. R. Co.* 128 N. Y. 436, 13 L. R. A. 401; *Curtis* v. *Keesler*, 14 Barb. 511; *Williams* v. *New York C. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651.

So, also, where the continuance of the trespass would cause irreparable injury.

Fox v. *Fitzsimons*, 29 Hun, 574; *Baron* v. *Korn*, 51 Hun, 401, 127 N. Y. 224.

So, also, where the irreparable injury results from the irresponsibility of the defendants.

Spear v. *Cutter*, 5 Barb. 486; *Johnson* v. *White*, 11 Barb. 197; *Lacustrine Fertilizer Co.* v. *Lake Guano & F. Co.* 82 N. Y. 476; *Corning* v. *Troy Iron & N. Factory*, 40 N. Y. 191; *Broiestedt* v. *South Side R. Co.* 55 N. Y. 220.

A bed planted where natural oysters may have been theretofore is lawfully planted, and must be protected. The question of natural oysters is immaterial.

Hand v. *Newton*, 92 N. Y. 88; *Robins* v. *Ackerly*, 91 N. Y. 98.

Possession by one tenant in common is the possession of the other, and the taking of the whole profits by one does not amount to an ouster of his cotenant; the possession of one is presumed to be in support of the common title.

4 Kent, Com. 270; *Jackson, Bratt*, v. *Tibbits*, 9 Cow. 241.

Where one tenant in common takes possession and rents the common property, or a portion of it, his cotenant may call him to account for rents received, or he may have partition.

1 Rev. Stat. 750, § 9; Code Civ. Proc. § 1666; *Green* v. *Putnam*, 1 Barb. 500; *Scott* v. *Guernsey*, 60 Barb. 163, 48 N. Y. 106; *Kingsland* v. *Chetwood*, 39 Hun, 602; *Roseboom* v. *Roseboom*, 15 Hun, 309; *Joslyn* v. *Joslyn*, 9 Hun, 388; *Dresser* v. *Dresser*, 40 Barb. 300; *Woolever* v. *Knapp*, 18 Barb. 265.

The Smiths had an equal right of possession with the town, and they took actual peaceable possession of the whole 70 acres; they had the right to acquire this possession in a peaceable manner, and their possession was lawful.

Wood v. *Phillips*, 43 N. Y. 152; *Hyatt* v. *Wood*, 4 Johns. 150, 4 Am. Dec. 258; *Mumford* v. *Brown*, 1 Wend. 52, 19 Am. Dec. 461; *Erwin* v. *Olmsted*, 7 Cow. 229; *McGarrell* v. *Murphy*, 1 Hilt. 132; Freem. Cotenancy & Partition, § 253.

It is the right of one tenant in common to

NOTE.—As to rights in oyster fisheries, see, in connection with the above case, that of Bradshaw v. Lankford (Md.) 11 L. R. A. 582, and *note*.

enter upon any portion of the common property not occupied by the other, and keep possession until actual partition, and his cotenant may not enter upon the portion of which he has actual possession. He cannot be interfered with by one having no better right of possession than himself.

King v. *Phillips*, 1 Lans. 421; *Erwin* v. *Olmsted*, *supra*; *Keay* v. *Goodwin*, 16 Mass. 1; 1 Washb. Real Prop. 685, 686; *Peabody* v. *Minot*, 24 Pick. 329.

One tenant in common may license a third person to cut timber on the ground owned in common, and the license is good and confers title to the timber cut by such person; the remedy of the cotenant is against the one giving the license to recover his share of the value of the timber cut.

Baker v. *Wheeler*, 8 Wend. 505, 24 Am. Dec. 66; *Foster* v. *Magee*, 2 Lans. 182; *Hastings* v. *Hastings*, 110 Mass. 285; 1 Washb. Real Prop. 693-695, note 6; *Miller* v. *Miller*, 7 Pick. 133, 19 Am. Dec. 264; *Brown* v. *Wellington*, 106 Mass. 318, 8 Am. Rep. 330.

One tenant in common who sows oats on the common land, and when ripe cuts them, and another tenant in common then carries them away, may maintain an action for conversion against the one taking them away; he had a right to cultivate the ground and harvest the oats.

Le Barren v. *Babcock*, 46 Hun, 598.

Mr. **Wilmot M. Smith,** with *Mr.* **Nicoll Floyd,** for respondent:

Each cotenant is entitled to be in possession and to use every part of the common property, so long as he does not exclude his cotenant.

Freem. Cotenancy & Partition, § 286; *Com.* v. *Lakeman*, 4 Cush. 597; *Carpentier* v. *Webster*, 27 Cal. 544; *Zapp* v. *Miller*, 109 N. Y. 57; *Joslyn* v. *Joslyn*, 9 Hun, 388; *Woolever* v. *Knapp*, 18 Barb. 265; *Wilcox* v. *Wilcox*, 48 Barb. 327; *Wood* v. *Phillips*, 43 N. Y. 152; *LeBarren* v. *Babcock*, 46 Hun, 598, 122 N. Y. 153, 9 L. R. A. 625; *McCabe* v. *McCabe*, 18 Hun, 154; *Scott* v. *Guernsey*, 48 N. Y. 124.

One tenant in common cannot maintain an action for trespass against his cotenant for entry upon the common property if real, or taking it, if personal.

Abbott, Trial Ev. p. 636; *DuBois* v. *Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; Malone Real Prop. Trials, 40, and cases cited; Sedgwick & Wait, Trial of Title to Land, § 276; 4 Kent, Com. 370; 17 Am. & Eng. Enc. Law, p. 122; *Jones* v. *Cohen*, 82 N. C. 75; *Bishop* v. *Blair*, 36 Ala. 80; *Doe*, *Halford*, v. *Tetherow*, 2 Jones, L. 393; *Strong* v. *Colter*, 13 Minn. 82; *Yamhill Bridge Co.* v. *Newby*, 1 Or. 173.

Martin, J., delivered the opinion of the court:

On the 1st day of July, 1891, a large portion of Great South Bay, in the county of Suffolk, N. Y., was owned by Helen T. and William S. Smith, the infant heirs of Robert R. Smith, and the town of Brookhaven, under its corporate name of the "Trustees of the Freeholders and Commonalty of the Town of Brookhaven," as tenants in common. The heirs of Robert R. Smith and the town of Brookhaven each owned an undivided one-half. The entire property contained about 40,000 acres of land under water, nearly all of which was suitable for oyster culture. Much of it was capable of nourishing and maturing oysters when planted upon it, and some of it, known as "oyster beds," produced spontaneously both marketable and seed oysters. The oyster beds were much the most valuable part of the land. On or about the day mentioned, Cornelia T. Smith, as widow of Robert R. Smith, and Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. and William S. Smith, made a lease to the plaintiffs of about 70 acres of the land, for the purpose of planting, cultivating, and growing oysters thereon. The lease was for the term of ten years, at an annual rent of $175. The premises leased was an oyster bed known as the "Reef and Swash Bed." It was equaled in the quantity and quality of oysters it produced by but few beds in the bay. Its yield was, with few exceptions, regular each year, and comprised both seed and marketable oysters. The portion known as the "Reef" contained about 35 acres, and the "Swash" about the same. The lease purported to rent the whole of the 70 acres. In it the oysters planted or growing upon the premises were excepted from the covenant therein for the peaceable possession and enjoyment of the premises. Upon the delivery of the lease, the plaintiffs staked and buoyed the premises. During the season from the fall of 1891 to the spring of 1892, they permitted the baymen to go upon the beds, and take all the natural oysters they could obtain, and they took substantially all that could be taken at the time. In the spring of 1892, marketable oysters were growing thereon, and the usual amount was taken from the premises. In September of that year, seed and native marketable oysters of two and three years' growth were growing there to the usual extent. In June, 1892, the plaintiffs resurveyed the premises, reset the stakes and buoys thereon, and dredged the reef. In the latter part of that month, and early in July, the plaintiffs spread 1,100 bushels of shells and 100 bushels of Virginia seed oysters over the whole premises. The quantity of shells required to properly cover the premises for the propagation of oysters was 35,000 bushels. On September 1 there was a fine set of young oysters over the whole of the premises, which was largely the result of the plaintiffs' cultivation. The defendants, at the times hereinafter mentioned, were inhabitants of the town of Brookhaven; as such, were permitted by the town to take oysters from the premises; and all the defendants but Abram Smith were duly licensed by the town to take oysters from the undivided half of the land under water in the South Bay belonging to the town, for which they paid a license fee. Between the 1st and 19th of September, 1892, the defendants entered upon the premises leased to the plaintiffs, and took and disturbed, to a slight extent, the oysters that had been planted by the plaintiffs. All the oysters proved to have been taken by any of the defendants from the leased premises were marketable oysters of two or three years' growth, and it was impossible to gather the natural product from the premises without, to some extent, taking or disturbing the oysters planted by the plaintiffs. The defendants were men of small means, and unable to re-

spond in damages to the plaintiffs. The town, for many years before this action, and up to the time of this trial, had purposely permitted the premises in question and other beds in South Bay to be used by the inhabitants of the town for taking seed and marketable oysters as a means of subsistence, and had refused to lease to any one the exclusive use of any of the oyster beds. When the lease to the plaintiffs was given, they had notice and full knowledge that it was given against the will of the town of Brookhaven. The oysters taken by the defendants up to September, 1892, were taken for market purposes. When the lease was given, the town was not cultivating the premises. The foregoing are substantially the facts found by the court.

As conclusions of law, the court held that the premises so leased were held and owned by the town of Brookhaven and the heirs of Robert R. Smith as tenants in common; that the lease to the plaintiffs was valid; that the plaintiffs possessed the rights in common in the property in question which the heirs of Robert R. Smith had, and the defendants possessed those which the town of Brookhaven had, and neither possessed any other nor different rights; that, under the lease, the plaintiffs had a right to take the natural oysters from the premises, but that neither of the cotenants could legally exclude the other from entry thereon or from taking the natural product thereof, that the planted oysters growing upon the premises between the 1st and 19th days of September, 1892, were the property of the plaintiffs, but that they could not legally prevent the defendants from entering upon the premises or from taking the natural growth of oysters thereon, and directed that the complaint be dismissed, with costs.

By this action the plaintiffs sought to enjoin the defendants from entering upon the premises, and taking or disturbing the oysters growing thereon, and to recover damages for such injury as they had sustained by reason of the acts of the defendants in disturbing the oysters planted by them. As there was no proof of the extent of any injury sustained by the plaintiffs, the action was in effect one for injunction. The findings of fact made by the learned trial judge and affirmed by the general term are fully sustained by the evidence, and therefore the question presented upon this appeal is whether, upon the facts as found, the court was justified in directing a judgment for the defendants.

Both parties admit that the relation which existed between them was that of tenants in common, and consequently there was a unity in their right of possession, as that is the very nature of the estate. The parties were tenants in common of the natural oysters, and the defendants, as such, had the same right as the plaintiffs to enter upon the premises and remove them. As to that, there is no dispute or controversy. But the appellants contend that, having dredged the land, and placed oyster shells and seed oysters upon it, they are entitled, not only to prevent the defendants from interfering with the oysters thus planted, but also to enjoin them from taking the natural ones, because in doing so they would, to a slight extent, disturb those planted by the plaintiffs. That the oysters taken by the defendants were chiefly of two or three years' growth, and therefore not the oysters planted by the plaintiffs, the court has found and the evidence establishes. The most that can be said is that the defendants, in removing the oysters as to which they were tenants in common, have slightly disturbed the oysters planted by the plaintiffs. The precise question presented is whether the plaintiffs could deprive the defendants of their right to take any of the natural oysters by scattering a few seed oysters over the premises in such a manner as to render it impossible to remove the natural ones without disturbing those planted. If they could not, then the decision of the courts below is right, and should be affirmed.

The appellants rely upon the case of *Le Barron* v. *Babcock*, 122 N. Y. 153, 9 L. R. A. 625. We find nothing in that case which upholds their claim. In the *Le Barron Case* the land was held by the plaintiff and the party represented by the defendant as tenants in common. The plaintiff was in peaceable possession, with the acquiescence of his cotenant. The oats and hay that were taken by the defendant had been severed from the freehold by the plaintiff, and were personal chattels. In that case it was said that when, in the due course of husbandry, the oats and hay were peaceably and in good faith severed from the common estate where they were grown, the title vested in the cotenant who had severed them. It was also said that, if the oats and hay were owned by the plaintiff and Mrs. House, it was not a conversion of them for the defendant, acting by her authority, to draw them away, and it was only upon the theory that the plaintiff owned them in his own right that the defendant was held liable. Neither the defendants nor their grantors ever acquiesced in the plaintiffs having any exclusive or other possession of this land, except such as they had as tenants in common with them. Nor were the oysters taken severed from the freehold by the plaintiffs, so that they became personal chattels. The land and the oysters thereon belonged to the tenants in common, and neither possessed any such title to the oysters, planted or natural, as would enable him to maintain an action for trespass or conversion against his cotenant for taking them from the land thus held in common. It is difficult to discover any principle which would justify a court of equity in restraining the defendants from taking the oysters which they had a right to remove, simply because in doing so some slight injury might result to those the plaintiffs had strewn over the lands. As the rights of tenants in common are equal in the use and enjoyment of the estate, it is a general rule that a court of equity will not interfere between them, even to restrain waste, unless it be of a malicious character, or so unusual and unreasonable as to constitute a wanton destruction of the estate. Freem. Cotenancy & Partition, § 323; High, Inj. § 692; Beach, Mod. Eq. Jur. § 735; Smith, Eq. 418. Another well-established rule of equity jurisprudence is that an injunction will not be granted when it will operate inequitably or contrary to the real justice of the case. *Troy & B. R. Co.* v. *Boston, H. T. & W. R. Co.* 86 N. Y. 107, 125.

In this case there is no evidence that the defendants' acts in removing the oysters which were the natural products of the land were malicious, unusual, or unreasonable, while it does show that, if an injunction was granted, it would operate inequitably and contrary to real justice by depriving the defendants of their admitted rights. There is nothing to show any disposition on the part of the defendants to unnecessarily interfere with or destroy the seed oysters planted by the plaintiffs. The only interference upon their part has been such as could not be avoided without an entire surrender of their rights to the use of the property.

Under these circumstances, we are clearly of the opinion that the trial court properly dismissed the plaintiffs' complaint upon the merits and that *the judgment of the General Term should be affirmed*, with costs.

All concur.

CALIFORNIA SUPREME COURT.

W. R. DAILEY *et al.*, Petitioners,
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, *Respt.*

(.....Cal.....)

The production in a theater of a play based upon the facts of a criminal case then on trial, although it may interfere with the administration of justice and deprive the accused of a fair trial, and may constitute a punishable contempt, cannot be restrained by injunction, under Const. art. 1, § 9, declaring: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right."

(*McFarland and Temple, JJ., dissent.*)

(March 24, 1896.)

PETITION for a writ of certiorari to review the action of respondent in directing petitioners to cease and refrain from giving a public performance of a certain play. *Order annulled.*

The facts are stated in the opinions.

Mr. **Carroll Cook,** for petitioners:

The order complained of was an attempt upon the part of the superior court to interfere with the rights guaranteed to petitioners by Cal. Const. art. 1, §§ 1, 9, 13, 14.

Every citizen has the absolute right unrestrained to express his sentiments upon any and all subjects, being responsible only for the abuse of that right.

Ex parte Barry, 85 Cal. 607; *Ex parte Hollis*, 59 Cal. 413; *People, Mulford*, v. *Turner*, 1 Cal. 151, 52 Am. Dec. 295; *People, Field*, v. *Turner*, 1 Cal. 154.

The order is in violation of property rights protected by said Constitution.

Cooley, Const. Lim. 3d ed. 488, 1st ed. 417.

So far as the legislature could do so, it has by the positive letter of the law provided that such an act would not be in contempt of court and could not be made such by a court.

Ex parte Bollman, 8 U. S. 4 Cranch, 93, 2 L. ed. 560; *Baker* v. *Chisholm*, 3 Tex. 158; *Ginn* v. *Rogers*, 9 Ill. 134; *Barry* v. *Mercein*, 46 U. S. 5 How. 120, 12 L. ed. 77.

When jurisdiction is by the Constitution conferred upon a particular court the legislature may prescribe the mode and manner by which it is to be exercised, and the regulations of the legislature will be obligatory.

Gray v. *St. Louis, I. M. & S. R. Co.* 54 Mo. App. 672; *Broadwell* v. *People*, 76 Ill. 555; *State, Ponchartrain R. Co.*, v. *Judge of 7th Dist. Ct.* 22 La. Ann. 567; *Ex parte Harker*, 49 Cal. 466.

Where a superior court exercises a special statutory and extraordinary power it stands upon the same ground and is governed by the same rule as courts of limited or inferior jurisdiction, and its acts will be invalid unless the authority upon which they are founded has been strictly pursued.

Haywood v. *Collins*, 60 Ill. 333; *Kansas City,*

NOTE.—The decision that an injunction cannot be granted to prevent an improper publication, even if it constitutes a punishable contempt of court and may interfere with the administration of justice by preventing a fair trial, which the court in the present case bases directly upon the constitutional declaration of a right freely to speak, write, and publish sentiments on all subjects, is believed to be without any direct precedent, although, as the opinion recites, the general understanding of constitutional writers seems to interpret that constitutional provision as a guaranty of a right to publish without any previous restraint or license. But several cases have sustained the right to an injunction against publication of false statements to injure property or business. These are referred to in the *note* to Flint v. Hutchinson Smoke Burner Co. (Mo.) 16 L. R. A. 243, but in none of these cases was this constitutional provision discussed. Considering the dissent of two of the judges in the above case, it is doubtful if the decision will be accepted unquestioningly as the true doctrine respecting the constitutional guaranty of the freedom of speech and the press. It may be considered certain that this constitutional guaranty is not limited to a freedom from censorship in advance of publication, and that it might easily be violated by laws attempting to punish persons for the expression of their honest sentiments on any subject. It may also be important to a proper interpretation of this constitutional guaranty to distinguish between "sentiments," which it declares may be freely expressed, and false statements of facts or obscene descriptions which involve no expression of sentiments. The court in the above case assumes that the theatrical representation involved a speaking of the "sentiments" of the author. Even if this is conceded, it would seem doubtful if the mere publication of a false statement of alleged fact involving no comment, criticism, or expression of opinion could be called a speaking of "sentiments," or come within this constitutional guaranty. B. A. R.

St. J. & C. B. R. Co. v. *Campbell*, 62 Mo. 588; *Denning* v. *Corwin*, 11 Wend. 651; *Rochester* v. *Roberts*, 29 N. H. 362; *Carleton* v. *Washington Ins. Co.* 35 N. H. 166; *Anderson* v. *Hamilton County Comrs.* 12 Ohio St. 643.

A court has no power to do anything which is not authorized by law.

Fitzhugh v. *Custer*, 4 Tex. 395, 51 Am. Dec. 728; *Fraser* v. *Freelon*, 53 Cal. 644.

The power of a court to punish for an alleged contempt of its authority, though undoubted, is, in its nature, arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law.

Batchelder v. *Moore*, 42 Cal. 414.

The statute in this state in relation to contempt of court is a limitation upon the power formerly exercised by courts to punish for contempt.

Galland v. *Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Ex parte Kearny*, 55 Cal. 229.

A court of equity cannot restrain the publication of libelous matter in advance of its publication.

Brandreth v. *Lance*, 8 Paige, 24, 34 Am. Dec. 368; *Shook* v. *Daly*, 49 How. Pr. 368; *Southey* v. *Sherwood*, 2 Meriv. 434, 438, 441; *Seeley* v. *Fisher*, 11 Sim. 582.

Messrs. **A. W. Thompson, William S. Barnes, John H. Dickinson, Eugene N. Deuprey,** and **Edgar D. Peixotto** for respondent.

Garoutte, J., delivered the opinion of the court:

One Durrant was upon trial in the city of San Francisco, charged with murder, and while the jury was being impaneled, the petitioner, Dailey, advertised by posters and newspapers that he would produce in a certain theater in said city of San Francisco a play entitled "The Crime of a Century." Thereupon, Durrant presented an affidavit to the court wherein his trial was then pending, setting forth that said play was based upon the facts of his case as established at the preliminary examination and the coroner's inquest, and that the production of said play during the progress of his trial would be an interference with the administration of justice, and deprive him of a fair and impartial trial. The affidavit was full and complete as to details, but we see no purpose to be subserved by a further statement of the allegations therein set out. Upon the presentation of the affidavit the superior court made an order directing this petitioner, Dailey, to desist and refrain from giving any public performance of said play, and further ordered him to cease from advertising the same. The present proceeding is one of certiorari to review the action of the court in making the aforesaid order, it being insisted that the trial court thereby exceeded its power and jurisdiction. The record before us incidentally develops that this order was subsequently served upon the petitioner, that he defied the power of the court in making it, produced the play, and was adjudged guilty of contempt; but with those matters we are not now concerned.

The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by § 9, art. 1, of the Constitution of this state. That section provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the use and abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the Constitution as to freedom of speech varies somewhat from that of the Constitution of the United States, and also more or less from the provisions of many state Constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted. The meaning of this provision, or others of similar import, has been declared with unanimity by all commentators upon the law. Blackstone declares that the liberty of the press consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. He says: "Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done before and since the Revolution of 1688, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learn-

ing, religion, and government. . . . Thus the will of individuals is still left free. The abuse only of that free will is the object of legal punishment." Story, in his work upon the Constitution, (§ 1885) declares: "Indeed, the liberty of the press, as understood by all England, is the right to publish without any previous restraint, or license; so that neither the courts of justice, nor other persons, are authorized to take notice of writings intended for the press, but are confined to those which are printed." De Lolme, in his Constitution of England (page 872), declares: "Liberty of the press consists in this: that neither courts of justice nor any other judges whatever are authorized to take notice of writings intended for the press, but are confined to those which are actually printed." In *Ex parte Barry*, 85 Cal. 607, the foregoing doctrine is reiterated and approved.

It would seem that the jurisdiction here attempted to be exercised would essentially belong to a court of equity. Yet, even if this proceeding for a restraining order had been inaugurated in such a forum, it would have signally failed. In Story, Eq. Jur. § 948*a*, the author says: "But the utmost extent to which courts of equity have gone in restraining any publication by injunction has been upon the principle of protecting the rights of property in the book or letters sought to be published. They have never assumed, at least since the destruction of the court of star chamber, to restrain any publication which purports to be a literary work upon the mere ground that it is of a libelous character, and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication." And this principle was declared by the learned chancellor in *Brandreth* v. *Lance*, 8 Paige, 26, 34 Am. Dec. 368, wherein he said: "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be intrusted to any tribunal, consistently with the principles of a free government." After referring to the court of star chamber, he proceeds: "Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation." In effect, the order made by the trial court in this case was one commanding the petitioner not to commit a contempt of court, and such a practice is novel in the extreme. The court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.

We conclude that the order made by the trial court was an attempted restraint upon the right of free speech, as guaranteed by the Constitution of this state, and that petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right.

For the foregoing reasons, *the order is annulled*, as being beyond the power of the court to make.

We concur: **Beatty**, Ch. J.; **Harrison**, J.; **Van Fleet**, J.; **Henshaw**, J.

McFarland, J., dissenting:

I dissent. All the provisions of the Constitution must be construed together, and effect given, when possible, to each. The one section (9) of article 1, which provides that "every citizen may freely speak," etc., is to be construed in view of that large and important part of the Constitution by which a judicial department of the government is created, and all the usual and necessary powers of courts given to the tribunals established under it. One of the most essential of these powers of a court is to protect itself against unlawful intrusion upon its orderly conduct of business, and to insure litigants in a pending proceeding the free and unembarrassed administration of justice. In the case at bar, in a court of record established by the Constitution, a trial was gravely progressing in which a man's life was at stake, and an act was about to be done which it is admitted "would be an interference with the administration of justice, and deprive him of a fair and impartial trial." Is it possible that a court is powerless to protect a defendant in a case pending before it from an act that would deprive him of a fair and impartial trial? In my opinion the right given by section 9 of article 1 not to be stopped beforehand from speaking slanders and writing libels, does not include the right not to be stopped from interfering with a pending proceeding in a court, and preventing a party thereto from having a fair and impartial trial. The right to slander and libel individuals, and the right of a court to prevent interference with the course of justice in a pending trial, are not inconsistent and may both stand together. And I think that the cases where it has been held that a threatened publication could not be enjoined will be found to be nearly all cases of threatened libels against individuals or property, and not cases where there was a threatened interference with a pending proceeding in a court, and an attempt to deprive a party thereto of a fair and impartial trial. I think that the order under review should be affirmed.

I concur: **Temple**, J.

OHIO SUPREME COURT.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*, *v.* Charles B. SNELL.

(.....Ohio.....)

***1. The introduction of new forms of vehicles,** and of new motive power on street railways, has not impaired the right of the foot passenger to safe passage at street crossings. It is the duty of drivers of vehicles, whether wagons, wheels, or cars, to so regulate the speed thereof, and give such warning of approach, at whatever cost of pains and trouble on their part, as that the footman, using ordinary care himself, may, in the absence of unavoidable accident, cross in safety.

2. When a street-railway company operating a double-track road discharges a passenger at a street crossing, having reason to know that such passenger, in order to reach his destination, must cross its tracks, it is the duty of such company to regard the rights of the passenger while on the crossing, and to so control the speed of cars on its tracks, and give such warning of their approach, as will reasonably protect the passenger from injury. Omission of such duty is negligence, and a person injured by reason thereof may maintain an action against the company for damages unless prevented by his own negligence contributing to the injury.

3. A person about to cross the track of a street railway at a street crossing is bound to exercise care proportioned to the danger to be avoided and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances surrounding him; but it is only ordinary care which is required, that which might reasonably be expected of persons of ordinary prudence. Ordinary care does not require him to anticipate negligence on the part of those operating the railway. And while he should use his faculties for his own protection, it is not negligence *per se* for him to omit to look in both directions for the approach of a car. Whether it is or is not negligence depends upon the circumstances.

4. Where the evidence of the plaintiff shows actionable negligence on the part of the company, and the question of contributory negligence of the plaintiff depends upon a variety of circumstances from which different minds may reasonably arrive at different conclusions as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions; and it is error in such case for the court to direct a verdict for the defendant.

5. And where in such case the question as to whether or not the plaintiff exercised his faculties of seeing and hearing before attempting to cross is in issue, and the oral evidence tends to show that he did, while circumstantial evidence tends to disprove that claim, a condition is presented involving such variety of circumstances as makes it proper to submit the question to the jury.

*Headnotes by the COURT.

NOTE.—As to the care required in attempting to cross an electric railway track in the street, see, in connection with the present case, that of Newark Pass. R. Co. v. Block (N. J.) 22 L. R. A. 374.

(February 25, 1896.)

ERROR to the Circuit Court for Hamilton County to review a judgment reversing a judgment in favor of defendant in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Spear, J.**:

Action below was by Snell against the street railway company, to recover for personal injuries received by being struck by a moving car of the company. In the common pleas, at the conclusion of the plaintiff's testimony, a motion by the company to direct a verdict in its favor was sustained, and a judgment on the verdict so rendered was entered. This judgment was reversed by the circuit court. The company asks a reversal of that judgment.

Messrs. **Paxton, Warrington, & Boutet, Kittredge & Wilby,** for plaintiff in error:

Obstructions to the view of a person about to cross a track, instead of furnishing an excuse, impose greater care, and this, too, at regular crossings where persons have a right to cross the tracks.

Horn v. *Baltimore & O. R. Co.* 54 Fed. Rep. 301, 6 U. S. App. 381; *Pittsburg, C. & St. L. R. Co.* v. *Peters,* 1 Ohio C. C. 34; *Pennsylvania Co.* v. *Morel,* 40 Ohio St. 338.

The iron tracks in the street over which plaintiff was stepping and towards which he was walking were notice and warning to him of danger.

Elliott v. *Chicago, M. & St. P. R. Co.* 150 U. S. 245–248, 37 L. ed. 1068–1071.

The obvious weight of rapid transit electric street cars, and the consequent difficulty of stopping them quickly, necessarily render their operation so dangerous as to require the application of the same rule to persons about to cross or occupy the tracks, as the one which is applied to persons approaching steam railroad crossings over public highways.

Hickman v. *Union Depot R. Co.* 47 Mo. App. 65; *Smith* v. *Citizens' R. Co.* 52 Mo. App. 36; *Fritz* v. *Detroit Citizens' Street R. Co.* (Mich.) 62 N. W. 1007; *Boerth* v. *West Side R. Co.* 87 Wis. 288; *Ward* v. *Rochester Electric R. Co.* 43 N. Y. S. R. 84; *Carson* v. *Federal Street & P. V. R. Co.* 147 Pa. 219, 15 L. R. A. 257; *Creamer* v. *West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *McGee* v. *Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300.

Messrs. **John W. Wolfe** and **Thomas L. Michie,** for defendant in error:

Stepping on to the track of a street railway, whether the cars thereon are horse cars or grip cars, without first stopping to look to see whether a car is approaching, is not, as matter of law, and without any regard to surrounding circumstances, negligence, but the character of such action is a question of fact for the jury. Running street cars at rapid speed (although

See also 34 L. R. A. 350; 36 L. R. A. 215; 37 L. R. A. 378; 38 L. R. A. 708; 45 L. R. A. 169, 671; 46 L. R. A. 457.

not exceeding that allowed by ordinance) without signal or warning over a sidewalk crossing, where a car bound in the opposite direction is discharging passengers, and when the view of the approaching car is obstructed by the one from which the passengers are alighting, is evidence of negligence to be submitted to the jury.

Chicago City R. Co. v. *Robinson*, 127 Ill. 9, 4 L. R. A. 126; *Omaha Street R. Co.* v. *Loehneisen*, 40 Neb. 37.

Defendant in error had a right to assume that plaintiff in error would operate its car with due care while passing the car from which he had alighted.

See *Meek* v. *Pennsylvania Co.* 38 Ohio St. 632.

There is a vital difference between the duties which a street-car company, occupying a portion of the public highway, owe to the public, especially at crossings in the city, and the duties of a railway company upon its own right of way.

Newark Pass. R. Co. v. *Block*, 55 N. J. L. 605, 22 L. R. A. 378; *Driscoll* v. *Market Street Cable R. Co.* 97 Cal. 553; *Weiser* v. *Broadway & N. Street R. Co.* 10 Ohio C. C. 14.

Spear, J., delivered the opinion of the court:

The ground upon which the common pleas directed a verdict was that the plaintiff's evidence disclosed contributory negligence of such a character as to preclude a recovery. In other words, the holding was that, as matter of law, the plaintiff was guilty of contributory negligence. If the plaintiff's conduct, as shown by the undisputed facts, left no rational inference but that of negligence, then the ruling was right, but if the question of contributory negligence depended upon a variety of circumstances from which different minds might arrive at different conclusions as to whether there was negligence or not, then the ruling was wrong. This follows from the rule given in *Ellis* v. *Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610. Applying the doctrine of that case, the motion involved an admission of all the facts which the evidence in any degree tended to prove, and presented only a question of law, whether each fact indispensable to the right of action, and put in issue by the pleadings, had been supported by some evidence. If it had been, no matter how slight the evidence, the motion should have been denied, because it was the right of the plaintiff to have the weight and sufficiency of his evidence passed upon by the jury. But if he had failed to give evidence tending to establish any fact without which the law would not permit a recovery, he had nothing to submit to the jury, and a question of law only remained. We are aware that this rule is much criticised, and plausible arguments against its reasonableness have been adduced, but it has been followed uniformly, and should be applied until definitely overruled, or changed by legislation.

The plaintiff was himself bound to use ordinary care, such degree of care as men of ordinary prudence commonly use under like circumstances; care proportioned to the danger to be avoided, and the consequence which might result from want of it, conforming in amount and degree to the particular circumstances under which it was to be exercised. If all people exercised the greatest possible caution in approaching and crossing railroad tracks accidents would be much less frequent than they are; but the law does not require extreme care. Such care, and such only, as ordinarily prudent persons could reasonably be expected to exercise under the circumstances is the full measure. In order, therefore, to judge whether or not a fair question was presented regarding plaintiff's contributory negligence, we must inquire into the circumstances as disclosed by the evidence he introduced.

The evidence showed that the company's road is operated on Eastern avenue, Cincinnati, a thoroughfare running east and west. It is a double-track electric road, the space between the tracks being about 3 feet. The cars are wider than the track, extending about 1 foot outside the rail. Defendant in error, Snell, resided on the north side of the avenue, between Washington and Weeks streets, the block between these streets being about 800 feet in length. Near his residence, in front of a drug store, there was a flag-stone street crosswalk at which the cars were accustomed to stop to receive and discharge passengers Snell had been a daily passenger on the road for a number of years, and was known, as also his residence and place of getting on and off, to the railroad conductors. On the day of the accident Snell was a passenger on an east-bound car on the south track. As the car approached the crossing the speed was slackened to allow Snell to get off, but did not quite stop. He stepped off outside of the south track at the crossing, and turned north to go to the north side of the street, which required him to cross both tracks. As he neared the south rail of the north track he was struck by a west-bound car and injured.

The evidence tends to show further that Snell had not observed the coming car before alighting, nor does it appear that he looked, while in the car, in the direction from which the other car was approaching. At some time, while crossing, he looked both east and west along the track, but the precise point from which he looked east is not clear. The conductor of the car on which he had ridden gave him no warning of the approaching car, nor was any gong, or other alarm sounded, or warning given, by the motorman in charge of the coming car. He was inexperienced, having been the driver of a milk wagon until two or three days before. On the same car there was an experienced motorman, who was on for the purpose of giving the new hand instruction. At the moment Snell was struck the car was running about 20 miles an hour, on down grade, and ran about 100 feet before it could be stopped. The car from which Snell alighted was moving slowly east, and had the other car been running at an ordinary rate of speed Snell would probably have had, after he saw it, opportunity to avoid it, but the car moved so rapidly that, after seeing it, he had but time to throw up his hands and try to step back when the car struck him.

The question presented for the court was, simply, Did the evidence establish, as matter of law, that Snell was guilty of negligence

contributing to his injury? The place of the accident was a street crossing, used as such by the public, and recognized as such by the company. It was the duty of the company to keep in mind the right of pedestrians on that crossing, and especially its duty to observe the rights of its own patrons who were under a necessity of using that crossing in going from its cars to their houses. Ancient rights have not changed because new vehicles of travel have been introduced upon the streets, nor because a portion of the people who ride, being in haste to reach their destination, demand rapid transit. The streets remain for all the people, and he who goes afoot has the right, especially at a crossing, to walk to his destination; he should not be compelled to run, or to dodge and scramble to avoid collision with vehicles. As a general proposition, drivers of vehicles have the same right to travel along the carriageway of a street that foot passengers have to walk there. There is no priority of right; so that the right of neither is exclusive. But it is to be borne in mind that the injury by collision is wholly upon the side of the footman; and the right of personal protection which every person possesses, together with that moral and legal obligation to refrain from doing an injury to his person which is imposed upon all others, gives the foot passenger such a right at street crossings as to make it the duty of drivers of vehicles, whether wagons, wheels, or cars, to so regulate their speed, and give such warning of approach, at whatever cost of pains and trouble on their part, as that the footman, using ordinary care himself and barring inevitable accident, may cross in safety. Life and limb are of more consequence than quick transit. The vehicle man must not run down the pedestrian. The opposite doctrine appears to have found lodgment in many minds, and there seems a disposition to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled, at their peril, to keep out of the way. As matter of law, it is as much the duty of the vehicle to keep out of the way of the footman, and especially so at crossings, as it is for the latter to escape being run over, giving due consideration to the greater difficulty of guiding and arresting the progress of the vehicle. The use of streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but if operated upon the theory of exclusive right to their track, they become wrongdoers. *Cincinnati & S. G. Ave. Street R. Co.* v. *Cumminsville*, 14 Ohio St. 523; *Citizens' Coach Co.* v. *Camden Horse R. Co.* 33 N. J. Eq. 267, 36 Am. Rep. 542; *Baxter* v. *Second Ave. R. Co.* 3 Robt. 516; *Barker* v. *Savage*, 1 Sweeney, 288; *Newark Pass. R. Co.* v. *Block*, 55 N. J. L. 605, 22 L. R. A. 378; *Atty. Gen.* v. *Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264.

Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward regardless of consequences. He is not bound, however, to anticipate negligence on the part of drivers of vehicles, but has the right to assume that they will not be negligent.

In this case, if the evidence was to be believed, there was a total disregard of plaintiff's rights, a clear case of gross, culpable negligence. The company owed to the passenger who had just alighted the duty of permitting him to cross from its car to the opposite side of the street without peril of life or limb from the acts of the company; instead of which it sent its car down the grade at break neck speed without giving any warning, or taking any pains to avoid running him down. Snell, it is true, was bound to anticipate that a car might come on the north track, but he was not required to anticipate that it would come at such a dangerous rate of speed, for that would be presuming that the company would be negligent, and if, acting on the presumption that the company would not be negligent, he used such caution as men of ordinary prudence would have used, his own conduct did not preclude a recovery. Whether he did use such degree of care, we think, was a question for the jury. The evidence presented a case where different minds might reasonably reach different conclusions. We are not required to determine the question whether or not Snell was negligent.

It is insisted that in the best view of the case for the plaintiff, the evidence shows that he did not look to the east, for while it may be that the verbal evidence tends to show that he did look in that direction, yet he could not have done so for if he had he surely would have seen the coming car, and that as a matter of law, it is negligence for one about to cross a railway not to look each way. Authorities are to be found giving apparent support to this proposition. The practice in some courts is for the court to direct a verdict whenever, in the opinion of the judge, the evidence would not warrant a judgment. And some of these decisions imply that the court has held persons about to cross a street-car track to the same degree of care as would be demanded were he crossing a steam railroad. We think there is no just analogy between the right of a street railway running cars along a highway and the right of a steam railroad running its trains across a highway at grade, and that the rule of care incumbent upon one about to cross a steam railroad is hardly a fair one to be applied in all its strictness to street railways in cities where a car that can be speedily stopped passes a crossing at frequent intervals, and where people necessarily cross the streets frequently and hurriedly. As remarked by Gray, Ch. J., in *Lyman* v. *Union R. Co.* 114 Mass. 88: "The cases relating to injuries suffered by being struck by a locomotive engine at a railroad crossing afforded no test of the degree of care required of the plaintiff in this case. The cars of the horse railway have not the same right to the use of the track over which they travel, do

not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not therefore bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other." Other cases in Massachusetts are to the effect that the fact that plaintiff's evidence does not show that he looked up and down the street before crossing is not, as matter of law, conclusive evidence that he was not in the exercise of due care, and that the mere fact of not looking when one attempts to cross a railroad is not conclusive evidence of want of care. *Williams* v. *Grealy*, 112 Mass. 82; *Bowser* v. *Wellington*, 126 Mass. 391; *Shapleigh* v. *Wyman*, 134 Mass. 118. Whether such omission is or is not negligence depends upon the circumstances. *Newark Pass. R. Co.* v. *Block, supra; Chicago City R. Co.* v. *Robinson*, 127 Ill. 9, 4 L. R. A. 126; *Omaha Street R. Co.* v. *Loehneisen*, 40 Neb. 37; *Shea* v. *Potrero & B. V. R. Co.* 44 Cal. 414; *Swain* v. *Fourteenth Street R. Co.* 93 Cal. 179; *Driscoll* v. *Market Street Cable R. Co.* 97 Cal. 553; Thomp. Neg. 396, note.

We suppose the rule for street cars is the same as for other vehicles, and if the footman is required, in a crowded thoroughfare, to look up and down and wait until all possibility of collision is past, it would be like sitting on the bank until the stream should run by, and there would be but few hours in the busy part of the day when it would be practicable to cross.

Whether looking eastward would have disclosed the coming car depends upon whether the receding car would have obstructed the view, and this depends upon its location at the time Snell looked, if he did look. The evidence is consistent with the conclusion that he looked up the track, but that the receding car prevented him from seeing the approaching one, and that, as the former made some noise, his attention was not called to the rumbling of the latter. And it is not inconsistent with the conclusion that ordinary range of vision would probably have enabled him without turning his head or eyes up the track, to see a car in time to avoid it had the car been running at a safe rate of speed, and we think one so crossing could not be asked to extend his observation beyond that distance within which a car proceeding at a customary and reasonably safe speed would threaten his safety.

Taking the effect of the evidence as a whole, one thing which is tolerably clear is that if the car had been running at a reasonable rate of speed, and proper warning had been given, Snell would not have been injured; all else is in more or less doubt. The evidence pro and con. therefore, was to be weighed, and the tribunal for that purpose was the jury, not the court upon the motion.

The judgment of reversal was, we think, right, and the same is affirmed.

Shauck, J., dissenting:

The case upon which the trial judge gave a conclusive direction to the jury, taking the view most favorable to the plaintiff that the evidence would permit, was that his senses of sight and hearing were normal, that he knew he was upon a double-track electric railway, that he quit a car and immediately passed to its rear toward the other track without looking in the direction from which the colliding car came, and was struck and injured by a car approaching at a rate of speed which, under the circumstances, was dangerous, and that he had no knowledge of its approach The negligence of the defendant is conceded, and the material inquiry relates to the conduct of the plaintiff. The degree or character of the defendant's negligence cannot be material, if, by due care on the part of plaintiff, the injury would have been avoided.

Upon this subject it is said in the principal opinion: "Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward regardless of consequences." If this means that under such circumstances the footman is required to use his senses of sight and hearing to ascertain whether a car is approaching upon the track which he is about to cross, it is a correct statement of the law and a full justification of the direction given to the jury. If, however, it means that nothing is required of him except to act rationally in view of dangers that may be threatened from a car of whose approach he may happen to know, it defines a rule which, in view of the difficulty in proving his knowledge, is incapable of practical application, and which is in conflict with the adjudicated cases and the established principles of the law of negligence.

Some of those principles are accurately though generally stated in the foregoing syllabus and opinion. But the law, keeping pace with the progress of society, has, from those general principles, deduced definite rules of conduct, applicable to situations which arise frequently. Such a rule was defined by this court in *Cleveland, C. & C. R. Co.* v. *Crawford*, 24 Ohio St. 631, by which it is made the imperative duty of "a person in the full enjoyment of the faculties of hearing and seeing before attempting to pass over a known railroad crossing should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor is negligence, and will defeat an action by such person for an injury to which such negligence contributed." That rule has been affirmed in very many cases, among which are *Cleveland, C. C. & I. R. Co.* v. *Elliott*, 28 Ohio St. 340; *Pennsylvania Co.* v. *Rathgeb*, 32 Ohio St. 66; *Baltimore & O. R. Co.* v *Whitacre*, 35 Ohio St. 627. In *Pennsylvania Co.* v. *Rathgeb* the general rules were correctly given to the jury, but the judgment of the trial court was reversed by this court because there was not given the definite and particular rule which the trial judge applied in this case.

Neither the authorities nor the reasons involved will permit a distinction between steam cars on the one hand and electric and cable cars on the other as to the application of this rule. *Bailey* v. *Market Street Cable R. Co* (Cal.) 42 Pac. 914; *Buzby* v. *Philadelphia Traction Co.* 126 Pa. 559; *Ward* v. *Rochester Electric R. Co.*

43 N. Y. S. R. 84; *Fritz* v. *Detroit Citizens' Street R. Co.* (Mich.) 62 N. W. 1007; *Boerth* v. *West Side R. Co.* 87 Wis. 288. The distinction is not encouraged by the decisions of the supreme court of Massachusetts, cited in the majority opinion. They relate to horse cars which are likened to ordinary vehicles because of their low speed, and the ease with which they may be stopped.

It is true that the introduction of a new motive power for the purpose of rapid transit has not changed the relative rights and duties of carriers and footmen. It is equally true that it imposes upon carriers and footmen alike the duty of exercising greater absolute care. This is true because the rules of relative care have not changed, the carrier is required to use greater care because of the increased speed of its cars and their greater weight, and the footman must use greater care because of his knowledge that he is lawfully exposed to greater danger.

There are considerations of great importance which cannot be eliminated from cases of this character. The car cannot be stopped instantly, nor can it be turned from its track. The footman can instantly stop or change his course. Considerations of health and economy require that the populations of large cities occupy extended territories, whence arises the necessity for rapid transit. Transit cannot be rapid as to those aboard the cars and slow as to those crossing the street. The same considerations require that there shall be low fares. From the fact that these carriers have no mysterious sources of revenue, it results that compensation awarded to the careless, though in form of a judgment against the carrier, must be ultimately paid by its careful patrons. The whole duty of the public in this regard is performed when they compensate those who, while in the exercise of due care, are injured by the carelessness of the agencies which public necessities have called into existence. In view of these and like considerations, I am not willing to seem to believe that it is practicable either to protect those who go upon the crowded streets of cities with slumbering senses, or to compensate them for injuries to which a failure to use their senses contributes.

The course of the trial judge in this case is worthy of commendation. Having devoted enough time to the orderly examination of the case to disclose a conclusive reason why the plaintiff could not recover a verdict according to law, he directed the verdict which the law required. The plaintiff had no constitutional or legal right to recover a verdict upon which he could not recover a judgment. Had the case been submitted to the jury upon general instructions, the court would not have been sitting to administer justice, but to experiment with a verdict. Such a course was required by no right of the plaintiff. It was forbidden by justice to the defendant and by a due regard for the rights of the public in a speedy administration of justice.

Burket, J., concurs in the dissenting opinion.

CONNECTICUT SUPREME COURT OF ERRORS.

Caroline L. BRADLEY *et al.*
v.
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, *Appt.*

(66 Conn. 539.)

Power of selectmen to cut and trim trees overhanging a highway without the consent of the owner, for the purpose of compelling a change in the location of telegraph or telephone wires, is denied by Gen. Stat. § 3944, prohibiting telegraph or telephone companies to injure any tree without the consent of the owner.

(July 24, 1895.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiffs in an action to recover damages for the alleged wrongful cutting of plaintiffs' trees. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John W. Alling** and **James T. Moran,** for appellant:

Whenever growing trees, whether within or without the limits of the highway, interfere with public travel, the town or its agents have the legal power to cut them down without notice to the land owner.

Ely v. *Parsons*, 55 Conn. 83; *Hewison* v. *New Haven*, 34 Conn. 142, 91 Am. Dec. 718; Wood, Nuisances, 277; *Beardsley* v. *Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

Whether trees standing upon or overhanging the highways are obstructions and ought to be removed for the public benefit and safety is a matter within the quasi legislative discretion conferred upon the selectmen.

Chase v. *Oshkosh*, 81 Wis. 313, 15 L. R. A. 553; *Johnston* v. *District of Columbia*, 118 U. S. 19, 30 L. ed. 75; *Jones* v. *New Haven*, 34 Conn. 13; *Tate* v. *Greensboro*, 114 N. C. 392, 24 L. R. A. 671; *Detroit* v. *Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Turner* v. *Ringwood Highway Bd.* L. R. 9 Eq. 422; *Boston* v. *Richardson*, 13 Allen, 159.

The selectmen cannot relocate the poles, wires, and fixtures in such a manner as to prevent the practical operation of the telephone company's line. If they deem it for the public benefit to order a relocation of the telephone poles, they must designate suitable locations.

Hannibal v. *Missouri & K. Teleph. Co.* (Mo.) 21 Am. & Eng. Corp. Cas. 47.

The telephone company in acting under the order and permit of the selectmen are not liable in trespass for the trimming of the trees.

Southern Bell Teleg. & Teleph. Co. v. *Constantine*, 61 Fed. Rep. 61, 23 U. S. App. 56.

NOTE.—As to the ownership and control of trees in a highway, see Chase v. Oshkosh (Wis.) 15 L. R. A. 553, and *note;* also, State, Avis, v. Vineland (N. J.) 23 L. R. A. 685; Tate v. Greensboro (N. C.) 24 L. R. A. 671; Dailey v. State (Ohio) 24 L. R. A. 724; Mount Carmel v. Shaw (Ill.) 27 L. R. A. 580.

See also 35 L. R. A. 267; 47 L. R. A. 497.

Prima facie it would be difficult to say that anyone had the right to prevent the proper guardians of the highway from cutting down any trees which were a permanent obstruction to the use by the public of any part of the highway.

Earl Lonsdale v. *Nelson*, 2 Barn. & C. 302

The permitting of these branches to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence, which distinguishes this case from most of the others which have occurred.

Ely v. *Parsons*, 55 Conn. 99; *Hubbard* v. *Deming*, 21 Conn. 360.

The power of municipal authorities over highways is as broad as the legislature sees fit to confer.

Dill. Mun. Corp. § 680; *Boston* v. *Richardson*, 13 Allen, 146.

The electric street railway is not an additional servitude.

Booth, Street Railway Law, § 83; Cooley, Const. Lim. 4th ed. *556.

The selectmen of the towns of New Haven and East Haven would have had the right, especially under the legislation of 1893, to order the removal of the shade trees of the plaintiff, in order to permit the construction of an electric street railway along the highway in question, and the action of the selectmen in this regard would not have been open for review in the courts, provided it was in good faith and free of malice towards the plaintiff.

Braisard v. *Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Tate* v. *Greensboro*, 114 N. C. 392, 24 L. R. A. 671; *Chase* v. *Oshkosh* 81 Wis. 313, 15 L. R. A. 553.

The tendency of judicial reasoning at the present time is to the effect that telegraph and telephone poles do not constitute additional servitude upon the highway.

People v. *Eaton*, 100 Mich. 208, 24 L. R. A. 721; *Pierce* v. *Drew*, 136 Mass. 75, 49 Am. Rep. 7.

Mr. **Edward H. Rogers,** for appellees:

The defense that the branches and limbs which were cut were a nuisance is concluded by the verdict.

Burnham v. *Hotchkiss*, 14 Conn. 311; *State* v. *Merrit*, 35 Conn. 314.

None of the trees which were cut or trimmed were "upon said highway" within the orders of the selectmen.

Lyman v. *Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Memphis Bell Teleph. Co.* v. *Hunt*, 16 Lea, 456, 57 Am. Rep. 237.

It is immaterial whether such cutting was from the inside or outside of the fence.

Woodruff v. *Neal*, 28 Conn. 167; Elliott, Roads & Streets, 520.

The jurisdiction of the selectmen over the highway in the absence of a special statute was limited to making it safe for travel.

Tomlinson v. *Leavenworth*, 2 Conn. 294; *Suffield* v. *Hathaway*, 44 Conn. 527, 26 Am. Rep. 483.

The defendant's acts were absolutely prohibited by the statutes of this state.

Gen. Stat. § 3944; Rev. 1875, 341, § 2; Laws 1879, chap. 36, 381.

All of the acts and statutes stand *in pari materia* and can be reconciled with each other.

Haynes v. *Jenks*, 2 Pick. 176; *Kallahan* v. *Osborne*, 37 Conn. 490; *Goodman* v. *Jewett*, 24 Conn. 589; 1 Swift, Dig. 12.

The right to the use of the streets for the maintenance, construction, or erection of new or additional lines of poles, wires, or fixtures, or both, could not of itself give any right to cut and injure trees, even in the absence of existing statutory prohibitions.

Eels v. *American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 Am. Rep. 640; *Board of Trade Teleg. Co.* v. *Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Western U. Teleg. Co.* v. *Williams*, 86 Va. 696, 8 L. R. A. 429; *Chesapeake & P. Teleph. Co.* v. *Mackenzie*, 74 Md. 36; *American Teleph. & Teleg. Co.* v. *Pearce*, 71 Md. 535; *Broome* v. *New York & N. J. Teleph. Co.* 42 N. J. Eq. 141; Lewis, Em. Dom. § 254.

Torrance, J., delivered the opinion of the court:

The complaint in this case alleges that the defendant wrongfully entered upon the land of the plaintiffs, and cut and trimmed six trees growing thereon. The defendant filed three answers; the first being a general denial, and the second and third setting up certain facts in justification of the trespass charged. The case was tried to the jury. There was a verdict for the plaintiffs, and from the judgment upon the verdict the present appeal is brought.

The facts upon which the questions raised by the appeal depend may be stated as follows: The land on which the trees stood is bounded on a public highway, and it lies partly in New Haven and partly in East Haven. The six trees in question stood just within the fence line adjoining the highway,—four of them being on the New Haven part of the land, and two of them on the East Haven part,—and their branches, to some extent, overhung the highway. The defendant is a corporation created by the legislature of this state, and authorized by its charter to construct and maintain telephone lines, including poles, wires, and necessary fixtures, upon any highway of this state. It had, before the date of the alleged trespass, constructed a telephone line along the east side of the highway which bounded the plaintiffs land, and was then operating the same. On the 22d of May, 1894, the selectmen of East Haven issued the following document to the defendant: "Whereas, in the construction of the line of the New Haven Street-Railway Company, certain telephone poles and wires interfere with the running and operation of the electrical conductors and cars of said company, and it is necessary that said telephone poles and wires should be removed and relocated: Now, therefore, we, the undersigned, selectmen of the town of East Haven, having, under the statutes of the state, direction and control over the placing, removal, and relocation of structures upon the highways of towns, for the purpose of securing a proper construction of such railway, hereby order, direct, and permit the removal and relocation by the Southern New England Telephone Company of sundry telephone poles and wires now located upon the layout of said railroad in said town of East Haven, and to trim such trees upon said highway as may be necessary for a distance of 1 foot from the out-

side wire of said line, according to the diagram hereto attached, and in accordance with the following detail, to wit: On the west side of Main street from the town line southeasterly to road known as 'Horse-Cart Way,' first north of townhall." On the same day the selectmen of New Haven issued to the defendant a document in substantially the same language respecting that part of the defendant's telephone line in New Haven which it was deemed necessary to change in the construction of the railway. Under these documents the defendant removed its line of poles, then standing on the east side of the highway aforesaid, to the west side of the same, and relocated its poles along said west side at the points designated by the selectmen. In so doing, some of them were placed in the highway adjoining the plaintiffs' premises, and, to permit the erection of the defendant's poles and wires at this point, the defendant cut and trimmed the six trees in question. In its second answer the defendant justified under these two documents issued by the selectmen as aforesaid. In its third answer it justified on the ground, in substance, that the parts of said trees cut and trimmed off were an obstruction and a nuisance to the public, in the use of the highway, and more especially to the defendant, in the construction and erection of its poles and wires at this point.

The controlling question in the case relates to the power of the selectmen, under the circumstances, to authorize the cutting and trimming of these trees; for, if they possessed such a power, then the facts set up in the second answer, if true, would be a complete justification, independently of the other facts set up in the third answer, and, if they did not possess it, then we think the defendant could not justify under the other facts set up in the third answer, for the reasons hereinafter stated. As this power, if it existed at all in the selectmen, was given to them by statute, it will be necessary to examine the statutes under which it is, or may be, fairly claimed such power was conferred; and, in connection with that examination it will simplify matters, perhaps, to look first at the statutes which prohibit the cutting and injuring of trees, without the consent of the owner, by companies who are authorized to maintain electrical wires or fixtures of any kind on the public highways. The statute under which the defendant in June, 1894, maintained its telephone line upon the highway in question, reads as follows: "Every telegraph or telephone company may maintain and construct lines of telegraph or telephone upon any highway, or across any waters in this state, by the maintenance and erection of the necessary fixtures, including posts, piers, or abutments for sustaining wires; but the same shall not be so constructed as to incommode public travel or navigation, nor to injure any tree without the consent of the owner." Gen. Stat. § 3944. The prohibition contained in this section, against injuring trees without the consent of the owner, was first passed in 1860. Pub. Acts 1860, chap. 66. And it has remained upon the statute book ever since. In addition to this prohibition, § 1477 of the General Statutes provides that every person who shall wilfully injure any tree in a highway "for any purpose connected with the erection or maintenance of any telegraph, telephone, or electric light or power, wires or fixtures, without the consent of the adjoining proprietor," shall be subject to fine and imprisonment; and § 1759 provides that "no telegraph, telephone, or electric light or power company shall cause to be cut down or injured any tree growing on the highway, for the purpose of constructing or maintaining any electrical wires or fixtures of any kind without the written consent of the adjoining proprietor," under penalty of a fine, and, in default of payment, imprisonment. Under these provisions, it is quite clear that the defendant upon its own authority, could not lawfully injure the trees in question, without the consent of the plaintiffs, either for the purpose of locating its line at this point originally, or of shifting and changing part of its line to this point from some other where it had been originally placed; and, indeed, the defendant makes no claim of this kind. What it does claim is that the selectmen had the power to compel it to change the location of its wires as ordered, and, as incidental to this, had the power to cut and trim the trees in question, which power to cut and trim the selectmen could and did delegate to it.

Assuming, for the purpose of the argument, that the selectmen could and did delegate such power to the defendant, if they possessed it, the important question is, Did they themselves possess it? Section 3945 of the General Statutes provides that no telephone company, "nor any company or association engaged in distributing electricity by wires or similar conductors, or in using an electric wire or conductor for any purpose, may hereafter exercise any of the powers which may have been conferred upon it to erect or place wires, conductors, fixtures, structures, or apparatus of any kind over, on, or under any highway or public ground or to change the location of the same, without the consent of the adjoining proprietors, or, in case such consent cannot be obtained, without the consent in writing of two of the county commissioners of the county in which it is desired to exercise said powers." The next section (3946) provides that the selectmen in their towns, but not in the cities or boroughs, shall, subject to the provisions of the preceding section, "have full direction and control over the placing, erection, and maintenance of any such wires, conductors, fixtures, structures, or apparatus, including the relocating or removal of the same. . . . and may make all orders necessary to the exercise of such power of direction and control," etc. Section 2 of chapter 169 of the Public Acts of 1893, so far as it is applicable to towns alone, provides that before any street railway company shall proceed to construct its railway, or lay additional tracks, or change its motive power, in a town, it shall cause a plan thereof to be made, as prescribed in said section, and presented to the selectmen of such town for their acceptance and adoption, either as originally made, or as modified after a hearing had thereon. Section 3 of the same act provides that the selectmen shall have "exclusive direction over the placing, or locating of any tracks, wires, conductors, fixtures, structures of any such railway permanently located in the streets or highways, including the relocating

or removal of the same, or changes in the grade thereof, and for the purpose of any public improvement and including the power of designating the material, quality, and finish thereof, may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing," etc. Under this act of 1893 the street-railway company mentioned in the record made a plan as prescribed by the act, and presented it to the selectmen of New Haven and of East Haven, who accepted and adopted it. It was for the purpose of enabling said street-railway company to build its road according to said plan that the selectmen of both towns issued the two documents to the defendant under which it attempts to justify the cutting and trimming of the trees in question, in its second answer. If we assume, for the sake of the argument, that the selectmen had the power, under § 3946 of the General Statutes, or under § 3 of the act of 1893, or under both, to order the defendant to remove and relocate its poles and wires for the purpose indicated in said documents, the question still remains whether they, in order to accomplish this purpose, had the power to injure these trees without the consent of the plaintiffs, and we think they had not. The power given to them by § 3946, to direct where the poles and wires of a telephone company shall be placed at the time of the original location of the line, is, we think, given to them subject to the prohibitions not to injure trees without the consent of the owner, contained in §§ 1477, 1759, and 3944 of the General Statutes, already quoted. Section 3946 does not repeal these other sections expressly, nor do we think it does so by implication. They all may well stand together, and, if this be true as to an original location we think it equally true of a relocation, as here. Nor do we think that the powers of the selectmen are enlarged in this respect by the act of 1893. That act does not purport to enlarge in any way the powers of selectmen over telephone companies. Neither does it expressly, or by any necessary implication repeal the sections of the General Statutes aforesaid, prohibiting injury to trees without the owner's consent. We see no necessary inconsistency between those sections and the act of 1893, and they may well stand together. This construction gives due force and effect to all the statutes in question, and, as it seems to us, is the only one which can be put upon them as a whole. If any insuperable difficulty arises from this construction, the remedy must be furnished by the legislature, and not by the courts. At present, however, we do not well see how any such difficulty can arise. Our conclusion is that the selectmen had no power, without the plaintiffs' consent, to cut or trim the trees in question, to enable the telephone company to erect or operate its line in the new location; and consequently they did not, and could not, delegate that power to the defendant. In this view of the matter, the rulings of the court upon the evidence, and its charge to the jury upon the defense made by and under the second answer, as they appear of record, were correct.

Under its third answer the defendant's claim, in substance, was that the branches cut were an obstruction and a nuisance which prevented the defendant from erecting and operating its line in the new location, and that it had, therefore, a right to cut them, under the circumstances. Its right to use the highway at all, for the purpose of erecting and operating a telephone line, is given, as we have seen, by statute, and it is given expressly on condition that it shall not be exercised so as to "injure any tree without the consent of the owner." If the construction hereinbefore put upon the statutes which we have been considering is correct, the facts set up in the third answer, even if true, furnished no justification for cutting and trimming the six trees.

There is no error.

The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Hermann Julius MEYER, doing Business under the Name of Bibliographical Institute Meyer,

v.

Dana ESTES *et al.*

(164 Mass. 457.)

1. **For the purpose of determining the right of one who after contracting to furnish electrotype plates took partners** into his business and completed his contract without notifying the other party of the change of firm, to relief against one who has broken his contract as to the use to be made of the plates, the contract must be regarded as performed, not by a volunteer stranger, but by the contracting party acting through the partnership.

2. **A third person, who buys the plates, sheets, and copyright of a published work,** cannot be considered as the successor in business of the publisher within the meaning of a contract by the publisher in procuring electrotype plates for it that they should be used only by the publisher "or his heirs or successors in business."

3. **An agreement by the purchaser of electrotype plates that he will not sell them to other parties** or multiply them for the purpose of selling them is valid and enforceable, and a sale by him to a third person

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NOTE.—The above case presents some interesting questions which are believed to be also novel in respect to the use of electrotype plates and contracts restricting such use.

On the matter of liquidated damages, see some annotation to Hathaway v. Lynn (Wis.) 6 L. R. A. 551, and King Iron Bridge & Mfg. Co. v. St. Louis (C. C. E. D. Mo.) 10 L. R. A. 829; also the later cases of Condon v. Kemper (Kan.) 13 L. R. A. 671; Tode v. Gross (N. Y.) 13 L. R. A. 652; Wilhelm v. Eaves (Or.) 14 L. R. A. 297; Tennessee Mfg. Co. v. James (Tenn.) 15 L. R. A. 211; Wallis Iron Works v. Monmouth Park Asso. (N. J.) 19 L. R. A. 456; and Krutz v. Robbins (Wash.) 28 L. R. A. 676.

with no restriction as to the use to be made of them may give his vendor a right to substantial damages for breach of the agreement.

4. **A contract relating to what is to be done in Massachusetts,** dated and signed there, and sent to a foreign country for acceptance, which is to be signified by telegram sent to the signers there, is a Massachusetts contract governed by its laws.

5. **A contract that in case of the wrongful use of electrotype plates the purchaser shall be responsible for the damages** caused the seller, and shall pay a fine to him "equal to the tenfold price of the wrongly used electrotypes," provides for a penalty and not liquidated damages, which cannot be enforced under Massachusetts law beyond the actual damages caused by the breach.

6. **Under a contract by two firms for the purchase of electrotype plates** to be used in a publication in which they are jointly interested, which contract is in form joint, and provides that they will be "responsible for any and all wrong use of said electrotypes," a firm which sells all its interest to the other may be held for damages caused by a breach of the contract by the other after the sale.

(October 19, 1895.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of an action brought to recover damages for breach of a contract regarding the use of certain electrotype plates. *Judgment for plaintiff.*

Plaintiff conducted a publishing house at Leipsic, Germany. Defendants purchased from him certain plates for illustrations to be used in a work which they were publishing, and received the same under a contract, of which the following is a copy:

The undersigned, Messrs. Estes & Lauriat and Messrs. S. E. Cassino & Co. of Boston, Mass., U. S. A., hereby agree to use all electrotypes ordered from the Bibliographical Institute Meyer, in Leipsic, only for the purpose of illustrating works to be published by the said Estes & Lauriat and the said S. E. Cassino & Co. or their heirs or successors in business, in the English language in the United States of America.

Estes & Lauriat and S. E. Cassino & Co. agree not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them, and to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to the Bibliographical Institute Meyer, and to pay furthermore a fine to the Bibliographical Institute Meyer equal to the tenfold price of the wrongly used electrotypes.

Estes & Lauriat,
S. E. Cassino & Co.

Plaintiff contended that defendants had broken their contract as to the use of the plates, and brought this action for damages.

Further facts appear in the opinion.

Mr. **William Schofield,** for plaintiff:

This contract is incidental to a sale of electrotype plates, restricting the use of the plates sold. It is a unilateral contract.

First Nat. Bank v. *Watkins,* 154 Mass. 385; *Great Northern R. Co.* v. *Witham,* L. R. 9 C. P. 16.

This contract imposes a joint liability upon all who were members of the two defendant firms at the time when they signed it.

Donahoe v. *Emery,* 9 Met. 63; *White* v. *Tyndall,* L. R. 13 App. Cas 263; *Bartlett* v. *Robbins,* 5 Met. 184; *New Haven & N. Co.* v. *Hayden,* 119 Mass. 361; *Fenton* v. *Lord,* 128 Mass. 466; *Levy* v. *Sale,* 37 L. T. N. S. 709; *Copland* v. *Laporte,* 3 Ad. & El. 517; Chitty, Cont. 11th Am. ed. 1353.

The situation of the parties, and the facts known to both, show that joint liability was intended.

Abbott v. *Hapgood,* 150 Mass. 248, 5 L. R. A. 586.

The rule of construction that the covenant is joint where the interest is joint, and several where the interest is several, has no application except to covenantees and promisees.

Chitty, Cont. 11th Am. ed. 1355; *Eccleston* v. *Clipsham,* 1 Wms. Saund. 154, note 1; *White* v. *Tyndall, supra.*

It is resorted to in the case of covenantees only when the contract is ambiguous, or consistent with a joint or several promise. It cannot contradict the writing.

Eccleston v. *Clipsham,* 1 Wms. Saund. 155, note 1 (*c*); *Sorsbie* v. *Park,* 12 Mees. & W. 147; *Cleaves* v. *Lord,* 3 Gray, 66; *Capen* v. *Barrows,* 1 Gray, 376; *Clapp* v. *Pawtucket Inst. for Savings,* 15 R. I. 489.

The contract being joint by its express terms, and also by construction with the aid of all material extrinsic facts, there are no equitable considerations in favor of defendants Estes & Lauriat.

Clarke v. *Bickers,* 14 Sim. 639; *White* v. *Tyndall,* L. R. 13 App. Cas. 263; Langdell, Summary of Laws of Contracts, 2d ed. § 4, p. 3; *Jordan* v. *Dobbins,* 122 Mass. 168, 23 Am. Rep. 305; *Offord* v. *Davies,* 12 C. B. N. S. 748; *Great Northern R. Co.* v. *Witham,* L. R. 9 C. P. 16.

The case of defendant Cassino stands no different in principle from that of defendants Estes & Lauriat.

Lindley, Partn. 6th ed. 231; *Hoby* v. *Roebuck,* 7 Taunt. 157; *Graham* v. *Whichelo,* 1 Cromp. & M. 188; *Dickson* v. *Indianapolis Colton Mfg. Co.* 63 Ind. 9; *Buxton* v. *Edwards,* 134 Mass. 567.

The sale to Houghton, Mifflin, & Co. of plates furnished by the plaintiff was a breach of the contract, for which all the defendants are liable.

"Successors in business" are those who take and carry on the whole of a business, commonly at the same place, or under the same business name.

Lindley, Partn. 6th ed. 441; *Hoxie* v. *Chaney,* 143 Mass. 592, 58 Am. Rep. 149; *Churton* v. *Douglas,* 1 Johns. (V. C.) Eng. 174; *Gray* v. *Smith,* L. R. 43 Ch. Div. 208; *Morgan* v. *Schuyler,* 79 N. Y. 490, 35 Am. Rep. 543; *Williams* v. *Farrand,* 88 Mich. 473, 14 L. R. A. 161; *Lodge* v. *Weld,* 139 Mass. 499.

The testimony of defendants Estes and Whidden, that "by the custom of the pub-

lishing trade in Boston, a firm which purchases all the plates, sheets, and rights of publication of a work is considered the successor in business of the firm making the sale, so far as that work is concerned," is incompetent.

Haskins v. *Warren*, 115 Mass. 514; *Sears* v. *LeBetter*, 137 Mass. 374; *Mooney* v. *Howard Ins. Co.* 138 Mass. 375, 52 Am. Rep. 277; *Howard* v. *Great Western Ins. Co.* 109 Mass. 384.

In this contract the parties have provided expressly for all the consequences of a breach. The stipulation for the payment of the tenfold price is not to be treated as a penalty, but as a promise for the payment of money upon the happening of a certain event which is within the control of the promisors. It is the substance of the agreement.

Lynde v. *Thompson*, 2 Allen, 456; *Fisk* v. *Gray*, 11 Allen, 132; *Cushing* v. *Drew*, 97 Mass. 445; *Leary* v. *Laflin*, 101 Mass. 334; *Galsworthy* v. *Strutt*, 1 Exch. 659.

There are, or may be, two elements to be considered in awarding compensation: (1) the actual loss to the plaintiff; (2) the profits of the defendant from infringement.

Mawman v. *Tegg*, 2 Russ. Ch. 385.

In such cases equity will decree an accounting as an incident to an injunction.

Ibid.; *Pike* v. *Nicholas*, L. R. 5 Ch. 255; *Callaghan* v. *Myers*, 128 U. S. 617, 32 L. ed. 547; *Belford* v. *Scribner*, 144 U. S. 488, 36 L. ed. 514.

The stipulations in question were no doubt made because of the inherent difficulty of assessing damages for a breach, and they provide for both elements of compensation.

Elbinger Actien-Gesellschafft v. *Armstrong*, L. R. 9 Q. B. 473; *Clemens* v. *Estes*, 22 Fed. Rep. 899; *Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. Rep. 914; *Tode* v. *Gross*, 127 N. Y. 480, 13 L. R. A. 652; *Black* v. *Henry G. Allen Co.* 42 Fed. Rep. 618, 9 L. R. A. 433.

Where a covenant is "to pay a particular liquidated sum," a court of equity cannot make a new covenant for a man nor is there any room for compensation or relief.

Lowe v. *Peers*, 4 Burr. 2225; *Elphinstone* v. *Monkland Iron & C. Co.* L. R. 11 App. Cas. 332; *Birch* v. *Stephenson*, 3 Taunt. 469; *Hurst* v. *Hurst*, 4 Exch. 571, 19 L. J. Exch. 413; *Weston* v. *Metropolitan Asylum*, L. R. 8 Q. B. Div. 387, L. R. 9 Q. B. Div. 404; *French* v. *Macale*, 2 Dru. & W. 269.

Where the covenant is secured by "liquidated damages," the plaintiff can proceed for the liquidated damages at law, or for performance of the principal agreement in equity.

Ropes v. *Upton*, 125 Mass. 258; *Sainter* v. *Ferguson*, 1 Macn. & G. 286; *Carnes* v. *Nisbett*, 7 Hurlst. & N. 158.

This agreement is not unconscionable. It contains no element of oppression or surprise or mistake; nor was there any inequality in the skill or knowledge of the parties with reference to the subject-matter.

Hume v. *United States*, 132 U. S. 406, 33 L. ed. 393; Bishop, Cont. § 737; *Ward* v. *Hudson River Bldg. Co.* 125 N. Y. 230; *Wooster* v. *Kisch*, 26 Hun, 61; *Sainter* v. *Ferguson*, 7 C. B. 716; *Galsworthy* v. *Strutt*, 1 Exch. 659; *Wallis* v. *Smith*, L. R. 21 Ch. Div. 243.

This contract is governed by the law of Saxony

The contract being unilateral, it was mere *nudum pactum* when signed and sent to Leipsic, and became binding by being accepted and acted on there.

Milliken v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Hill* v. *Chase*, 143 Mass. 129; *McIntyre* v. *Parks*, 3 Met. 207; *Pattison* v. *Mills*, 1 Dow & C. 342, 3 Wils. & S. 218.

Prima facie a contract is governed in respect to its nature, vaildity, and interpretation by the law of the place where it is made.

Milliken v. *Pratt*, *supra*; *Baxter Nat. Bank* v. *Talbot*, 154 Mass. 215, 13 L. R. A. 52; *Carnegie* v. *Morrison*, 2 Met. 381; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; Bar, Private Int. Law, 2d ed. § 249, p. 540.

A contract valid in the state or country where it is made will be enforced even in a state or country where it would be invalid, provided it be not there contrary to public policy or morals.

Baxter Nat. Bank v. *Talbot*, *supra*; *Greenwood* v. *Curtis*, 6 Mass. 358; *Milliken* v. *Pratt*, *supra*; *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340; *O'Regan* v. *Cunard S. S. Co.* 160 Mass. 356.

In respect to performance, the part of the contract in question is a stipulation for the payment of money, and no place of payment being mentioned, for the purpose of deciding what law shall govern the place of making, the contract is also the place of performance.

Hill v. *Chase*, 143 Mass. 129; *Murphy* v. *Collins*, 121 Mass. 6; *Merchants' Bank* v. *Griswold*, 72 N. Y. 472, 28 Am. Rep. 159; 5 Dane, Abr. 176.

This stipulation being valid by the law of Saxony and invalid by the law of Massachusetts, the presumption is that the contract was made with a view to that law which would give it full effect.

Hamlyn v. *Talisker Distillery* [1894] A. C. 202; *Re Missouri S. S. Co.* L. R. 42 Ch. Div. 321; *Peninsular & O. Steam Nav Co.* v. *Shand*, 3 Moore, P. C. C. N. S. 272; *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. ed. 104; *Bell* v. *Packard*, 69 Me. 111, 31 Am. Rep. 251; Whart. Confl. L. 2d ed. § 429.

Hermann J. Meyer is the proper party plaintiff, by the law of Massachusetts.

Holmes v. *Small*, 157 Mass. 221; *Saunders* v. *Saunders*, 154 Mass. 337; *Borden* v. *Boardman*, 157 Mass. 410; *Abbott* v. *Hills*, 158 Mass. 396; *Pease* v. *Hirst*, 10 Barn. & C. 122.

The admission of the partners in no way affected the defendants.

British Waggon Co. v. *Lea*, L. R. 5 Q. B. Div. 149; *Cabot* v. *Haskins*, 3 Pick. 83.

Messrs. **Elder, Wait, & Whitman,** for defendant Estes:

There was no breach of the contract by the sale to Houghton, Mifflin, & Co.

The action cannot be maintained by this plaintiff.

As to the plates furnished by the partnership, there can be no doubt that their sale or misuse, if any, by the defendants is not within the protection of the contract.

Boston Ice Co. v. *Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Hills* v. *Snell*, 104 Mass. 173, 6 Am. Rep. 216.

There was no privity of contract between the plaintiff and the defendants as to plates furnished by a third person.

Stoddard v. *Ham*, 129 Mass. 383, 37 Am. Rep. 369; *Hennessey* v. *Deland*, 110 Mass. 145; *Connor* v. *Hackley*, 2 Met. 613; *Home Sav. Bank* v. *Mackintosh*, 131 Mass. 489; *Wilson* v. *Hill*, 3 Met. 66; *Dadmun Mfg. Co.* v. *Worcester Mut. F. Ins. Co.* 11 Met. 429; *Bass* v. *Percival*, 5 Allen, 345.

The contract is not joint. Estes & Lauriat and S. E. Cassino are not liable for the sale by Whidden to Houghton, Mifflin, & Co.

Leake, Cont. p. 456, and cases cited; Addison, Cont. 3d Am. ed. p. 79, § 42, note; *Peckham* v. *North Parish*, 16 Pick. 274; *Capen* v. *Barrows*, 1 Gray, 376; *St. Louis, A. & R. I. R. Co.* v. *Coultas*, 33 Ill. 188; *Ludlow* v. *McCrea*, 1 Wend. 228; *Bartlett* v. *Robbins*, 5 Met. 184; *Hall* v. *Thayer*, 12 Met. 130; *Springfield* v. *Harris*, 107 Mass. 532; *Adriatic F. Ins. Co.* v. *Treadwell*, 108 U. S. 361, 27 L. ed. 754; *Collins* v. *Prosser*, 1 Barn. & C. 682; *Boutelle* v. *Smith*, 116 Mass. 111.

An agreement prima facie joint may be construed to be several, if the interest of either party appearing upon the face of the instrument shall require that construction.

Chitty, Cont. 11th Am. ed. p. 139; *Anderson* v. *Martindale*, 1 East, 497; *Ludlow* v. *McCrea*, 1 Wend. 228; *Peckham* v. *North Parish*, 16 Pick. 274; *Capen* v. *Barrows*, 1 Gray, 376; *Bartlett* v. *Robbins*, 5 Met. 184; *Hall* v. *Thayer*, 12 Met. 130; *Springfield* v. *Harris*, 107 Mass. 532; *Colt* v. *Learned*, 118 Mass. 380.

The contract is governed by Massachusetts law, and the "fine" cannot be recovered.

The contract was not made at Leipsic.

McCulloch v. *Eagle Ins. Co.* 1 Pick. 278; *Lewis* v. *Browning*, 130 Mass. 173; *Pine* v. *Smith*, 11 Gray, 38; *Carnegie* v. *Morrison*, 2 Met. 381.

The mere fact that notice of an acceptance was to be sent from Leipsic does not make Leipsic the place of making the contract.

Wilson v. *Lewiston Mill Co.* 74 Hun, 612; *Golson* v. *Ebert*, 52 Mo. 260; *Lewis* v. *Browning*, 130 Mass. 176.

But even assuming that Leipsic was the place of making the contract, and that the law there in force would permit the collection of a fine, the claim is not valid that the law of the place of making governs the interpretation of this contract.

Story, Confl. L. § 242.

If the contract is to be executed in another country, the place of making it becomes immaterial.

Little v. *Riley*, 43 N. H. 109; *Stricker* v. *Tinkham*, 35 Ga. 176, 89 Am. Dec. 280; *Wooten* v. *Miller*, 7 Smedes & M. 380; *Richardson* v. *Rowland*, 40 Conn. 565; *Gregerson* v. *Imlay*, 4 Blatchf. 503; *Wayne County Sav. Bank* v. *Low*, 81 N. Y. 566, 37 Am. Rep. 533; *Arnold* v. *Potter*, 22 Iowa, 194; *Curtis* v. *Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271; *Brown* v. *Camden & A. R. Co.* 83 Pa. 316; *Bell* v. *Bruen*, 42 U. S. 1 How. 169, 11 L. ed. 89; *Andrews* v. *Pond*, 38 U. S 13 Pet. 65, 10 L. ed. 61; *Waverly Nat. Bank* v. *Hall*, 150 Pa. 466; *Brinker* v. *Scheunemann*, 43 Ill. App. 659; *Woldert* v. *Arledge*, 4 Tex. Civ. App. 692; *Case* v. *Dodge*, 18 R. I. 661; *Lewis* v. *Headley*, 36 Ill. 433, 87 Am. Dec. 227; *McIlvaine* v. *Legare*, 36 La. Ann. 359; *Warren* v. *Lynch*, 5 Johns. 239; *Baeder* v. *Carnie*, 44 N. J. L. 208; *Thurman* v. *Kyle*, 71 Ga. 628; 3 Am. & Eng. Enc. Law, p. 562; *Penobscot & K. R. Co.* v. *Bartlett*, 12 Gray, 244, 71 Am. Dec. 753; *Milliken* v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Shoe & L. Nat. Bank* v. *Wood*, 142 Mass. 563; *Hill* v. *Chase*, 143 Mass. 129.

It is useless for the plaintiff to contend that this additional sum is stipulated as "liquidated damages," and that he is entitled to recover it *in eo nomine*. The parties themselves denominate it a "fine."

Higginson v. *Weld*, 14 Gray, 165; *Tayloe* v. *Sandiford*, 20 U. S. 7 Wheat. 17, 5 L. ed. 385; *Taylor* v. *Steamer Marcella*, 1 Woods, C. C. 302; *Salters* v. *Ralph*, 15 Abb. Pr. 273; *White* v. *Arleth*, 1 Bond, C. C. 319; *Kemble* v. *Farren*, 6 Bing. 141; *Re Newman*, L. R. 4 Ch. Div. 724; *Ex parte Pollard*, 17 Nat. Bankr. Reg. 228; *Spear* v. *Smith*, 1 Denio, 464; *Bagley* v. *Peddie*, 5 Sandf. 192; *Patent Brick Co.* v. *Moore*, 75 Cal 205; *Wallis* v. *Smith*, L. R. 21 Ch. Div. 243; *Higginson* v. *Weld*, 14 Gray, 165.

At most only nominal damages can be recovered.

Priest v. *Nichols*, 116 Mass. 401; *Wolcott* v. *Mount*, 36 N. J. L. 271, 13 Am. Rep. 438; *Wakeman* v. *Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676; *Griffin* v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Taylor Mfg. Co.* v. *Hatcher Mfg. Co.* 39 Fed. Rep. 440, 3 L. R. A. 587.

Mr. **H. Wardwell,** for defendant Cassino:

For breach of such an agreement the plaintiff could recover only actual and reasonable damages.

Cutler v. *How*, 8 Mass. 257; *Baxter* v. *Wales*, 12 Mass. 365; *Thornborough* v. *Whitacre*, 6 Mod. 305; *James* v. *Morgan*, note to 6 Mod. 305, *note;* Chitty, Cont 11th Am. ed. 30, note (g), 1323, note (*b*); 1 Parsons, Cont. 437.

Field, Ch. J., delivered the opinion of the court:

The agreement sued on must be regarded as an agreement made by the partnership of Estes & Lauriat and S. E. Cassino & Co. with Hermann Julius Meyer, then doing business in Leipsic under the name of "The Bibliographical Institute Meyer." After this agreement had been entered into, and some of the electrotype plates had been ordered and furnished through the English and Foreign Electrotype Agency, Hermann Julius Meyer took his two sons into partnership, and proceeded to carry on the same business under the same name as before; and after this other plates were ordered by the defendants and furnished by the partnership. It appears by the report that "no notice was given by the plaintiff to the defendants, or either of them, or by the defendants, or either of them, to the plaintiff, of any change in their business relations." So far as appears, the defendants did not know that the plaintiff had taken his sons into partnership, or that any other person than the plaintiff had any interest in the business carried on under the name of "The Bibliographical Institute Meyer." There is no evidence, therefore, that the defendants made any contract with the part-

nership composed of the plaintiff and his two sons, and the plates furnished after the formation of this partnership must, we think, as between the parties to this suit, be regarded as furnished by the plaintiff to the defendants, in pursuance of the contract. It is not a case where a stranger to a contract voluntarily undertakes to perform it. After the formation of the partnership the plates were furnished, in legal contemplation, by the plaintiff, acting through the partnership of which he was a member. The form of the contract shows a joint agreement on the part of Estes & Lauriat and S. E. Cassino & Co. with the plaintiff. *Bartlett* v. *Robbins*, 5 Met. 184; *Donahoe* v. *Emery*, 9 Met. 63; *Boutelle* v. *Smith*, 116 Mass. 111; *White* v. *Tyndall*, L. R. 13 App. Cas. 263. There are no words in it that indicate a several liability of these two firms. The previous correspondence between the parties had informed the plaintiff that the two firms of Estes & Lauriat and Cassino & Co. were jointly interested in certain publications, and the letter of Estes & Lauriat to the plaintiff, inclosing a copy of the agreement, signed by the two firms, which the plaintiff was to accept or reject by telegraph, contained the following sentences, *viz.*: "You must understand that Messrs. S. E. Cassino & Co. have an equal interest in this publication with ourselves, and it is a physical impossibility for us to execute any agreement by which they shall not be equally bound; and since they join us in this agreement, you have all the protection which you would have in an agreement from us alone." "Should you decline to accept this agreement joining Messrs. Cassino & Co. to us in your form of agreement, please cable the following words, 'Estes, Boston: No. Meyer,' and by this we shall understand that the negotiation is entirely at an end, as it is impossible for us to make any agreement which does not connect Messrs. Cassino & Co. with us in ordering these cuts for this enterprise." The enterprise referred to was the publication of an illustrated work of natural history, in six volumes, of which each of the two firms was to publish at its own expense three volumes. Each firm was to engage in the sale of the entire work, and was to receive for its own use the wholesale price of that part of the work published by it. It was a part of the plan between the two firms that some of the plates used to illustrate the work should be obtained from the plaintiff; that a part of these plates should be used in each of the volumes; that each firm should pay for the plates used in the volumes published by it, and that the plates should be the separate property of the firm which paid for them; but it does not appear that this agreement between the two firms as to the separate property in the plates used by each firm was known to the plaintiff. As the volumes to be published were published as an entire work, although, as between themselves, the two firms owned the separate volumes, the two firms may be said to be jointly interested in the publication. The agreement sued on is that the defendants will use all the electrotype plates to be ordered through the plaintiff "only for the purpose of illustrating works to be published by the said Estes & Lauriat and the said S. E. Cassino & Co., or their heirs or successors in business, in the English language, and in the United States of America," and they agree "not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them, and to be responsible for every and all wrong use of said electrotypes to the amount of any damages," etc. This language literally relates to a publication by the two firms jointly, or by their heirs or successors in business; but the agreement not to sell these electrotypes to any other parties must mean to any other parties than some of themselves, and, as the two firms were separate partnerships, and were known to be such, the agreement must be held to confer the right upon either of the firms and its successor in business to use the electrotype plates for the purpose of illustrating works to be published by either firm separately, as well as the right to use the plates for illustrating works to be published by the two firms jointly, although the intention of the parties existing at the time of the making of the contract was that the electrotype plates should be used in publishing the natural history in six volumes, in the manner hereinbefore set forth. After making this contract, it was found impracticable for the two firms to publish the natural history together, and on September 24, 1883, Estes & Lauriat sold to S. E. Cassino & Co. all their interest in the work, and delivered to Cassino & Co. all materials and other articles owned by them relating to the history, and after that time Estes & Lauriat had nothing to do with the publication. At the time of the execution of the agreement sued on, the firm of S. E. Cassino & Co. was composed of Samuel E. Cassino and Bradlee Whidden. On December 31, 1885, this firm was dissolved, and Cassino sold all his interest in the firm assets to Whidden. Whidden continued to carry on the business under the old firm name until about December 31, 1886, and after that continued still in business as a publisher under his own name. On July 5, 1887, Whidden sold and delivered to Houghton, Mifflin, & Co., of Boston, the property known as the "Standard Natural History," which is the name adopted for the work, "said property consisting of all the electrotype plates of six volumes as published; all duplicate cuts ever made, now owned by him; the dies for binding cloth books; all stock in sheets, flat or folded; all bound stock whether in paper parts, cloth, sheep, or half or full morocco; and the copyright of the work;" and he guaranteed that the property conveyed "is free from any and all encumbrances or liens on account of copyright, or on account of any other claim or indebtedness whatsoever." At the time of this sale all of the history had been stereotyped, and the electrotype plates for the illustrations had been soldered into the stereotype plates, and sets of the history had been printed in six large octavo volumes. The report finds that the work was the most valuable part of the assets of S. E. Cassino & Co., and was the "principal live publication" of the firm.

Houghton, Mifflin, & Co., after the purchase, continued the publication of the work, using, also, with their own imprint, the printed sheets purchased of Whidden. They made some revision of the text, and continued to publish and sell the work as revised down to the time of the trial, and were then publishing it. After the revision the work was called "The Riverside Natural History." But few alterations had been made by the revision, and it was substantially the same work as that prepared and printed by Cassino & Co. Houghton, Mifflin, & Co. have never made any use of the electrotype plates except in the publication of this natural history. They had no connection with the firm of Estes & Lauriat, or with Cassino & Co., and they had no other rights in the plates derived from any one, except the rights derived from Whidden by the purchase. They sold, at their place of business in Massachusetts, 100 copies of the history to one Trench, of the firm of Kegan, Paul, Trench, & Co., of London, England, which were bound by Houghton, Mifflin, & Co., with the imprint of the London firm as the publishers, and these were sent to London. Subsequently the London firm found that there was some trouble about the sale of the work in Great Britain, and 38 of the 100 copies were returned to Houghton, Mifflin, & Co. It is found in the report that Houghton, Mifflin, & Co. had no knowledge of any restriction as to the sale of said plates, and that there was no competent evidence at the trial of any damage to the plaintiff by reason of said sale of 100 copies.

Some evidence was introduced at the trial by the defendants "that by the custom of the publishing trade in Boston, a firm which purchases all the plates, sheets, and rights of publication of a work is considered the 'successor in business' of the firm making the sale, so far as that work is concerned." There has been no finding of fact on this point. It is evident, we think that Houghton, Mifflin, & Co. were not in any general sense the successor in business of either the firm of Estes & Lauriat, or of Cassino & Co., or of Whidden. The original agreement contemplated that Estes & Lauriat or Cassino & Co. might use the plates in any of their publications, whether made by them jointly or separately, and that the successor in business of either firm should have the same right; but this probably means that the successor to the business generally of either firm should have the same right as the firm had, not that every purchaser of the right to continue any single publication of the firm should have the right to use the plates while the firm continued in business, and might use the plates in other publications. The sale to Houghton, Mifflin, & Co. did not restrict them to the use of the plates in illustrating the Standard Natural History, and therefore this evidence became immaterial. When the natural history had been printed by means of the stereotype plates into which the electrotype plates had been soldered, and had been published by Cassino & Co. or by Whidden, who may be regarded as the successor in business of Cassino & Co., and when the publication had been sold, with the plates, to Houghton, Mifflin, & Co., it may be that the continuance of this publication by Houghton, Mifflin, & Co., even if it were a technical breach of the agreement, could not work anything more than nominal damages to the plaintiff. The agreement, however, is that Estes & Lauriat and Cassino & Co. will not sell these electrotype plates to any other parties; and they have been sold to Houghton, Mifflin, & Co., who, so far as appears, must be regarded as another party than the defendants, "their heirs or successors in business," and the sale must be considered as a breach of the agreement. If the damages directly resulting from the publication of the history by Houghton, Mifflin, & Co. cannot be regarded as substantial, yet if, by the sale, Houghton, Mifflin, & Co. acquired the absolute property in the plates, so that they can use them in any of their publications, and can multiply them, and sell them to others to be used, the sale may be of substantial damage to the plaintiff.

It sufficiently appears that the plaintiff, at the date of the agreement, was the general owner of the plates, and of the right to multiply, sell, and use them, and that in his dealings with the defendants he required an agreement on their part that they would use them only in their own publications, and would not sell them, or multiply them for the purpose of selling them, in order that he might have the opportunity of selling the plates to other persons who might wish to use them in their publications, or might be able to protect persons to whom he had already sold the right to use the plates. It does not appear that the plates or the prints from them were protected, or could have been protected, by a copyright in the United States, but the plaintiff meant to accomplish much the same result, in requiring this agreement from the defendants, as could be reached under a copyright law by a license. It is not entirely clear from the agreement whether the plates were sold absolutely to the defendants, or were let to them to be used in a particular way. The prints, after they had been published, unless protected by a copyright, could be copied by anyone, and plates could be engraved and electrotype plates made; but this would be a costly process when compared with that of multiplying the plates. We think that it must be held that the plates were sold to the defendants so that the title passed to them. The agreement on their part not to sell them to other parties, nor to multiply them for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of opinion that such an agreement is reasonable, and one which ought to be enforced between the parties to it. See *Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. Rep. 914; *Clemens* v. *Estes*, 22 Fed. Rep. 899; *Parton* v. *Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784. The price to be paid for the plates, if they were to become the absolute property of the purchaser, without any restriction upon the use to be made of them, might reasonably be more than if they were purchased under such an agree-

ment as is the foundation of this suit. It must be considered that the title of Houghton, Mifflin, & Co., and their right to use the plates, are unaffected by this agreement; and therefore it is impossible to say, on the facts and evidence reported, that the defendants are liable only in nominal damages.

In determining the measure of damages, the first question is whether the contract is to be governed by the law of Massachusetts or by the law of the Kingdom of Saxony. We think that it is to be governed by the law of Massachusetts. The contract was signed in Massachusetts, and sent to the plaintiff at Leipsic, Saxony. It did not become a contract until the plaintiff accepted it, and notified the defendants of such acceptance, which he did by telegram sent to them at Boston. *Lewis* v. *Browning*, 130 Mass. 173; *Pine* v. *Smith*, 11 Gray, 38; *Hill* v. *Chase*, 143 Mass. 129. The contract relates to what is to be done by the defendants in the United States of America. The defendants are described as "of Boston, Mass., U. S. A.," and the date of the contract is Boston. We think that it must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which is also the law of the forum, must determine the damages to be recovered in the action.

The provisions of the contract are that the defendants are "to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to the Bibliographical Institute Meyer, and to pay furthermore a fine to the Bibliographical Institute Meyer equal to the tenfold price of the wrongly used electrotypes." The principal question in this part of the case is whether this fine is to be considered as a penalty. Some evidence has been introduced that by the law of the Kingdom of Saxony the plaintiff, in the case of a wrong use of the electrotype plates, could recover both the damages and the fine, although there is the testimony of one jurisconsult that under that law the plaintiff is not entitled to recover both, but can recover either one or the other, as he may elect. As by the terms of the contract the fine is in addition to the amount of any damages which may have been caused by the wrong use of the electrotype plates, it is impossible to hold that by our law the fine can be considered as liquidated damages. The amount of the fine is plainly intended as a penalty to be paid in addition to the amount of any actual damages suffered. *Higginson* v. *Weld*, 14 Gray, 165. The agreement does not provide that the damages suffered shall be considered to be tenfold the price of the wrongly used electrotype plates, but it leaves the damages to be assessed in the usual way, and provides that the fine shall be paid in addition to the damages, whatever they may be. As under our law the fine must be considered as in the nature of a penalty, it cannot be recovered, and the plaintiff is entitled to recover only the amount of the damages which have been caused by the breach of the contract. There may be some question whether this fine was intended to cover a breach of the contract which consisted in selling the electrotype plates to other parties than the defendants, their heirs or successors in business, when the plates have not actually been used for any other purpose than that for which the defendants were authorized to use them. Whether the fine was intended to cover all breaches of the contract or not is, however, immaterial, because, as a fine, it cannot be enforced. Damages are recoverable in the present suit for a breach of the agreement caused by the sale of the plates to Houghton, Mifflin, & Co., and as, by the purchase, Houghton, Mifflin, & Co. have acquired the right to use the plates for any of their publications, as well as the right to multiply them and sell them to others to be used, the damages to the plaintiff cannot be said to be nominal. It appears in the copy of the papers from the superior court that a jury has already assessed the damages, but this is not mentioned in the report of the presiding judge, and if it is a fact we can take no notice of it.

By the terms of that report the amount of *the damages is to be determined by a jury*, unless the parties agree to have it determined by an assessor

So ordered.

KANSAS SUPREME COURT.

George D. WESNER, *Plff. in Err.*,
v.
Enoch O'BRIEN.

(56 Kan. 724.)

***1. The district court has power to award land as alimony** in a divorce proceeding based only on constructive notice to the defendant, where the plaintiff alleges sufficient grounds for divorce and alimony in the petition, and asks to have such land appropriated as alimony, and where the publication notice contains a particular description of the land sought to be appropriated, and the nature of the relief demanded.

2. An action for divorce must be brought in the county where the plaintiff resides, and when rightfully brought, and alimony is asked as an incident of the divorce, any lands of the defendant brought within the control of the court by proper averments in the petition and notice may be awarded as alimony, although they may lie in a county of the state other than where the action was brought.

*Headnotes by JOHNSTON, J.

NOTE.—The authorities on the general subject of the validity of a decree of divorce obtained on publication or service out of the state where the defendant did not appear are found in a *note* to Butler v. Washington (La.) 19 L. R. A. 814.

See also 35 L. R. A. 70; 42 L. R. A. 419.

(May 9, 1896.)

ERROR to the Court of Appeals for the Southern Department, Eastern Division, to review a judgment affirming a judgment of the District Court for Miami County in favor of plaintiff in an ejectment proceeding to recover possession of land of which defendant had taken possession as assignee from the wife of plaintiff to whom it had been awarded as alimony in a divorce proceeding. *Reversed.*

The facts are stated in the opinion.

Mr. **John C. Sheridan,** for plaintiff in error:

The statute provides (§§ 54, 72, and 641 of the Code) for suits for divorce against nonresidents, and §§ 646, and 645 of the Code provide that "when a divorce shall be granted" the "court shall make provision for the guardianship, custody, support, and education of the minor children" (§ 645), and when, "by reason of the fault or aggression of the husband, the wife shall . . . be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, . . . which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in instalments, as the court may deem just and equitable." (Code, § 646).

Where the court has authority to grant the divorce, it not only has the authority, but by statute is required, when asked, to decide and determine these other matters, as the custody of minor children, alimony, division of property, etc., which are, by statute, made necessary incidents and consequences of the divorce.

Such being the authority, if not the absolute mandatory requirement, of our statute, the decisions of other states cannot apply.

5 Am. & Eng. Enc. Law, p. 750.

A suit for divorce is partly *in personam* and partly *in rem.*

5 Am. & Eng. Enc. Law, p. 751; Story, Confl. L. §§ 549, 592; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565.

Every state "has the right to determine all questions pertaining to the title and status of lands within its local limits."

2 Bishop, Mar. & Div. § 16.

Messrs. **N. W. Wells, W. H. Browne,** and **B. F. Simpson,** for defendant in error:

Marriage is the civil status of a man and a woman united in law for life, with mutual obligations to discharge toward each other, and to the community.

1 Bishop, Mar. & Div. 4th ed. §§ 3 *et seq.*, § 164 and footnotes.

The relation of two married persons to each other is not a mere personal relation depending on their will, but a status—a legal condition established by law.

Askew v. *Dupree*, 30 Ga. 175; *Ellison* v. *Martin*, 53 Mo. 575; *Adams* v. *Palmer*, 51 Me. 480; *Hunt* v. *Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Cook* v. *Cook*, 56 Wis. 195, 43 Am. Rep. 706.

Every state has the undoubted right to determine the status or social and domestic condition of the persons domiciled within its territory

Strader v. *Graham*, 51 U. S. 10 How. 82, 13 L. ed. 337; Story, Confl. L. §§ 51, 250; Burge, Colonial & Foreign Laws, § 57.

So far as a divorce suit is to affect this status it is to change a thing independent of the parties, and it is a proceeding, not against the parties *in personam*, but against their status *in rem.*

Roth v. *Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Ellison* v. *Martin*, *supra*; *Gould* v. *Crow*, 57 Mo. 200; *Coddington* v. *Coddington*, 20 N. J. Eq. 263; *Hunt* v. *Hunt*, *supra*; *People* v. *Baker*, 76 N. Y. 78; *Cook* v. *Cook*, *supra*; *Chapman* v. *Chapman*, 48 Kan. 636.

Jurisdiction to pass a decree *in rem* exists over everything fixed in the state.

Story, Confl. L. § 549; *Hickey* v. *Stewart*, 44 U. S. 3 How. 750, 11 L. ed. 814; *Thompson* v. *The Julius D. Norton*, 2 Ohio St. 26, 59 Am. Dec. 658; *Howell* v. *Manglesdorf*, 33 Kan. 194; *Amsbaugh* v. *Exchange Bank*, Id. 105.

Notice by publication or otherwise to the parties concerned is rather to give them every chance and to exclude suspicion of secrecy and fraud than to meet a necessity of service of summons.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565.

Jurisdiction to pass a decree *in personam* depends on the court having authority over the person, either by regular summons or by voluntary appearance.

So far as an action for divorce relates to alimony it is a proceeding *in personam.*

Beard v. *Beard*, 21 Ind. 321; *Turner* v. *Turner*, 44 Ala. 437; *Lytle* v. *Lytle*, 48 Ind. 200; *Sanford* v. *Sanford*, 5 Day, 358; *Ellison* v. *Martin*, 53 Mo. 575; *Gould* v. *Crow*, 57 Mo. 200; *Leith* v. *Leith*, 39 N. H. 20; *Prosser* v. *Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Middleworth* v. *McDowell*, 49 Ind. 386; *Madden* v. *Fielding*, 19 La. Ann. 505; *Nichols* v. *Nichols*, 25 N. J. Eq. 60; *Harding* v. *Alden*, 9 Me. 140, 23 Am. Dec. 549.

The distinction between the right or jurisdiction to dissolve a marriage, and to settle collateral questions concerning property was recognized in this country in the early days of our judicial history.

Maguire v. *Maguire*, 7 Dana, 181; *Holmes* v. *Holmes*, 4 Barb. 295; *Crane* v. *Meginnis*, 1 Gill & J. 463; *Townsend* v. *Griffin*, 4 Harr. (Del.) 440; 1 Bishop, Mar. & Div. § 14; 2 Bishop, Mar. & Div. § 170.

The action for divorce was instituted and determined in Johnson county. There was no attachment; no judgment upon which execution or order of sale could issue; no lien; no process asked for or issued by which the strong hand of the law was laid on the land. It was not situated in the county in which the action was brought, was pending, and was finally determined. If there had been an execution levy and judicial sale of the land to pay costs, it would have conferred no title on the purchaser at such a sale.

Lytle v. *Lytle*, *supra.*

The theory that if the court had jurisdiction over the person and subject matter it could do almost anything it pleased, and no matter how irregular or unwarranted its proceedings they were good until reversed, was productive of so much injustice that it provoked hostile criticism for many years and resulted in the esta-

lishment of another element in defining jurisdiction.

Windsor v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Rosenbaum* v. *Bauer*, 120 U. S. 450, 30 L. ed. 743; *Ex parte Walker*, 25 Ala. 81; *Jones* v. *Brown*, 54 Iowa, 74, 37 Am. Rep. 185; *Munday* v. *Vail*, 34 N. J. L. 418; *People*, *Tweed*, v. *Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Re Pierce*, 44 Wis. 411; *Stewart* v. *Anderson*, 70 Tex. 588; *Spoors* v. *Coen*, 44 Ohio St. 497; *Re Petty*, 22 Kan. 477; *Re Dill*, 32 Kan. 691, 49 Am. Rep. 505; *Mastin* v. *Gray*, 19 Kan. 458.

Jurisdiction is invoked by the filing of a petition containing all the requisites, and in the manner prescribed by law.

United States v. *Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Rhode Island* v. *Massachusetts*, 37 U. S. 12 Pet. 657, 9 L. ed. 1233; *Grignon* v. *Astor*, 43 U. S. 2 How. 319, 11 L. ed. 283.

After acquiring jurisdiction, the court must proceed according to the established mode governing the class to which the case belongs, and must not transcend in the extent or character of its judgment the law that is applicable to it.

Windsor v. *McVeigh*, *supra*.

A decree in equity, which is entirely outside of the issue raised in the record, is invalid and will be treated as a nullity, even in a collateral proceeding.

Munday v. *Vail*, *Stewart* v. *Anderson*, *Spoors* v. *Coen*, and *Re Dill*, *supra*.

Johnston, J., delivered the opinion of the court:

This was an action brought by Enoch O'Brien to recover from George D. Wesner a tract of land situate in Miami county, and the rents and profits of the same for a period of three years. Prior to June 18, 1875, the land was owned by O'Brien, and on that day, in a divorce proceeding brought by his wife, Annie O'Brien, it was decreed to her as alimony. Afterwards Annie O'Brien transferred the land to another, and Wesner derived his title from that source, and about three years before the commencement of the action he took possession of the same, and made substantial improvements thereon. More than fourteen years after the divorce proceedings, Enoch O'Brien began this proceeding, challenging the effect of the decree and the title of Wesner. On the trial it appeared that the action for divorce was begun in Johnson county, and, as summons could not be served upon Enoch O'Brien within the state, service was obtained by publication; and in the notice it was expressly stated that she would ask judgment for the custody and control of an infant son, and that the tract of land in question should be decreed to her as alimony. The constructive notice was given in the manner prescribed by law, and the judgment awarding her the land as alimony was based solely upon constructive notice. On the trial of this cause, record evidence of the divorce proceeding, and the decree appropriating the lands in question as alimony, was excluded by the court because it appeared that Enoch O'Brien had no other than constructive notice of the proceedings, and because the land was not in the county within which the court was sitting. This ruling presents the controlling question of the case. It is conceded that constructive notice was sufficient to authorize a divorce of the parties, but it is contended that a decree terminating the marriage relation was the full extent of the jurisdiction and power of the court. The determination of the question depends, to a great extent, upon the statutes of the state; and that the state has full power, through its legislature and courts, to regulate and control the status of its citizens, and to dispose of or control real property, to whomsoever it may belong, within its limits, will hardly be denied. It is provided that service may be made by publication "in actions to obtain a divorce, where the defendant resides out of the state," and "in actions brought against a nonresident of the state . . . having in this state property . . . sought to be taken by any of the provisional remedies or to be appropriated in any way." It is also authorized where the action relates to real or personal property in this state in which a nonresident defendant has or claims an interest, or where the relief demanded consists wholly or partly in excluding him from any interest therein. Civil Code, § 72. These provisions, if valid, afford authority to dissolve the marriage relation upon constructive notice, and also to appropriate the real property of the nonresident defendant. In *Dillon* v. *Heller*, 39 Kan. 599, it is held that "Kansas is supreme except so far as its powers and authority are limited by the Constitution and laws of the United States. And within the Constitution and laws of the United States, the courts of Kansas may have all the jurisdiction over all persons and things within the state which the Constitution and laws of Kansas may give to them, and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas To obtain jurisdiction of anything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service." The same view has been expressed by the Supreme Court of the United States, where it is said: "The state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens." *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565. In the exercise of this power, lands of nonresident owners are appropriated for the taxes assessed against them upon a publication notice only; mortgage and mechanics' liens are foreclosed against nonresident defendants where there is neither personal service nor appearance; and the property of nonresident defendants lying within the territorial jurisdiction of the court is subjected to the payment of claims and demands, in a variety of ways, without other service than by publication. *Dillon* v. *Heller*, *supra*. It was therefore competent for the legislature to provide for the granting of a divorce upon constructive service, and, as alimony is an incident of divorce,

it may be awarded in the same proceeding if it is within the power of the court.

Did the district court of Johnson county exceed its jurisdiction in decreeing the land in question as alimony? It had jurisdiction of the plaintiff, who was a resident of Kansas and of the county in which the action was brought. The child, whose custody she asked, but who died before the decree was rendered, was within the territorial jurisdiction of the court. The land sought to be appropriated as alimony was within the state and the operation of its laws, and subject to the control and disposition of its courts. The wife asked that this particular tract be subjected to the payment of her claim for support, definitely describing it in her petition, and setting out facts entitling her to alimony. That such relief was demanded was expressly stated in the publication notice wherein the land was particularly described. In this way the land was brought before the court, and subjected to its control. It is true, as the authorities cited by the defendant in error show, that upon such a notice a judgment for money, or one which could be enforced against the person of the defendant, cannot be rendered A court has no authority to render a judgment *in personam* without obtaining jurisdiction of the person of the defendant. Here, however, the land was brought within the control of the court in what was substantially a proceeding *in rem*. The complaining wife was here. The land sought to be subjected as alimony was here. She had an inchoate interest in the land, which possessed the element of property to such a degree that she could maintain an action during the life of her husband for its protection, and for relief from fraudulent alienation by her husband. *Busenbark* v. *Busenbark*, 33 Kan. 572. It was necessary for the support of the wife, who was seeking a divorce, and the law provides that alimony may be awarded in such cases. The land was subject to the laws of the state, and was within the reach of the proceedings and process of its courts. In such a case we think the court has power, not only to terminate the marriage relation, but to fix the custody and control of the children of the marriage who are before the court, and to appropriate as alimony any real property of the defendant within its territorial jurisdiction. It is true that there was no formal seizure of the property, but a seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation; and this is afforded by the publication notice, which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set apart as alimony. A formal seizure is no more essential to the jurisdiction of the court, in a proceeding of this kind, than in an action to quiet title to land, based alone on constructive service; and in the latter case it was held that complete jurisdiction was acquired by the court without formal seizure, and in the same manner as it was obtained in the divorce proceeding. *Dillon* v. *Heller*, *supra*. The theory that the limit of the power of the court in a divorce suit, where there is no personal service, is the dissolution of the marriage, does not obtain in this state. In the early case of *Lewis* v. *Lewis*, 15 Kan. 181, it was held that upon such service a decree barring the defendant of any interest in the plaintiff's property was valid and binding. See also *Chapman* v. *Chapman*, 48 Kan. 636.

We cannot sustain the view of the court of appeals that the jurisdiction of the court in such a proceeding does not reach lands in a county other than where the court is sitting. *Wesner* v. *O'Brien*, 1 Kan. App. 416. The jurisdiction depends upon the domicil of the plaintiff, and not upon the location of the land sought to be appropriated as alimony. It must be brought in the county of which the plaintiff is a resident, and cannot be maintained unless the plaintiff has been an actual resident of the state, in good faith, for one year before the filing of the petition. Civil Code, § 640. Alimony is an incident of the divorce proceeding, and, when the action is rightfully brought, any land within the operation of the laws of the state, and which has been brought within the control of the court, may be appropriated as alimony. The ancillary step in a divorce proceeding is not to be treated as an action brought to recover real estate, or to determine an interest therein, and is not governed by the provisions of the Code directing that such actions shall be brought in the county wherein the land, or some part thereof, is situated. The divorce action may be brought where the plaintiff resides, and only one action is necessary; and, when it is properly brought there is drawn to the court, and within its jurisdiction, any lands of the defendant sought to be appropriated as an incident of the divorce, wherever they may be situated within the state. If this were not the rule, how could lands of the defendant, situated in different parts of the state, be reached by a court granting the divorce upon either personal or constructive service? Must an action be brought in each county in which any of the land lies? And, if so, must the plaintiff acquire a residence in each before the court can be invested with authority to award the land as alimony? We think that only a single action is required or authorized, and that any land within the state, brought within the control of the court in the manner heretofore stated, is subject to its jurisdiction and decree, without regard to county lines or boundaries. For these reasons, *the Court of Appeals erred in affirming the judgment of the District Court, which will be reversed, with directions to grant a new trial of the cause.*

All the Justices concur.

MARYLAND COURT OF APPEALS.

Annie R. HANSON *et al.*, *Appts.*,
v.
LITTLE SISTERS OF THE POOR of Baltimore *et al.*

(79 Md. 434.)

1. **A gift in trust for the maintenance of a parish school,** to the vestry of a Protestant Episcopal church, which is a corporation, is not void for indefiniteness and uncertainty.
2. **A trust for the maintenance of a parish school is germane** to the object for which a Protestant Episcopal church is incorporated.
3. **The legal capacity of a corporation to take a devise of property** in excess of the amount prescribed by its charter cannot be raised collaterally by private persons,—such as the testator's heirs or next of kin,—or in any other way except in a direct proceeding by the state.

(June 21, 1894.)

APPEAL by plaintiffs from an order of the Circuit Court of Baltimore City confirming an auditor's report based on a construction of the will of Thomas H. Hanson, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. **Richard S. Culbreth** for appellants.

Messrs. **Harry M. Benzinger** and **Charles J. Bonaparte,** for appellees, Little Sisters of the Poor:

Re McGraw's Estate, 111 N. Y. 66, 2 L. R. A. 387, has been followed in *Wood* v. *Hammond*, 16 R. I 98, and is sustained by *Chamberlain* v. *Chamberlain*, 43 N. Y. 424; it is also supported by *obiter dicta* in *De Camp* v. *Dobbins*, 31 N. J. Eq. 690, and possibly by *Cromie* v. *Louisville Orphans' Home Soc.* 3 Bush, 365, but it is opposed to the overwhelming weight of authority on the subject.

Chambers v. *St. Louis*, 29 Mo. 523; *Land* v. *Coffman*, 50 Mo. 243; *Shewalter* v. *Pirner*, 55 Mo. 219; *Hayward* v. *Davidson*, 41 Ind. 212; *Baker* v. *Northwestern Guaranty Loan Co.* 36 Minn. 185; *Barnes* v. *Suddard*, 117 Ill. 238; *California State Teleg. Co.* v. *Alta Teleg. Co.* 22 Cal. 398; *Dickey* v. *Allen*, 2 N. J. Eq. 40; *De Camp* v. *Dobbins*, 29 N. J. Eq. 36; *Mallett* v. *Simpson*, 94 N. C. 37, 55 Am. Rep. 595; *Goundie* v. *Northampton Water Co.* 7 Pa. 233; *Harrison* v. *Waln*, 9 Serg. & R. 318; *Banks* v. *Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Bybee* v. *Oregon & C. R. Co.* 26 Fed. Rep. 586; *Hickory Farm Oil Co.* v. *Buffalo, N. Y. & P. R. Co.* 32 Fed. Rep. 22; *Vidal* v. *Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Girard* v. *Philadelphia*, 74

NOTE.—*Right of private persons to contest the power of a corporation to take or hold property.*

The general rule on this subject seems to be that if the corporation has acquired the title and possession of the property its right to hold it cannot be questioned by a private citizen. But if it is necessary for the corporation to seek the aid of the court to perfect its title an interested individual may contest its claims, and the court will, in case it has no right to hold the property, refuse a decree in its favor.

State alone can question right of corporation in possession.

Under the English mortmain acts the forfeiture for illegal alienation to a corporation was to the immediate or paramount lord of the fee, or, in default of them, to the King. 2 Bl. Com. 269.

The question as to the right to hold property is one between the corporation and the government alone. Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa, 101.

The commonwealth alone can object to the legal capacity of a corporation to hold real estate. Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. 32 Fed. Rep. 22.

The objection that an execution purchase of property by a national bank was *ultra vires* can only be urged by the government of the United States. Hennessy v. St. Paul, 54 Minn. 219.

Whether a corporation in accepting a deed to real estate exceeded its powers is a question that can only be raised by the state in a direct proceeding. Ragan v. McElroy, 98 Mo. 349; Bradwell v. Weller (Mo.) 6 West. Rep. 448.

The right of a corporation to hold and convey property cannot be questioned collaterally. Saunders v. Farmer, 62 N. H. 572.

If a corporation whose income is limited by its charter receives a grant by means of which the income exceeds that limit, it is a question between the corporation and the sovereign in which individuals have no concern. Bogardus v. Trinity Church, 4 Sandf. Ch. 633; Humbert v. Trinity Church, 24 Wend. 587.

The right of a corporation organized for a limited time to take and convey a fee can only be questioned by the state. People, Bank of Monroe, v. Canal Comrs. 5 Denio, 401.

No private citizen has the power to question, by resorting to legal proceedings, the action of a corporation as being *ultra vires* where he has no more interest therein than any other citizen. Starin v. Edson, 112 N. Y. 206.

A conveyance to a corporation is valid until office found. Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595.

A good title will pass until questioned by the state. Kelly v. People's Transp. Co. 3 Or. 189.

That a corporation is holding more property under a lease than it is authorized to hold by its charter cannot be set up by one not specially injured by such act. Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co. 10 Mo. App. 401.

Where property which a corporation is under some circumstances authorized to acquire is purchased for a purpose not authorized, the title of the corporation to the property cannot be defeated by a person who is a stranger to the agreement by which it was acquired, and who is not injured thereby. Ehrman v. Union Cent. L. Ins. Co. 35 Ohio St. 324.

A person having no connection with the title cannot raise the question of the right of the corporation to hold the land. Galveston Land & I. Co. v. Perkins (Tex.) 26 S. W. 256.

The state alone can question the right of a foreign corporation to hold the quantity of land which it attempts to hold within the state. Taylor v. Alliance Trust Co. 71 Miss. 694.

The power of a foreign corporation to hold real estate cannot be assailed collaterally. Barnes v. Suddard, 117 Ill. 237.

The title of a foreign corporation is good against

See also 35 L. R. A. 269, 693; 36 L. R. A. 242; 37 L. R. A. 138; 38 L. R. A. 339.

U. S. 7 Wall. 1, 19 L. ed. 53; *Cowell* v. *Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *American & Foreign Christian Union* v. *Yount*, 101 U. S. 352, 25 L. ed. 888; *McConihay* v. *Wright*, 121 U. S. 201, 30 L. ed. 932; *Jones* v. *Habersham*, 107 U. S. 174, 27 L. ed. 401; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *Swope* v. *Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Reynolds* v. *First Nat Bank*, 112 U. S. 405, 28 L. ed. 733; *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358, 20 L. ed. 430; *Myers* v. *Croft*, 80 U. S. 13 Wall. 291, 20 L. ed. 562; *Jones* v. *New York Guaranty & I. Co.* 101 U. S. 622, 25 L. ed. 1030; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439, 28 L. ed. 764; *Cross* v. *Del Valle*, 68 U. S. 1 Wall. 75, 17 L. L. ed. 515; *Doe, Governeur*, v. *Robertson*, 24 U. S. 11 Wheat. 332, 6 L. ed. 488; *Phillips* v. *Moore*, 100 U. S. 208, 25 L. ed. 603; *Fritts* v. *Palmer*, 132 U. S. 282, 33 L ed. 317; *Hough* v. *Cook County Land Co.* 73 Ill. 23, 24 Am. Rep. 230.

In Maryland the proposition is well settled that the performance of any condition imposed upon the exercise of a corporate right, is a matter between the state and the corporation only, and can under no circumstances be taken advantage of by third parties.

Chesapeake & O. Canal Co. v. *Baltimore & O. R. Co.* 4 Gill & J. 1; *Hodges* v. *Baltimore U. Pass. R. Co.* 58 Md. 603; *Bonaparte* v. *Baltimore, H. & L. R. R. Co.* 75 Md. 343.

Messrs. **Richard Bernard** and **Alfred D. Bernard,** for appellee, Vestry of St. Mary's Church:

It is contended by the appellants that the devise to the vestry is void, because the parish school is not an incorporated body. This can hardly be considered an open question in Maryland.

Barnum v. *Baltimore*, 62 Md. 297, 50 Am. Rep. 219; *Eutaw Place Baptist Church* v. *Shively*, 67 Md. 495; *Halsey* v. *Convention of P. E. Church*, 75 Md. 275.

If the testator's effort to impose an implied trust in favor of the parish school upon the devise in question should fail, it does not follow that the devise to the vestry should fail also.

Morice v. *Bishop Durham*, 9 Ves. Jr. 398, 10 Ves. Jr. 522; *Briggs* v. *Penny*, 3 Macn. & G. 546; *Stead* v. *Mellor*, L. R 5 Ch. Div. 225.

Indefiniteness or uncertainty in the object or subject-matter of the trust sought to be imposed upon the legatee or devisee by precatory words is evidence that the testator's purpose was not mandatory but discretionary, leaving the legatee or devisee to take beneficially.

1 Lewin, Tr. 1st Am. ed. pp. 130, 132, notes; 1 Jarman, Wills, Am. ed. 1893, p. 361, notes;

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every one but the state. Carlow v. Aultman, 28 Neb. 672; Myers v. McGavock, 39 Neb. 843; Hanlon v. Union P. R. Co. 40 Neb. 52.

As to the right to contest the power of a foreign corporation to hold property, see *note* to Lancaster v. Amsterdam Imp. Co. (N. Y.) 24 L. R. A. 322.

The rule as stated in the cases above cited is particularly applicable where the corporation has power to acquire property for some uses and to a certain amount, and the only question is whether or not it has exceeded such uses or amount.

Where a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the government and the corporation, and is no concern of third persons. Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547.

Where a corporation is incompetent by its charter to take the title to real estate a conveyance to it is not void, but voidable. The title is valid until assailed in a direct proceeding instituted for that purpose. Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733; Fritts v. Palmer, 132 U.S. 282, 33 L. ed. 317.

In a controversy over certain real estate held by a church organization for the purpose of erecting a building on it, between two sections of the divided membership of the church, the court said: Whether the quantity of land was more than was necessary for the erection of the building is a question the court will not undertake to determine in this collateral proceeding. Such question belongs to the state. Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ, 60 Fed. Rep. 937.

If a mining company has power to acquire a certain quantity of water for its purposes, the question whether or not it has exceeded the amount is for the government, and cannot be raised by an individual. Cole Silver Min. Co. v. Virginia & G. H. Water Co. 1 Sawy. 478.

The power of a corporation by the law under which it is created to purchase a particular character of property cannot be questioned in an action between it and another corporation or person. California State Teleg. Co. v. Alta Teleg. Co. 22 Cal. 398.

If a corporation is authorized to take real estate for some purposes, it cannot be made a question by a private individual whether its real estate has been acquired for authorized uses. Alexander v. Tolleston Club, 110 Ill. 65; Hamsher v. Hamsher, 132 Ill. 273, 8 L. R. A. 556; Hayward v. Davidson, 41 Ind. 214.

Under the statute limiting the acreage which foreign corporations can hold, the state alone can take advantage of an excessive holding. American Mortg. Co. v. Tennille, 87 Ga. 28, 12 L. R. A. 529.

The question whether or not a municipal corporation authorized to hold real estate for certain purposes has transcended the exact limits of its power can only be raised by the state. Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243.

If a company has power to take property for some purposes, its title under a deed cannot be avoided on the ground that it is not for an authorized purpose, by any person other than the state. Gilbert v. Hole, 2 S. D. 164.

If a corporation is given power to purchase and hold only a certain class of lands, it may purchase and alien another class subject only to the interference of the state. Leazure v. Hillegas, 7 Serg. & R. 319; Baird v. Bank of Washington, 11 Serg. & R. 418; Goundie v. Northampton Water Co. 7 Pa. 233.

It is stated in Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188, that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but valid until assailed by a direct proceeding for that purpose.

If a corporation has power to take land for some purposes, a particular purchase cannot be questioned by a private individual. Hough v. Cook County Land Co. 73 Ill. 23, 24 Am. Rep. 230.

When a corporation is incompetent by its charter to take title to real estate a conveyance to it is not void, but only voidable at the instance of the state. Russell v. Texas & P. R. Co. 68 Tex. 646.

To enable a person to make inquiry into an excess in the property of a corporation he must be in a position to claim an interest in the property if it is adjudged that the corporation cannot hold it

2 Story, Eq. Jur. 13th ed. § 1070, notes; *Re Pennock's Estate*, 20 Pa. 272, 59 Am. Dec. 718; *Warner* v. *Bates*, 98 Mass. 274; *Tolson* v. *Tolson*, 10 Gill & J. 159; *Chase* v. *Plummer*, 17 Md. 165; *Williams* v. *Worthington*, 49 Md. 572, 33 Am. Rep. 286; *Handley* v. *Wrightson*, 60 Md. 198.

Fowler, J., delivered the opinion of the court:

The two questions presented by this appeal arise on a bill filed for the construction of the third clause of the will of the late Thomas H. Hanson, of Baltimore city. Under this clause certain warehouse property was devised to Wilton Snowden in trust to hold the same and collect the rents and income, and after paying all taxes, etc., to divide the net income thereof equally between "the Little Sisters of the Poor," "the vestry of St. Mary's Church," of Hampden, Baltimore county, and three other corporations not necessary now to mention. The trustee was authorized to sell the property so devised at any time within two years from the death of the testator, and to divide the net proceeds of such sale equally between the five corporations just referred to. In a subsequent part of the clause under consideration, the testator declared that it was his express desire that the money so received by "the vestry of St. Mary's Church" from the sale of said property should be applied by it to the maintenance of the parish school connected with said church. After paying the income to the appellants for more than a year without objection, the trustee, in the exercise of the power given by the will, sold the property for $13,500. This sale has been finally ratified by the circuit court of Baltimore city, and an account has been stated distributing the net proceeds of the sale in accordance with the provisions of the will. The widow and heirs at law of the testator have excepted to this account because of the sums of money allowed, respectively, to the Little Sisters and the vestry. As to the former, the exceptions are based on the ground that that corporation already has an estate, which it has acquired by purchase, gift, or devise, amounting, on the whole, to $50,000, the amount limited by its charter, and that therefore it is incapable of taking any more; and as to the vestry, the contention is that the devise or bequest to it is void for indefiniteness and uncertainty. The court below overruled these exceptions, and ratified the account, and from this action this appeal was taken by the exceptants.

In view of the worthy objects of the testator's bounty, it is fortunate that no settled rule or principle of law will prevent us from giving

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Church of Redemption v. Grace Church, 68 N. Y. 582.

The inability of the corporation to hold the property does not give immunity to wrongdoers.

When injury is done to real estate held by a corporation, the party by whose negligence it was done cannot escape liability by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for a purpose not authorized by law. Farmers' L. & T. Co. v. Green Bay & M. R. Co. 11 Biss. 334.

Where a corporation authorized to receive grants of land for the purposes of the corporation brings an action against a trespasser to recover possession of lands granted to it, such trespasser will not be heard to question the title of the corporation on the ground that it had no authority to hold them. Southern P. R. Co. v. Orton, 32 Fed. Rep. 457, 6 Sawy. 157.

Individuals will not be protected in trespassing upon land which a corporation holds in excess of its charter power. Whitman Gold & S. Min. Co. v. Baker, 3 Nev. 386.

A person who was not a party to the transaction by which a corporation acquired property cannot question its right to take and hold it, for the purpose of defeating its liability for loss while in its possession for transportation. Farmers' & M. Bank v. Detroit & M. R. Co. 17 Wis. 376.

Right of persons contracting with corporation.

A person who has made a sale of real estate to a bank cannot question its capacity to take the title after it has paid him the consideration for the purchase. Smith v. Sheeley, 79 U. S. 12 Wall. 358, 20 L. ed. 430.

And this is true in respect to corporations generally. Myers v. Croft, 80 U. S. 13 Wall. 291, 20 L. ed. 578.

The heirs at law of a citizen of Illinois who has conveyed to a New York corporation cannot, in an action to set aside the conveyance on the ground that it was against the public policy of Illinois, raise the question that the grantee corporation has acquired a larger quantity of real estate than its charter allows. American & Foreign Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888.

That a corporation has no power to take property will not make property sold to it subject to seizure for the debts of the vendor. Edwards v. Fairbanks, 27 La. Ann. 449.

Whether or not a county can hold land which has been donated to it is not a question which the grantor or his assignees can raise. Quitman County v. Stritze, 70 Miss. 320.

That a corporation authorized to purchase land for one purpose applies it to another gives the vender no right to rescind the contract. Barrow v. Nashville & C. Turnp. Co. 9 Humph. 304.

The vendee of land from a corporation cannot defeat recovery of the purchase price by setting up inability of the corporation to take and hold real estate. Missouri Valley Land Co. v. Bushnell, 11 Neb. 192; Watts v. Gantt, 42 Neb. 869.

One who has contracted to purchase land from a corporation cannot avoid his contract because of the fact that in purchasing the land the corporation had exceeded its legal power. Walsh v. Barton, 24 Ohio St. 43.

One who purchases land from a corporation cannot defeat an action for the price by showing that the corporation had no power to take title to it. Rutland & B. R. Co. v. Proctor, 29 Vt. 93.

The power of an insurance company which has taken property in satisfaction of a mortgage to alien the same cannot be questioned by the vendee, although it has not disposed of it within the time specified by statute nor obtained a certificate permitting its being held longer. Home Ins. Co. v. Head, 30 Hun, 405.

One who has purchased coal from a corporation cannot defeat an action to recover the price by showing that the corporation had no right to hold the leases under which it mined the coal. Grant v. Henry Clay Coal Co. 80 Pa. 208.

Defective organization and forfeiture.

The right of an association assuming to be a corporation to hold property cannot be questioned on the ground that the corporation was defectively organized, in an action brought by an individual

full effect to the testator's benevolent intention to aid these two corporations. What we have said in *Eutaw Place Baptist Church* v. *Shirely*, 67 Md. 494, and in *Halsey* v. *Convention of P. E. Church*, 75 Md. 275, would seem to be conclusive as to the validity of the bequest to the vestry. Indeed, the case first cited would appear to be identical with this. There the testator bequeathed to the Eutaw Place Baptist Church a sum of money, the income to be applied to the support of the Sunday school attached to the said church, and it was urged in that case, as here, that the bequest to the church was "in trust for an indefinite and uncertain body of individuals, that fluctuates from time to time, without legal succession," and that therefore the bequest was void because of this uncertainty, and want of legal identification of the objects to be benefited by the bequest. In meeting this contention this court said (Alvey, former chief judge, delivering the opinion): "If the bequest had simply been made to the church, without reference to the Sunday school, there could have been no question of its validity, and the church could have applied the fund to any purpose, and to promote any object within the sphere of its corporate powers and functions as a religious body." The principle so well settled in this state, "that a bequest to trustees for the benefit of a vague and indefinite object is equally as invalid as an immediate bequest to such object," was held to have no application whatever to the bequest to the Baptist church. There the bequest was to the church, to be applied to the Sunday school attached to the church, and although the school was held to be an unincorporated body, it was "shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church." In the case before us the testator directed the money to be paid to the vestry of St. Mary's Church, and he expressed the desire that it should be applied to the maintenance of its parish school. It is shown by the general canons of the Protestant Episcopal Church, as well as by the testimony of the Right Reverend William Paret, bishop of that church in this state, that the parochial school, wherever it exists, is, like the Sunday school, under the management of the rector of the parish, and an integral part of the church organization. These parochial schools, as appears by the bishop's testimony, are as old as the church itself in this country. "They were in the church before the war of the Revolution, when the church here stood as part of the British church." It is obvious, therefore, there

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citizen to set aside a contract which he had made with the association in its corporate name and character. Baker v. Neff, 73 Ind. 68.

The question of the forfeiture by a railroad of its land grant by reason of failure to complete the road within the time specified cannot be raised by an individual. Knevals v. Hyde (Neb.) 20 Alb. L. J. 371.

Suits by the corporation.

If the aid of the court is necessary to enable the corporation to obtain possession of the property, its inability to take the property will be decreed. United States Trust Co. v. Lee, 73 Ill. 142.

There is some seeming conflict of authority in cases of ejectment suits. Some of the cases hold that the corporation can maintain ejectment, while others deny it that right. Some of this conflict may be accounted for by considering the different purposes for which ejectment is brought in different localities. If ejectment is brought to establish title, it would seem that under the general rule as stated above the corporation must fail, whereas if it is brought against a trespasser the same rule would deny him the right to question the title of the plaintiff.

After a corporation which has power to hold land has purchased real estate, and the conveyance has been regularly executed to the corporation, the court will not, in an action of ejectment to recover possession of the land, decide whether or not it violated its charter in receiving the conveyance. Shewalter v. Pirner, 55 Mo. 218.

In an action by a ditch company to recover possession of land, defendants cannot question the necessity of the land for the purposes of the corporation. Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544.

In ejectment by a corporation to recover land the defendant cannot defeat the action by showing that the corporation has no power to hold the land. Bone v. Delaware & H. Canal Co. (Pa.) 5 Atl. 751.

Persons in possession of property belonging to a religious corporation cannot, for the purpose of defeating an action to recover the possession, set up that the plaintiff is not properly organized and therefore is incapable of holding property. That is a question for the state to raise on a direct proceeding. This rule is founded upon principles of common justice and public policy. It would be unjust and intolerable if every intruder were allowed to take advantage of every informality or irregularity of organization. East Norway L. N. E. Lutheran Church v. Froislie, 37 Minn. 447.

But other cases have held that—

If the corporation has no power to acquire the land it cannot be permitted to recover possession of it in an action of ejectment. St. Peter's Roman Catholic Cong. v. Germain, 104 Ill. 440.

If property is given to a corporation for a purpose for which it has no right to hold it, its inability to so hold may be decreed in an action by it to recover possession of the property from a third person. Quaker Soc. v. Dickenson, 1 Dev. L. 189.

If the corporation should resort to ejectment to recover possession of the land, it might not be able to recover. Leasure v. Union Mut. L. Ins. Co. 91 Pa. 491.

So, in Carroll v. East St. Louis, 67 Ill. 568, a purchase of land by a foreign corporation was held void in an ejectment suit by a private individual to recover possession of it.

Specific performance.

In a suit by a corporation to compel specific performance of a contract to convey land to it the defendant may raise the question of its ability to take the title. Pacific R. Co. v. Seely, 45 Mo. 212.

If it is necessary for the corporation to sue to compel a conveyance to it of the title to the real estate, the defendant may raise the question of its right to take and hold the land. Case v. Kelly, 133 U. S. 21, 33 L. ed. 513.

But one who has contracted to purchase land from a corporation cannot resist specific performance of the contract on the ground that the corporation exceeded its powers in purchasing the land. Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

So, a suit for specific performance of a contract with a corporation cannot be defeated on the ground that it has no right to take the title to the real estate which it acquired as a necessary founda-

can be no foundation in fact for the contention that the testator directed the vestry to execute a trust not germane to the object for which it was incorporated. It might as well be contended that, because the corporation known as the vestry of St. Mary's Church was not expressly authorized by its charter, as in fact it is not so authorized, to maintain a Sunday school, such school is not germane to the powers of the church corporation. But, in addition to this view, it will be observed that the charter of the vestry provides that "the duties and powers of said vestry," which, of course, includes the rector of the church, "as to all matters properly belonging to a vestry, shall be as prescribed by the various clauses of the act of 1798, chap. 28, known as the 'vestry act'" and it is conceded by the appellants that a corporation formed under that act has power to maintain parish schools.

In the other case we have cited (*Halsey's Case*), where the devise was "to the Convention of the Protestant Episcopal Church of the Diocese of Maryland, to be held as a place for a church school for boys," the general principles in force in Maryland in regard to the jurisdiction of chancery, as applicable to the enforcement of trusts for charitable and religious purposes, were fully and clearly stated and it was there held that the devise to the convention was good.

We are unable to see any substantial distinction between the cases we have mentioned and the one we are now considering. In each of them there is a corporation capable of taking, and the object and character of the trust are definite and certain. "When these exist," said the present chief judge of this court, in delivering the opinion in *Halsey's Case*, and "when the gift is made to one capable of taking it, and when the trust is declared in definite terms, a court of chancery has the same power to enforce such a trust for a charitable or religious purpose as it has to enforce a trust for any other purpose." The case of *Church Extension of M. E. Church* v. *Smith*, 56 Md. 362, so much relied on by the appellants, has, we think, no application whatever to the case before us now, in which, as in the *Eutaw Baptist Church Case, supra*, the bequest was to the church, to be applied to a clear and well-defined object,—in the one case to the Sunday school, and in the other to the parish school,—both obviously within the sphere of the functions of the respective churches. In the *Church Extension Case* the bequests were de-

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tion for the execution of the contract. Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394.

Property acquired by will.

The rule in regard to suits by the corporation is applied in case of wills. In such cases it is incumbent upon the beneficiary to show his right to the gift, and in case it fails to do so the court will distribute the property as intestate.

If a corporation claims property under a will it must show its ability to take, and an individual whose interests will be affected by its receiving the property may raise the question of its inability. Chamberlain v. Chamberlain, 43 N. Y. 424, Reversing 3 Lans. 390.

If under its charter a corporation has no power to take real estate a devise to it will be void, and equity will not aid it in obtaining the land in an interpleader proceeding as against the claims of the heirs at law. State, Wiltbank, v. Bates, 2 Harr. (Del.) 18.

A devise or bequest to a corporation of property which will exceed the amount or value which the corporation is by law permitted to take will be void for the excess; and as to that excess no title will vest for a single instant in the corporation, but will vest instantly in the heir or next of kin. The power to raise the question of the right of the corporation to take is not confined to the state, but the question may be raised by the heirs or next of kin. *Re* McGraw's Estate, 111 N. Y. 66, 2 L. R. A. 387, Affirming 45 Hun, 354.

And the Supreme Court of the United States held that it had no jurisdiction of the case, as no Federal question was involved. Cornell University v. Fiske, 136 U. S. 152, 34 L. ed. 427.

A corporation which has no power to take lands by devise cannot hold them under a will. Starkweather v. American Bible Soc. 72 Ill. 50, 22 Am. Rep. 133.

If a corporation has acquired all the property it is enabled by its charter to take, a devise to it of further property will be void in favor of the testator's heirs at law. Cromie v. Louisville Orphans' Home Soc. 3 Bush, 365.

If a statute makes a bequest to a corporation void, it can take no title to property bequeathed, but such property will go the residuary legatee. Barton v. King, 41 Miss. 288.

If the corporation had no power to take by will, the court has so declared, although the question was in a controversy with an individual. Goddard v. Pomeroy, 36 Barb. 546.

A devise to a corporation which is incapable of taking is void. Ayres v. Methodist Episcopal Church, 3 Sandf. 351.

The question of the power of a corporation to take property under a will may be raised by other persons interested in the will, and the question is not limited to the state. Wood v. Hammond, 16 R. I. 98.

There are a few cases containing expressions to the contrary. But such expressions were either *dicta*, or have not been followed by courts of higher authority in the states where they were uttered.

In case of a charitable bequest to a city the court says if the trusts were in themselves valid in point of law, it is plain that no private person could have any right to inquire into or contest the right of the corporation to take the property. This right would exclusively belong to the state in its sovereign capacity and in its sole discretion to inquire into and contest the same by proper judicial proceedings. Vidal v. Philadelphia, 43 U. S. 2 How. 127, 11 L. ed. 205.

And the principle of that case was followed in Girard v. Philadelphia, 74 U. S. 7 Wall. 1, 19 L. ed. 53.

The question whether or not the property exceeds the permitted amount cannot be raised on a proceeding to test the validity of the devise, but its power to hold can only be questioned by the state. Rainey v. Laing, 58 Barb. 489; Howell v. Earp, 21 Hun, 395; White v. Howard, 38 Conn. 342.

Third persons cannot object to the capacity of a religious corporation to take a gift of property, on the ground that its property already equals the amount limited by the general law under which it is formed. De Camp v. Dobbins, 29 N. J. Eq. 36.

But that statement was questioned on appeal. De Camp v. Dobbins, 31 N. J. Eq. 690.

H. P. F.

clared void for want of certainty and definiteness in the objects to be benefited which is not the case here.

The objection to the validity of the bequest to the Little Sisters of the Poor is, as we have seen, based upon entirely different grounds, and presents an important question,—namely, whether the legal capacity of a corporation to take property in excess of the amount prescribed by its charter can be raised collaterally by private persons, or in any other way, except in a direct proceeding by the state. The corporation in question was formed in 1854 under the name of "the Trustees of the Roman Catholic Asylum for Widows in the City of Baltimore." Its name was subsequently changed to that of "The Little Sisters of the Poor," and the provision of its charter (Act 1854, chap. 199, § 1), is that it may "have, take, and hold by purchase, gift, and devise any estate and property not exceeding in the whole the sum of $50,000." Testimony was taken by both sides to show the actual value of the property held by this corporation, but we think it unnecessary to consider this question; for, conceding that the charter limits have been exceeded, it is not for the appellants to complain so long as the state, which created the corporation, remains silent. The doctrine of *ultra vires*, as applied to contracts generally, relied on by the appellants, has no application here. The question is as to the validity of a bequest. Nor is there any doubt as to the intention of the testator. He intended this part of his property to go to The Little Sisters, and therefore, if we are prevented by no rule of law to the contrary, we must give full effect to his intention, as expressed in his will.

In regard to the question before us, there has been considerable conflict of authority. The court of appeals of New York in *Re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, announced the doctrine relied on by the appellants here, but the Supreme Court of the United States in *Jones* v. *Habersham*, 107 U. S. 174, 27 L. ed. 401, adhere to the contrary doctrine,—namely, that restrictions imposed by the charter of a corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only by the state in a direct proceeding instituted for that purpose. And it was so held in a case where, as here, the heirs of a decedent filed a bill to have declared void certain devises to a charitable corporation which, it was averred, would swell the amount of property owned by the corporation to a value greater than the charter authorized. It cannot be denied that this corporation had power to take and hold any estate and property not exceeding the charter limits, and the devise, therefore, was not void on its face, and must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being, they have committed a wrong, not against any particular individual, but against the state, and this wrong can only be inquired into by a proceeding on the part of the state. *Whitman Gold & S. Min. Co.* v. *Baker*, 3 Nev. 386. In other words, the corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter. The contrary doctrine would make it very hazardous to take title from a corporation with such a limitation on its charter, and, if the objection could be made by anyone, title to property once held by such corporations would cease to be marketable, litigation would be promoted, and courts would be constantly called on to decide the very difficult questions of fact as to whether the property of a corporation does or does not exceed in value the charter limits. In the case now before us, the estimates of the witnesses differ greatly, and a devise or bequest would be held valid or void according to the estimate adopted by the court. We think this is one of those cases which may be put in the class with those referred to by the late Justice Miller in his dissenting opinion in *Fritts* v. *Palmer*, 132 U. S. 293, 33 L. ed. 321, where he says: "I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate, such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, . . . in which the question as to whether they have exceeded that amount . . . may be one for the state alone, and not of any private citizen." Adopting, therefore, the doctrine of the Supreme Court of the United States in *Jones* v. *Habersham*, *supra*, *we will affirm the order appealed from.*

INDIANA SUPREME COURT.

Eliza Gertrude ORTH *et al.*, *Appts.*,
v.
Harry A. ORTH *et al.*

(.....Ind.....)

1. A letter to testator's wife containing advice as to the management of the estate and expressing a hope that she will convey certain property to a person named and that she will have sufficient after paying debts to assist all his children as they may need from time to time, and expressing full confidence that she will act justly toward all, closing with a desire that she will have a competence during life and then what is left give to all the children alike, does not create any interest in the property in favor of the children, or impose any burden upon the absolute title which is given to her by the will.

2. A trust, whether declared or arising from conduct, which does not with reasonable certainty point the essential elements of a trust, is no trust at all.

NOTE.—For gifts by will as affected by promises made to the testator and by secret trusts, see *note* to Gore v. Clarke (S. C.) 20 L. R. A. 465.

As to precatory words in a will, see Knox's Appeal (Pa.) 6 L. R. A. 353, and many cases cited in *note* thereto.

3. **The failure to perform a promise** made by the sole beneficiary of a will to the testator, to comply with his requests, contained in a letter, that a portion of the property should be used to aid certain other persons, is not such a fraud as will create a trust *ex maleficio*.

4. **A parol promise to a testator by the sole beneficiary of his will** to dispose of a portion of the property in favor of another person, is invalid so far as it involves the disposition of real property or of personal property of an amount which comes within the statute of frauds.

On Rehearing.

5. **The rule that a trust in personal property may be created by parol** cannot be permitted to work a revocation of a will contrary to the requirements of the statute upon that subject.

6. **The rule that one who, standing in a fiduciary relation to another,** obtains an advantage from him, is presumed to have obtained it fraudulently, does not apply to the case of a testamentary provision by a husband in favor of his wife.

(November 26, 1895.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Carroll County in favor of defendants in an action brought to enforce an alleged trust in property given by the will of Godlove S. Orth, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. L. Taylor, T. F. Palmer, John H. Gould,** and **George R. Eldridge,** with *Messrs.* **George Burry** and **Charles C. Spencer,** for appellants:

Where a person knowing that a testator in making a disposition in his favor intends it to be applied for purposes other than his own benefit either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and in such a case the court will not allow the devisee to set up the statute of frauds, or rather the statute of wills by which the statute of frauds is now in this respect superseded; and for this reason the devisee by his conduct has induced the testator to leave him the property.

Rockwood's Case, 1 Cro. Eliz. 164; *Chamberlaine* v. *Chamberlaine*, Freem. Ch. 34; *Thynn* v. *Thynn*, 1 Vern. 296; *Devenish* v. *Baines*, 1 Prec. in Ch. 3; *Oldham* v. *Litchfield*, 2 Vern. 506; *Drakeford* v. *Wilks*, 3 Atk. 539; *Reech* v. *Kennegal*, 1 Ves. Sr. 123, Ambl. 67, 1 Wils. 227; *Barrow* v. *Greenough*, 3 Ves. Jr. 152; *Byrn* v. *Godfrey*, 4 Ves. Jr. 6; *Stickland* v. *Aldridge*, 9 Ves. Jr. 516; *Paine* v. *Hall*, 18 Ves. Jr. 475; *Chamberlain* v. *Agar*, 2 Ves. & B. 259; *Podmore* v. *Gunning*, 7 Sim. 644; *Russell* v. *Jackson*, 10 Hare, 204; *Wallgrave* v. *Tebbs*, 2 Kay & J. 321; *Tee* v. *Ferris*, Id. 357; *Moss* v. *Cooper*, 1 Johns. & H. 352; *Jones* v. *Badley*, L. R. 3 Eq. 635; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Springett* v. *Jenings*, L. R. 10 Eq. 488; *Rowbotham* v. *Dunnett*, L. R. 8 Ch. Div. 430; *Re Boyes*, L. R. 26 Ch. Div. 531; *Owing's Case*, 1 Bland, Ch. 370, 17 Am Dec. 311; *Hoge* v. *Hoge*, 1 Watts, 163, 26 Am. Dec. 52; *Barrell* v. *Hanrick*, 42 Ala. 60; *Caldwell* v. *Caldwell*, 7 Bush, 515; *Dowd* v. *Tucker*, 41 Conn. 197; *O'Hara* v. *Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *Gilpatrick* v. *Glidden*, 81 Me. 137, 2 L. R. A. 662; *Graves* v. *Graves*, 29 N. Y. S. R. 624; *Ragsdale* v. *Ragsdale*, 68 Miss. 92, 11 L. R. A. 316; *Larmon* v. *Knight*, 140 Ill. 232; *Gaither* v. *Gaither*, 3 Md. Ch. 160; *Church* v. *Ruland*, 64 Pa. 432; *Vreeland* v. *Williams*, 32 N. J. Eq. 734; *Glass* v. *Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; Browne, Stat. Fr. p. 3, § 93; *Towles* v. *Burton*, Rich. Eq. Cas. 146, 24 Am Dec. 409; *Jones* v. *McKee*, 3 Pa. 497, 45 Am. Dec. 661; *McKee* v. *Jones*, 6 Pa. 425; *Schultz's Appeal*, 80 Pa. 396; *Williams* v. *Fitch*, 18 N. Y. 546; *Campbell* v. *Brown*, 129 Mass. 23; *Sooner's Appeal*, 104 Pa. 609; *Piper* v. *Hoard*, 107 N. Y. 82; *Richardson* v. *Adams*, 10 Yerg. 273; *Hooker* v. *Axford*, 33 Mich. 453; *DeLaurencel* v. *DeBoom*, 48 Cal. 585; *Kennedy* v. *Kennedy*, 2 Ala. 571; *Brook* v. *Chappell*, 34 Wis. 405; *Thomson* v. *White*, 1 Dall. (Pa.) 427, 1 Am. Dec. 252; *Cox* v. *Arnsmann*, 76 Ind. 212; *Browne* v. *Browne*, 1 Harr. & J. 430.

It is not material whether the purpose of the trust is communicated to the trustee before or after the execution of the will.

Drakeford v. *Wilks*, 3 Atk. 539; *Moss* v. *Cooper*, 1 Johns. & H. 367; *Gilpatrick* v. *Glidden*, *supra*.

It is not necessary that the trustee expressly promise to carry out the trust. As soon as he learns the intention of the testator he is bound to elect and declare whether he will undertake the trust or not. Silence is acquiescence and the trust must be executed.

Byrn v. *Godfrey*, 4 Ves. Jr. 10; *Paine* v. *Hall*, 18 Ves. Jr. 475; *Wallgrave* v. *Tebbs*, 2 Kay & J. 321; *Moss* v. *Cooper*, *supra*; *Jones* v. *Badley*, L. R. 3 Eq. 635; *McCormick* v. *Grogan*, *supra*; *Springett* v. *Jenings*, L. R. 10 Eq. 495; *Rowbotham* v. *Dunnett*, *supra*; *O'Hara* v. *Dudley*, 95 N. Y. 412, 47 Am. Rep. 53; *Gilpatrick* v. *Glidden*, 81 Me. 153, 2 L. R. A. 662; *Schultz's Appeal*, 80 Pa. 400.

The statute of frauds is no defense in the case of such a trust.

Cox v. *Arnsmann*, *supra*; *Arnold* v. *Cord*, 16 Ind. 177; *Hunt* v. *Elliott*, 80 Ind. 257; *Butt* v. *Butt*, 91 Ind. 305; *McMakin* v. *Schenck*, 98 Ind. 264.

The failure of Mrs. Orth to execute the trust was in law a fraud against which equity will relieve.

Gilpatrick v. *Glidden*, 81 Me. 137, 2 L. R. A. 662; *Barrell* v. *Hanrick*, 42 Ala. 73; *Caldwell* v. *Caldwell*, 7 Bush, 515; *O'Hara* v. *Dudley*, 95 N. Y. 412, 47 Am. Rep. 53; *Hoge* v. *Hoge*, 1 Watts, 163, 26 Am. Dec. 52; *Dowd* v. *Tucker*, 41 Conn. 197; *Ragsdale* v. *Ragsdale*, 68 Miss. 92, 11 L. R. A. 316; *Graves* v. *Graves*, 29 N. Y. S. R. 624; *Larmon* v. *Knight*, 140 Ill. 232.

Persons claiming under Mrs. Orth who are not bona fide purchasers, for instance her heirs and administrator, are in law her successors in trust and liable to account.

Perry, Tr. § 217; *Keister* v. *Howe*, 3 Ind. 268; *Larmon* v. *Knight*, and *Gilpatrick* v. *Glidden*, *supra*; *Barrell* v. *Hanrick*, 42 Ala. 60; *Graves* v. *Graves*, *supra*.

Where a person by fraud prevents A from giving a legacy to B, or prevents A from executing a contract with B, even though the contract was not enforceable at law, both law and

equity will furnish B appropriate relief against him depending upon the facts of the case.

Rice v. *Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Benton* v. *Pratt*, 2 Wend. 385, 20 Am. Dec. 623; Cooley, Torts, 379; Addison, Torts, §§ 16-18; Kerr, Fr. 374; *Benton* v. *Pratt, supra; Snow* v. *Judson*, 38 Barb. 210.

An agreement entered into upon a supposition of a right or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement.

Stapleton v. *Stapleton*, 1 Atk. 2; Bishop, Cont. § 57; *Honeyman* v. *Jarvis*, 79 Ill. 319; *Parker* v. *Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *McKinley* v. *Watkins*, 13 Ill. 140; *Pool* v. *Docker*, 92 Ill. 501; *Wray* v. *Chandler*, 64 Ind. 154; *United States Mortg. Co.* v. *Henderson*, 111 Ind. 24; *Jones* v. *Rittenhouse*, 87 Ind. 348.

On Rehearing.

At common law trusts both of real and personal property could be created by parol, and personal property not being within the statute trusts therein may still be created by parol.

Bispham, Eq. 1893, § 63; 1 Perry, Tr. 1882, § 86; Lewin, Tr. 1888, § 53; Hill, Trustees, 1867, § 57.

The statute of frauds was not made to cover fraud. It has been repeatedly held that this was not the purpose of the statute and that the statute will not be permitted to aid in the perpetration of a fraud. The principle of interpretation is that where there is fraud constructive or actual the want of a writing shall not be set up.

1 Bigelow, Fr. 1890, 451, 452; 1 Beach, Eq. Jur. 1892, § 84; 1 Perry, Tr. 1889, § 226; *Giffen* v. *Taylor*, 139 Ind. 573; *Catalani* v. *Catalani*, 124 Ind. 54; *Myers* v. *Jackson*, 135 Ind. 136; *Cox* v. *Arnsmann*, 76 Ind. 210; *Tinkler* v. *Swaynie*, 71 Ind. 562; *Teague* v. *Fowler*, 56 Ind. 569; *Arnold* v. *Cord*, 16 Ind. 177; *Brison* v. *Brison*, 75 Cal. 525.

Trusts arising by implication of law are not within the statute, and this is so whether or not they are by the statutes expressly excepted.

Ind. Rev. Stat. 1881, § 2969; Ind. Rev. Stat. 1894, § 3391; *Giffen* v. *Taylor*, 139 Ind. 578; 1 Perry, Tr. 1889, § 137; *Hoxie* v. *Carr*, 1 Sumn. 173; *Foote* v. *Bryant*, 47 N. Y. 544; *Br son* v. *Brison, supra*; *Catalani* v. *Catalani*, 124 Ind. 58.

Strictly speaking a so-called "implied trust" raised by a court of equity is not a trust at all. The jurisdiction and relief are founded, not on trust, but on fraud. The so-called "implied trust" is a fiction—a mere name to designate the form of the remedy for the fraud. Neither implied trust nor any subdivision of it is ever properly applied to designate any part of the fraud which is alleged and for which the implied trust is the remedy.

1 Beach, Eq. Jur. 1892, §§ 226, 233; Bispham, Eq. 1893, 151; 1 Perry, Tr. 1889, § 166; *Rolfe* v. *Gregory*, 4 De G. J. & S. 576; 2 Lewin, Tr. 1888, 864; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607.

The character and limits of the so-called "implied trust" are determined, as are the character and limits of all decrees, by the nature and requirements of the particular case.

1 Beach, Eq. Jur. 1892, § 256; 1 Story, Eq. Jur. 1886, 13 h ed. § 439; *Moore* v. *Crawford*, 130 U. S. 122, 32 L. ed. 878.

Where A gives money or property to B upon B's promise to hold it in whole or in part for C, and B afterwards appropriates the money or property to his own use, a court of equity will in its decree treat B as a trustee.

Moore v. *Crawford*, 130 U. S. 122, 32 L. ed. 878; Bigelow, Fr. p. 452; 1 Beach, Eq. Jur. §§ 218, 219; 1 Perry, Tr. 1889, §§ 124, 128, 130, 134, 137; Bispham, Eq. 1893, 79; *Giffen* v. *Taylor*, 139 Ind. 573; *Prow* v. *Prow*, 133 Ind. 340; *Myers* v. *Jackson*, 135 Ind. 136; *Pierce* v. *Hower*, 142 Ind. 626; *Brison* v. *Brison*, 75 Cal. 525; *Alaniz* v. *Casenave*, 91 Cal. 41; Rev. Stat. 1894, §§ 3391, 3396, 3398; *Cox* v. *Arnsmann*, 76 Ind. 210; *Goldsmith* v. *Goldsmith*, 145 N. Y. 318; *Denike* v. *Denike*, 13 Misc. 381; *Young* v. *Peachy*, 2 Atk. 254.

The only point which is open to debate in cases of this character is whether the facts show such a case of fraud as falls within the exception.

Brison v. *Brison*, 75 Cal. 527.

A mere parol contract to hold land in trust, and its breach, are not such fraud as takes a case out of the statute.

1 Perry, Tr. 1889, § 134; *Goldsmith* v. *Goldsmith*, 145 N. Y. 313; Bispham, Eq. 1893, § 218; Bigelow, Fr. 1888, 483.

The fraud required to take a case out of the statute results from the acts and relations of the parties and not from the agreement and its breach, or rather it results from the grouped and aggregated circumstances, relations, and agreements.

1 Perry, Tr. 1889, § 134; *Goldsmith* v. *Goldsmith*, and *Brison* v. *Brison, supra*; *Foote* v. *Bryant*, 47 N. Y. 547.

Fraud may be divided as follows:

1. Fraud arising from facts and circumstances of imposition. This is sometimes called "real fraud," "active fraud," "actual fraud," "deception," "deceit," or "deception affecting the motive."

1 Bispham, Eq. 1893, §§ 205, 206; 1 Bigelow, Fr. chap. 1, p. 384; Moncrieff, Fr. 1891, 101, 102; 1 Bigelow, Fr. 484; Clark, Cont. 332; Cooley, Torts, 1888, 487; Pollock, Torts, 1887, 241; Bishop, Cont. 1887, § 668; Anson, Cont. 2d ed. 203; *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. Div. 483; *Burrill* v. *Stevens*, 73 Me. 395, 399, 40 Am. Rep. 366; *Miller* v. *Howell*, 2 Ill. 499, 32 Am. Dec. 36; *Brower* v. *Goodyer*, 88 Ind. 572; *Tennessee Coal, I. & R. Co.* v. *Sargent*, 2 Ind. App. 460; *Levi* v. *Kraminer*, Id. 595; *Wallgrave* v. *Tebbs*, 2 Kay & J. 321; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Moss* v. *Cooper*, 1 Johns. & H. 367; *O'Hara* v. *Dudley*, 95 N. Y. 412; *Gilpatrick* v. *Glidden*, 81 Me. 137, 2 L. R. A. 662; *Drakeford* v. *Wilks*, 3 Atk. 539.

2. Fraud which arises from the circumstances, relations, and conditions of the parties. This is sometimes called "constructive fraud." It includes (1) those cases which grow out of "conduct subsequent," and (2) those cases which grow out of a violation of the duties imposed by fiduciary, confidential, and kindred relations of the parties.

Bigelow, Fr. p. 261; *Leavitt* v. *Stern*, 159 Ill. 526; *Gilpatrick* v. *Glidden*, *supra*; *Barrell* v. *Hanrick*, 42 Ala. 73; *Caldwell* v. *Caldwell*, 7 Bush, 515; *O'Hara* v. *Dudley*, *supra*; *Hoge* v. *Hoge*, 1 Watts, 163, 26 Am. Dec. 52; *Dowd* v. *Tucker*, 41 Conn. 197; *Ragsdale* v. *Ragsdale*, 68 Miss. 92, 11 L. R. A. 316; *Graves* v. *Graves*, 29 N. Y. S. R. 624; *Larmon* v. *Knight*, 140 Ill. 232; *Prow* v. *Prow*, 133 Ind. 340; Bispham, Eq. 1893, § 231; 1 Story, Eq. Jur. 1886, §§ 307, 308; 1 Perry, Tr. 1889, § 166; 2 Washb. Real Prop. 1887, 522, note 3; *Goldsmith* v. *Goldsmith*, 145 N. Y. 318; *Denike* v. *Denike*, 13 Misc. 381; *Brison* v. *Brison*, 75 Cal. 525; *Alaniz* v. *Casenave*, 91 Cal. 41; *Garvin* v. *Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Street* v. *Goss*, 62 Mo. 226; *Giffen* v. *Taylor*, 139 Ind. 577; *Warner* v. *Warner*, 132 Ind. 213; *Catalani* v. *Catalani*, 124 Ind. 55; *Ewing* v. *Wilson*, 132 Ind. 224, 19 L. R. A. 767.

Messrs. **W. D. Wallace** and **S. P. Baird**, for appellees:

If the failure to perform a parol promise takes every case out of the statute of wills and the statute of frauds their enactment was a useless ceremony.

This distinction between obtaining a will by false and fraudulent promises and the mere failure to keep a parol promise has been repeatedly recognized and enforced by the courts.

Collins v. *Hope*, 20 Ohio, 493; *Lantry* v. *Lantry*, 51 Ill. 458, 2 Am. Rep. 310; *Allmon* v. *Pigg*, 82 Ill. 149, 25 Am. Rep. 303; 2 Pom. Eq. Jur. §§ 1054, 1056; 10 Am. & Eng. Enc. Law, p. 66, note; *Irwin* v. *Ivers*, 7 Ind 308, 63 Am. Dec. 420; *Sands* v. *Thompson*, 43 Ind. 28; *Irvin* v. *Hubbard*, 49 Ind. 350, 19 Am. Rep. 679; *Jagers* v. *Jagers*, 49 Ind. 428; *Hayes* v. *Burkam*, 51 Ind. 130; *Mescall* v. *Tully*, 91 Ind. 96; *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222; *Green* v. *Groves*, 109 Ind. 519; *Pearson* v. *Pearson*, 125 Ind. 341, *Stonehill* v. *Swartz*, 129 Ind. 310.

Mrs. Orth had full power of disposition of the entire estate; she had the right to appropriate it all to her own use. Upon the death of Orth Mrs. Orth's right in the estate became fixed. She either held it absolutely free from any trust or burdened with a trust. She could not hold it both ways. As she had a right to appropriate it all to her own use she must have held it free from any trust.

Ide v. *Ide*, 5 Mass. 500; *Van Horne* v. *Campbell*, 100 N. Y. 287, 53 Am. Rep. 166; *Fullenwider* v. *Watson*, 113 Ind. 18; Lewin, Tr. p. 137; Pom. Eq. Jur. §§ 1015, 1016; *Howard* v. *Carusi*, 109 U. S. 725, 27 L. ed. 1089; *Van-Horne* v. *Campbell*, *supra*; *Williams* v. *Worthington*, 49 Md. 572, 33 Am. Rep. 286.

A pleading that seeks to set up a parol trust on the ground of fraud and in opposition to a written instrument must contain clear, direct, and precise allegations of every fact necessary to create the trust or it will be demurrable.

3 Reed, Stat. Fr. § 929; Perry, Tr. § 226; *Patton* v. *Beecher*, 62 Ala. 579; *Toney* v. *Wendling*, 138 Ind. 228; *Petzold* v. *Petzold*, 55 Minn. 39; *Spiker* v. *Rohrer*, 37 W. Va. 258; *Jackson* v. *Landers*, 134 Ind. 529; *Stanton* v. *Kenrick*, 135 Ind. 382; Wait, Fraud. Conv. § 141.

A beneficiary of a trust *ex maleficio* or constructive trust has not an equitable estate in the trust property as a beneficiary of an express trust has. The beneficiary of a trust *ex maleficio* has but a right of action which will not ripen into an actual estate until the trust has been established by a decree of the court.

Perry, Tr. § 166; Pom. Eq. Jur. § 1044; *Cooper* v. *Cockrum*, 87 Ind. 443; *Bedilian* v. *Seaton*, 3 Wall. Jr. 280.

Therefore whatever right of action William M. Orth might have had in his lifetime upon his death became vested solely in his administrator and not in his heirs.

These trusts are bottomed upon fraud which takes the trust out of the statutes of frauds and wills, and not upon parol agreements which would be within the statutes. The nature, extent, and character of the trusts therefore are measured and determined by what property was intercepted and diverted from the complainants to the defendants by the fraud of the latter.

2 Reed, Stat. Fr. § 478; Perry, Tr. § 181; *Devenish* v. *Baines*, Prec. in Ch. 3; *Ragsdale* v. *Ragsdale*, 68 Miss. 92, 11 L. R. A. 316; *Arnold* v. *Cord*, 16 Ind. 177.

In the case at bar there is no averment that Orth ever even evinced a desire to make any will other than the one he left, much less are we informed what provision he would have made for any of his children, but for the alleged promises of his wife.

The alleged trust is created and defined, if defined at all, solely by agreement, not by any act of commission or omission.

1 Pom. Eq. Jur. § 152.

Where there is an express trust there can be no implied one.

Mescall v. *Tully*, 91 Ind. 98; *Wright* v. *Moody*, 116 Ind. 179.

The facts alleged in the complaint are not sufficient to raise a constructive trust or trust *ex maleficio*.

Stonehill v. *Swartz*, 129 Ind. 310; *Wright* v. *Moody*, 116 Ind. 175; *Peterson* v. *Boswell*, 137 Ind. 211; *Catalani* v. *Catalani*, 124 Ind. 54; *Irwin* v. *Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Richter* v. *Irwin*, 28 Ind. 26; *Sands* v. *Thompson*, 43 Ind. 28; *Irwin* v. *Hubbard*, 49 Ind. 355, 19 Am. Rep. 679; *Jagers* v. *Jagers*, 49 Ind. 428; *Hayes* v. *Burkam*, 51 Ind. 130; *Carlisle* v. *Brennan*, 67 Ind. 12; *Mescall* v. *Tully*, 91 Ind. 96; *Caylor* v. *Roe*, 99 Ind. 1; *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222; *Green* v. *Groves*, 109 Ind. 519; *Gowdy* v. *Gordon*, 122 Ind. 533; *Pearson* v. *Pearson*, 125 Ind. 341; *Austin* v. *Davis*, 128 Ind. 472, 12 L. R. A. 120; Pom. Eq. Jur. § 1055; Perry, Tr. § 181; Browne, Stat. Fr. § 94; Reed, Stat. Fr. § 478; *Whitton* v. *Russell*, 1 Atk. 448; *Lantry* v. *Lantry*, 51 Ill. 458, 2 Am. Rep. 310; *Scott* v. *Harris*, 113 Ill. 447.

The mere refusal of a trustee to execute an express trust or the denial of the existence of a trust by him does not constitute such fraud as will take the case out of the statute of frauds.

Adams v. *Adams*, 79 Ill. 517; *Perry* v. *McHenry*, 13 Ill. 227; *Collins* v. *Hope*, 20 Ohio, 493; *Brock* v. *Brock*, 90 Ala. 86, 9 L. R. A. 287; *Manning* v. *Pippen*, 86 Ala. 357, 95 Ala. 537; *Patton* v. *Beecher*, 62 Ala. 579; *Tolleson* v. *Blackstock*, 95 Ala. 510; *Bedilian* v. *Seaton*, 3

Wall. Jr. 279; *Salter* v. *Bird*, 103 Pa. 436; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Finlayson* v. *Finlayson*, 17 Or. 347, 3 L. R. A. 801; *Titcomb* v. *Morrill*, 10 Allen, 15; *Tatge* v. *Tatge*, 34 Minn. 272; *McClain* v. *McClain*, 57 Iowa, 167; Pom. Eq. Jur. §§ 152, 155, 1056; *Stonehill* v. *Swartz*, 129 Ind. 310; *Peterson* v. *Boswell*, 137 Ind. 211; *Irwin* v. *Ivers*, *Hayes* v. *Burkam*, *Mescall* v. *Tully*, *Wallace* v. *Long*, *Wright* v. *Moody*, *Pearson* v. *Pearson*, and *Austin* v. *Davis*, *supra*; Perry, Tr. § 181; Browne, Stat. Fr. § 94; Reed, Stat. Fr. § 478; *Whitton* v. *Russell*, *Lantry* v. *Lantry*, and *Scott* v. *Harris*, *supra*.

Even if the complaint had alleged that the promises of Mrs. Orth were false and fraudulent, and that she had no intention at the time that they were made of carrying them out, the complaint would not under the decisions of this court be sufficient.

Hayes v. *Burkam*, *Salter* v. *Bird*, and *Bedilian* v. *Seaton*, *supra*.

There could be no right of action against Mrs. Orth or her estate for breach of the alleged parol agreement made between her and William M. Orth. Such an agreement would be void under the statute of frauds.

Wallace v. *Long*, and *Austin* v. *Davis*, *supra*.

To permit any of the provisions of a will, duly executed and attested as required by law, to be changed or modified by parol evidence of promises made by a devisee, would strike down the statute in reference to the revocation of wills and lead to the most disastrous frauds.

Rev. Stat. 1894, § 2729; *Fox* v. *Fox*, 88 Pa. 19; *Clingan* v. *Mitcheltree*, 31 Pa. 25; *Runkle* v. *Gates*, 11 Ind. 95; *Hise* v. *Fincher*, 10 Ired. L. 139, 51 Am. Dec. 383; *Mundy* v. *Mundy*, 15 N. J. Eq. 290; *Malone* v. *Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263; 4 Kent, Com. 517.

There is no cause of action stated on the alleged parol agreement between Mrs. Orth and William M. Orth.

1. Such an agreement would be void under the statute of frauds.

Wallace v. *Long*, and *Austin* v. *Davis*, *supra*.

2. If such an agreement were valid it would not create a trust. No property was obtained on the faith of it. There is nothing but a promise and breach thereof alleged, for which a right of action for damages would accrue to William M. Orth against the estate of Mrs. Orth and, as her estate was settled, the action is barred.

Rev. Stat. 1881, § 2442; Acts 1883, Elliott's Supp. § 385; *McComas* v. *Long*, 85 Ind. 549.

The allegation that Harry A. Orth and Mary Orth McNutt, by appealing to the maternal feelings of their mother, prevented her from executing a will in favor of William M. Orth, does not create any liability against them or in favor of William M. Orth or his representatives.

Ashley v. *Dixon*, 48 N. Y. 430, 8 Am. Rep. 559; *Rabb* v. *Graham*, 43 Ind. 1; *Jagers* v. *Jagers*, 49 Ind. 428; Cooley, Torts, 497; *Wallace* v. *Long*, and *Austin* v. *Davis*, *supra*; *Hutchins* v. *Hutchins*, 7 Hill, 104.

Hackney, Ch. J., delivered the opinion of the court:

The late Hon. Godlove S. Orth, by his last will, devised and bequeathed to Mary Ann Orth, who was his second wife, all of his real and personal property, without condition, reservation, or limitation. Bearing the date of said will, and accompanying the same, was this letter from the testator to his said wife:

To My Dear Wife:

Among my papers you will find my will of this date. I give and bequeath to you all my property, real and personal. I do this because it will greatly facilitate the settlement of my estate, will tend to save unnecessary costs and expenses, and will give you, if properly managed, a competence during your life, and something for each of the children, Will, Mollie, and Hal., thereafter. After the payment of all my debts, I trust you will have sufficient left to assist all my children as they may need from time to time, without however, endangering your own support, and I have full confidence that you will act justly towards all. Unfortunately, as you know, I am heavily in debt, but by prudent management, I think, you can save our Benton county farms or at least the 640 acres, being in section 12, and selling if necessary, the two 80-acre tracts in section 1. The two houses occupied by W. M. Orth and Jos. Ewing are now held by us jointly, and on my death will become your property without the will. I should like very much, and hope you will, as soon as you find you can safely do it, make a deed to my granddaughter Lizzie Ray Orth, for the house now occupied by her father. This will furnish them with a home. Our land in Bollinger county, Missouri, is also held by us jointly, and after my death will belong to you without the will. Some of my creditors may want their money sooner than you can realize by sale of property. In such event I advise you to borrow money by giving mortgage on some of my property, but I would advise you not to mortgage your own property for any such purpose. Unless I am much mistaken, the rents from the city property and farms will always be more than sufficient to pay taxes and interest on my debts; but of course, it will be good policy to sell property as fast as you can conveniently, without sacrifice, and apply proceeds to the payment of my debts. Whenever you can sell any of your own property, especially that which is unproductive, I advise you to do so, and apply proceeds to the payment of my debts, thus relieving the property which by the will becomes yours, of the debts against the same. I do not think it necessary to administer on the estate. You can settle without it, I think. But, should it become necessary, you can take out letters yourself, or join some good friend with you. You will need advice. Hal. will, of course, be on hand, besides others whom you may regard as trustworthy. Do not pay my debts until a full examination, for it might so happen that claims will be presented through mistake or otherwise, or without proper credits allowed. In my papers you will generally find receipts and memoranda in reference to all my business affairs. Have all these carefully examined. In a word, act carefully, prudently, and under such good advice as you can procure, and act justly towards yourself and towards all my children, and I shall be content. My desire in this matter is that all my debts be paid, that you have a

competence during your life, and then, what is left, give to all the children alike. Farewell.
Godlove S. Orth.

In December, 1882, he departed this life, leaving surviving him his widow, said Mary Ann Orth, who elected to take under the will; Harry A. Orth and Mary Orth McNutt, his children by said Mary Ann; and William M. Orth, a son by his former wife. Since the death of the testator said Mary Ann Orth and William M. Orth have departed this life intestate. Harry A. Orth is administrator *de bonis non* with the will annexed of the estate of said testator, and is administrator of the estate of said Mary Ann Orth. William M. Orth left surviving, as his only heirs, the appellants, Eliza Gertrude Orth, his widow, and Lizzie Ray Orth, his daughter; and the appellant Spencer is administrator of said William's estate. Said appellants instituted this suit, in eight paragraphs of complaint, against the appellees, Mary Orth McNutt and Harry A. Orth, personally and as administrator of said two estates of his father and his mother. Harry A. Orth and Mary Orth McNutt severally demurred to each paragraph of the complaint, stating as causes of demurrer that neither paragraph stated facts sufficient to constitute a cause of action, and that several causes of action were improperly joined. Harry A. Orth, in his capacity as administrator *de bonis non*, demurred separately to each paragraph of complaint; stating as causes of demurrer a want of sufficient facts, a want of jurisdiction over his person, and a want of jurisdiction of the subject-matter of the action. Pending the demurrers the plaintiffs dismissed their action as to the estate of Mary Ann Orth, and thereupon the court sustained said several demurrers to the several paragraphs of complaint. Upon that ruling arise the only questions for review.

The first paragraph of complaint alleged the execution of the will and of said letter, both of which were exhibited by reference, and alleged that Mary Ann Orth knew the contents of said letter, and promised said Godlove to carry out the requests and intention expressed in said letter; that said Godlove during his last illness would have made other provisions in favor of said William, but that Mary Ann, Harry A., and Mary O. conspired to deprive William of any interest in the estate, and did, by promises and protestations, dissuade said Godlove from making changes in his will, and that they did during his last sickness exclude from his room and bedside the friends of William, and persons who might secure a change in said will; that a few days before his death said Godlove called to his bedside his said wife and his three children, and in the presence in each and all of them, had said wife and said Harry A. and Mary O. to promise to carry out the wishes expressed in said letter. It is also alleged that parts of the estate were converted by Mary Ann Orth, and parts were made over to and converted by said Harry A. and Mary O.; that Mary A., when executrix, and Harry A., as administrator *de bonis non*, made no inventory and no accounting to the court of the assets of the estate, or any disposition of the same. An accounting and partition are prayed, upon the theory that the letter and the oral promises created a trust in favor of William M. in the property of the estate of his father. The second paragraph alleges substantially the same facts, but adds that after the death of Godlove S. Orth his widow, Mary Ann Orth, stated to William M. Orth that she was intending and endeavoring to treat all the children alike, according to the expressed wishes of his father, that pursuant to that expressed intention and her promise, she procured a will to be written which to some extent would carry out such wishes; that said Harry A. and Mary O., further contriving to defraud William of that portion of the estate of his father which after the death of Mary Ann would rightfully belong to him or his heirs, by importunities, and by appealing to the maternal feeling of said Mary Ann Orth in an improper manner, before and during her last sickness, postponed from time to time the execution of such will until Mary Ann Orth died without making provision for said William. By this paragraph damages are sought. The third paragraph differs from the first in alleging a promise by Mary Ann Orth to William Orth, after the death of Godlove S. Orth, to carry out the wishes expressed in said letter, and frequent requests by William M. that she do so, and that she died having neglected to comply with that promise. Damages are claimed by this paragraph. The fourth paragraph pleads the facts alleged in the second paragraph, but upon the theory of a trust, as in the first paragraph, seeks an accounting and partition. The fifth paragraph alleges substantially the facts pleaded in the first, second, and third paragraphs, and demands an accounting and partition. The sixth paragraph differs from the third in alleging that the promise of Mary Ann Orth to William M. to carry out the wishes of his father as expressed in said letter was induced by a threat of said William to sue her for the enforcement of his claim, and that by reason of her said promise, and in consideration thereof, he desisted from suing as he had intended. An accounting and partition were prayed. The seventh paragraph alleged the facts of the sixth, and, instead of an accounting and partition, sought damages. The eighth paragraph was the same as the sixth, omitting the allegation that William M. Orth withheld suit in consideration of the promise of Mary Ann Orth to provide for him, and that she had died without executing her will. In addition to the facts pleaded in the sixth paragraph, it was alleged that Harry A. and Mary O. wrongfully converted to themselves the property of Godlove S. Orth remaining at the death of Mary Ann Orth. The demand was for damages. The complaint covers 90 pages of typewritten legal cap, and the paragraphs differ so slightly that we have deemed it advisable to state them briefly, rather than to set them out at length.

Our statute of wills (Rev. Stat. 1894, § 2746, Rev. Stat. 1881, § 2576) provides that "no will, except a nuncupative will, shall affect any estate unless it be in writing, signed by the testator, or by some one in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses." It would seem unnecessary to remark that this

provision is wise, in its purpose to require the solemn and almost sacred disposition of property by testament to exclude unauthentic writings, the possible subjects of forgery, and evidence of parol declarations of devise and bequest, the possible subjects of false testimony. The letter of the testator, if it contained testamentary words, has not the attestation required by the statute to entitle it to recognition as his will, nor does it carry even the force of recognition by any reference from within the lines of the will. It is not acknowledged as required in the case of deeds, even if that should be sufficient, and has no other authentic protection from the rule guarding against forged instruments of title. We do not regard the letter as of a testamentary character. See *McCarty* v. *Waterman*, 84 Ind. 550; *Moore* v. *Stephens*, 97 Ind. 271. Indeed, we do not understand counsel to insist that by it William M. Orth became a devisee or legatee, but it may possibly be considered in determining the intention of the testator in the provisions made by his will. *Copeland* v. *Summers*, 138 Ind. 219, and 226. In so receiving it, however, we should be mindful of the rule that the authentic provisions of the testament itself are recognized by the statute as the most worthy source of information as to the testator's intention, and that, where the intention there manifested is without uncertainty or doubt, we should be slow to permit doubt or uncertainty to thrust itself into the will, and thwart that clearly expressed and otherwise certain intention. The only disposition of property made by the will was in the following language: "I do hereby devise and bequeath to my wife, Mary Ann Orth, in fee simple, all and singular, my real estate of whatsoever nature or description, situate in Tippecanoe, Benton and White counties, Indiana, all of my real estate in the states of Iowa and Missouri, or wheresoever else situated, and of which I may die seised and possessed. And I do further give, devise, and bequeath to my wife, Mary Ann Orth, absolutely, all of my personal estate, of whatever nature or description, which may be owned by me at the time of my death. I hereby grant to my said wife full power, either with or without administration on my estate, to collect all my debts and choses in action, and to do whatever may be necessary in the final settlement of my estate, hereby enjoining upon her to pay all just debts and liabilities as soon after my death as may be. Should administration on my estate be necessary or desirable, I hereby appoint my said wife executrix of this my last will and testament, giving her authority to associate one or more persons with her in the execution of this trust. I desire all of my dear children to know and feel that this disposition of my estate is in my judgment the best, under all the circumstances surrounding it, knowing that they will find my said wife as much disposed to love and care for them, and to deal justly by them, as I have always felt and acted towards them myself."

It would be difficult, if not impossible, to conceive or to reduce to words a more sweeping and unfettered disposition of property, or a clearer or more certain designation of the object of the bounty. Mary Ann Orth was given in fee simple all of the real estate, and was given absolutely all of the personal property. Consider the letter as if it followed these unambiguous declarations of intention to vest in the wife the fullest title known to the law, and we will determine its legal and equitable effect. We have already seen that it does not arise to the standard of a testament, and we are now to look at it to ascertain if it bespeaks the testator's intention to have encumbered the devise and bequest with a trust in favor of his children. Almost the first words of the letter, which is addressed to his wife, are: "I give and bequeath to you all my property, real and personal." She is advised of his financial embarrassment, and in a practical, thoroughly business like course, she is advised how to take the best advantage of the embarrassment. In this advice the intention is repeated that her title and holding are unqualified, for he suggests that of her property, not received by devise, she sell that which is unproductive, paying his debts with the proceeds, and "thus relieving the property which by the will becomes yours." There is no word of command in the letter, but its tone is entirely advisory. True there are expressions of hope, of confidence, and of request. The hope is that his indebtedness may not sweep away the estate, and leave the wife without support during her life, without means to help his children from time to time as they may need it, and without something which she may at the end give to his children; the confidence, that she will so help his children from time to time, and finally, "what is left, give to all the children alike;" the request, that she convey to William's daughter, Lizzie Ray Orth, as a home for William's family, a house and lot belonging to the wife independently of the will. There is not a syllable expressing the intention to charge the estate devised with an enforceable legal or equitable trust in favor of the children. There is that which, from various expressions, denotes a confiding trust in the wife that she will deal fairly, justly, and equitably with his children. That trust raises but a moral obligation, and creates no interest in the property in favor of the children, and does not burden the absolute title given by the will to the wife. In 1 Lewin on Trusts, ed. 1888, p. 135, it is said: "Where both objects and property are certain, yet no trust will arise if the testator expressly declare that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given; or if, all circumstances considered, it is more probable that the testator meant to communicate a mere discretion; . . . or if a testator give the property to his wife, 'well knowing her sense of justice and love to her family, and feelingiperfect confidence that she will manage the same to the best advantage for the benefit of her children' [or 'to be used by her in such ways and means as she may consider best for her own benefit and that of my three children;' or 'feeling confident that she will act justly to our children in dividing the same when no longer required by her;' or 'in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease']; or 'to be at her disposal in any way she may think best for the benefit of

herself and family;' [or 'to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having full confidence that she will do so.'"] We cite in support of the text the following decisions: *Harper* v. *Phelps*, 21 Conn. 257; *McCreary* v. *Burns*, 17 S. C. 45; *Colton* v. *Colton*, 21 Fed. Rep. 594; *Foose* v. *Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Hopkins* v. *Glunt*, 111 Pa. 287; *McIntyre* v. *McIntyre*, 123 Pa. 329; *Howard* v. *Carusi*, 109 U. S. 725, 27 L. ed. 1089; *Rose* v. *Porter*, 141 Mass. 309. There should be no confusion of the expression of the testator of confidence that his wife at her death would provide for the children, with the absolute devises and bequests of the will, so as to possibly imply a life estate rather than a fee simple in the wife. No such contention is made by the appellants, but the one inquiry arising from the letter is, Does it point a trust in the property devised, or bespeak the testator's intention to raise a trust in favor of his children? Very clearly, we think, it does not. But, while considering it as if a part of the will, suppose its terms were more obscure and doubtful than we have regarded them, and that they should make the question doubtful as to whether the testator intended to narrow the otherwise free and unfettered devise and bequest. Our duty would then be to disregard the doubt, and adhere to the clearly-expressed provisions as indicating the intention of the testator. As said in the recent case of *Ross* v. *Ross*, 135 Ind. 367: "Where an estate in fee is devised in one clause of a will, in clear and decisive terms, it cannot be taken away or cut down, by raising a doubt upon a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee. *Bailey* v. *Sanger*, 108 Ind. 264; *O'Boyle* v. *Thomas*, 116 Ind. 243." The case of *Fullenwider* v. *Watson*, 113 Ind. 18, involves the two questions as to considering the effect of words of recommendation, and excluding those merely casting doubt upon provisions otherwise clearly made. There the will gave to the wife, by decisive words, the personal estate, but followed the words of bequest with the following: "To have, use, and enjoy the same as she may choose, and to dispose of the same in such manner as she may desire; yet I request that if, at the time of her decease, any of the personal property shall remain undisposed of, it be given to the children of my son, . . . and the children of my daughter. . . . " This court said of the bequest: "We are very far within the authorities when we affirm the proposition that, where a bequest of personal property, without limitation to life or particular use, is made, and is accompanied by an absolute power of disposition, the first taker takes the whole interest. It has been for centuries the rule that, where the whole estate is absolutely devised, a repugnant condition must yield. *Allen* v. *Craft*, 109 Ind. 476, 58 Am. Rep. 425. But here there is no condition, for the words employed are words of recommendation, not words of condition or restriction, and the case is within the rule declared by the adjudged cases. *Van Gorder* v. *Smith*, 99 Ind. 404; *Stowell* v. *Hastings*, 59 Vt. 494, 59 Am. Rep. 748; *Howard* v. *Carusi*, *supra*; *Knight* v. *Knight*, 3 Beav. 148; 2 Story, Eq. Jur. § 1070."

Considered as a rule for ascertaining the intention of the testator, there is no room to distinguish between bequests of personal property and devises of real estate. The force of the letter in the creation of a trust certainly gains no strength by considering it apart from the will, where it must stand, and where, as we have said, the courts should be slow to accept it, in the face of the statutes of wills, of trusts, and of frauds, as impairing the force of solemn testamentary provisions made in conformity to the statutes. Appellants' learned counsel strenuously insist that they do not set up the letter as creating the trust upon which they rely, but insist that the trust which they would enforce, and for the violation of which they seek damages, is a trust *ex maleficio*, or a constructive trust arising from the fraudulent conduct of Mrs. Orth subsequent to the execution of the will. The position of counsel is stated by them in a quotation, supplemented by the authorities they cite, which we take from their brief: "Where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and in such a case the court will not allow the devisee to set up the statute of frauds,—or rather the statute of wills, by which the statute of frauds is now, in this respect, superseded,—and for this reason: The devisee, by his conduct, has induced the testator to leave him the property, and, as Lord Justice Turner says in *Russell* v. *Jackson*, 10 Hare, 204, 'no one can doubt that, if these defendants had stated that he would not carry out the intentions of this testator, this disposition in their favor would not have been found in this will.' But in this the court does not violate the spirit of the statute, but for the same end, namely, prevention of fraud, it ingrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent the party from applying the property to a purpose foreign to that for which he undertook to hold it." *Rockwood's Case* (1636) 1 Cro. Eliz. 164; *Chamberlaine* v. *Chamberlaine* (1678) Freem. Ch. 34; *Thynn* v. *Thynn* (1684) 1 Vern. 296; *Devenish* v. *Baines* (1689) 1 Prec. in Ch. 3; *Oldham* v. *Litchfield* (1705) 2 Vern. 506; *Drakeford* v. *Wilks* (1747) 3 Atk. 539; *Reech* v. *Kennegal* (1748) 1 Ves. Sr. 123, 1 Ambl 67, and 1 Wils. 227, *Barrow* v. *Greenough* (1796) 3 Ves. Jr. 152; *Byrn* v *Godfrey* (1798) 4 Ves. Jr. 6, 10; *Stickland* v. *Aldridge* (1804) 9 Ves. Jr. 516; *Paine* v. *Hall* (1812) 18 Ves. Jr. 475; *Chamberlain* v. *Agar* (1813) 2 Ves. & B. 259; *Podmore* v. *Gunning* (1836) 7 Sim. 644; *Russell* v. *Jackson* (1852) 10 Hare, 204, 211; *Wallgrave* v. *Tebbs* (1855) 2 Kay & J. 321, 322; *Tee* v. *Ferris* (1856) Id. 357; *Moss* v. *Cooper* (1861) 1 Johns. & H. 352, 366; *Jones* v. *Badley* (1866) L. R. 3 Eq. 635, 652; *McCormick* v. *Grogan* (1869) L. R. 4 H. L. 82; *Springett* v. *Jenings* (1870) L. R. 10 Eq. 488, 495; *Rowbotham* v. *Dunnett* (1878) L. R. 8 Ch. Div. 430, 436; *Re Boyes'*

Case (1884) L. R. 26 Ch. Div. 581, 535; *Owing's Case* (1828) 1 Bland, Ch. 370, 17 Am. Dec. 311; *Hoge* v. *Hoge* (1832) 1 Watts, 163, 215, 216 26 Am. Dec. 52; *Barrell* v. *Hanrick* (1868) 42 Ala. 60, 73; *Caldwell* v. *Caldwell* (1870) 7 Bush, 515; *Dowd* v. *Tucker* (1874) 41 Conn. 197; *O'Hara* v. *Dudley* (1884) 95 N. Y. 403, 47 Am. Rep. 53; *Gilpatrick* v. *Glidden* (1888) 81 Me. 137, 2 L. R. A. 662; *Graves* v. *Graves* (1890) 29 N. Y. S. R. 624; *Ragsdale* v. *Ragsdale* (1890) 68 Miss. 92, 11 L. R. A. 316; *Larmon* v. *Knight* (1892) 140 Ill. 232; *Gaither* v. *Gaither*, 3 Md. Ch. 160; *Church* v. *Ruland*, 64 Pa. 432; *Vreeland* v. *Williams*, 32 N. J. Eq. 734; *Glass* v. *Hulbert*, 102 Mass. 24–40, 3 Am. Rep. 418; Browne, Stat. Fr. p. 3, § 93; *Towles* v. *Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 409; *Jones* v. *McKee*, 3 Pa. 497, 45 Am. Dec. 661; *McKee* v. *Jones*, 6 Pa. 425; *Schultz's Appeal*, 80 Pa. 396; *Williams* v. *Fitch*, 18 N. Y. 546; *Campbell* v. *Brown*, 129 Mass. 23, 26; *Socher's Appeal*, 104 Pa. 609; *Piper* v. *Howard*, 107 N. Y. 82; *Richardson* v. *Adams*, 10 Yerg. 273; *Hooker* v. *Oxford*, 33 Mich. 453; *De Laurencel* v. *De Boom*, 48 Cal. 585; *Kennedy* v. *Kennedy*, 2 Ala. 571; *Brook* v. *Chappell*, 34 Wis. 405; *Thomson* v. *White*, 1 Dall. (Pa.) 427, 1 Am. Dec. 252; *Cox* v. *Arnsmann*, 76 Ind. 212, 213; *Browne* v. *Browne*, 1 Harr. & J. 430.

If the position so assumed were correct, and if the authorities cited could be held to apply under the statutory provisions in this state concerning wills, trusts, and frauds,—questions upon which we now venture no opinion,—it is nevertheless true that, upon the allegations of any paragraph of the complaint, the letter is read to define the limits and character of the trust. It is from the letter that the subject of the trust insisted upon is to be taken; it is from the letter that the objects of the trust must be learned; it is from the letter that the time and manner of performance of the trust shall be determined, if at all. No promise of Mrs. Orth to her husband is alleged which did not have reference to his wishes as expressed in the letter. No promise of Mrs. Orth to William is alleged which did not have reference to the wishes of his father as expressed in the letter. The alleged promises to William after the death of his father, however, do not constitute an element in the creation of a trust, if a trust was created, but from the standpoint of the appellants, may possibly be considered in determining whether Mrs. Orth violated the alleged promises to her husband.

The important question, involving the letter, is that, as we have said, it must be accepted as defining the scope of the trust claimed. The oral promises constituting the alleged fraud,—the essence of the trust *ex maleficio*,—considered apart from the letter, would be meaningless, since those promises were but generally to carry out the wishes expressed in the letter. The alleged oral promises, without the letter, do not define the extent of the property to be regarded as the subject of the trust, nor the interest to be held for the several alleged beneficiaries, nor the time when the trust obligations should be discharged. In a word, there was nothing definite, in the conversation alleged as to any element of a trust, unless possibly it was as to the persons hoped to be benefited. If we are correct in our conclusions that the letter raises no trust, and does not limit or qualify the absolute devise and bequest to Mrs. Orth; if it gives to the appellants no legal or equitable interest in the property, and does not supply the alleged trust, as appellants expressly affirm in their able briefs; and if it must be looked to as defining the trust claimed to arise from the alleged fraud of Mrs. Orth,—we find that the same uncertainty and indefiniteness attend the alleged trust *ex maleficio* with the letter as without it. We apprehend that authority should not be required to support the proposition that a trust, whether declared or arising from conduct, which does not with reasonable certainty point the essential elements of a trust, is no trust at all. The rule stated by Lewin (page 56) is: "Nor will the trust be executed if the precise nature of the trust cannot be ascertained." We do not understand the appellants to maintain that, as a rule of equity, Mrs. Orth should have been punished, or that her children shall now be punished, to the extent of giving up all of the property devised, because of her fraud or their fraud. Nor is it more reasonable that because of fraud, if such it be, without being able to ascertain and define the nature and extent of the trust which the testator may have had in mind, a court of equity should affix the punishment at a sum equal to one third of the property devised, and confer it upon William's heirs. If we are unable to ascertain the nature and extent of the trust intended, we are powerless to enforce it, and are unauthorized to gauge it to meet the ordinary rules of equality. As already indicated, the letter creates no trust, the parol promises create no trust, and the letter and the promises together, so far from creating a trust, but constitute the promise to perform in the future a duty neither legal nor equitable. Does this breach of duty work such fraud and injustice as to require that equity shall construct a trust in behalf of the heirs of the testator? If it does, equity will be required, contrary to the views of the appellant, and contrary to our view of the effect of the letter, to go to the letter, and from it frame the terms and conditions of the trust, and supplement them with the oral promise creating it, and ingraft both upon the will, to its overthrow. But we are not willing to concede that the fraud is such as to raise a trust *ex maleficio*. Such a trust, in its very nature, implies the absence of an intention on the part of the parties to create a trust by their own expression, for it would be but to repeal the statute of trusts (Rev. Stat. 1894, § 3391; Rev. Stat. 1881, § 2969), forbidding the creation by parol of a trust concerning lands, to permit the parties, after declaring a parol trust and violating it, to then plead that violation as the fraud calling for the equitable construction of that particular trust. "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust." 2 Pom. Eq. Jur. § 1044; Perry, Tr. § 166; *Pillow* v. *Brown*, 26 Ark.

240; *Hollinshead* v. *Simms*, 51 Cal. 158; *McLane* v. *Johnson*, 43 Vt. 48; *Thompson* v. *Thompson*, 16 Wis. 92; *Collins* v. *Collins*, 6 Lans. 368; *Griffith* v. *Godey*, 113 U. S. 89, 28 L. ed. 934; Lewin, Tr. p. 180, note 1; *Mescall* v. *Tully*, 91 Ind. 96; *Wright* v. *Mooty*, 116 Ind. 175. There are, perhaps, cases where parol trusts, ineffectual under the statute, have been procured by such fraud and deceit as that equity will grant relief for the fraud, without regard to the declared trust; but such cases do not proceed upon the idea that equity enforces the trust which is inhibited by the statute, but rather upon the idea that equity constructs a trust. If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud, and established a trust on the terms of such legal trust. Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including, specifically or generally, a trust of the character of that here claimed. Nor have we allegations of a desire on his part to execute any valid separate instrument declaring such a trust. It is alleged generally that Mrs. Orth "dissuaded the said Godlove from making changes in his said will in favor of the said William M. Orth, or making other provisions for him which he would otherwise have done;" but it is nowhere alleged that the testator expressed a desire to, and was by fraud dissuaded from making, a trust such as that here sought to be constructed upon equitable rules. While the complaint is probably subject to the objection of appellees' counsel, that it does not allege the acts constituting any fraud claimed to have been exercised, we need not condemn the pleading on that ground; but, giving the pleading the most favorable construction in behalf of the appellants, the fraud of Mrs. Orth consisted in failing to comply with the requests contained in the letter, having promised her husband that she would comply with them. This, we say, is not such fraud as equity would accept as sufficient to require the construction of the trust here insisted upon. In 27 Am. & Eng. Enc. Law, p. 52, it is said: "There is a sharp conflict among the authorities as to what constitutes such fraud as will justify the admission of parol evidence to establish a trust in favor of the grantor. The earlier English cases were very liberal in admitting such evidence; but the current of modern authority is to the effect that parol evidence is not admissible to show an agreement to hold property in trust where it is conveyed by a deed absolute on its face, unless the instrument was obtained by fraud or was made absolute by mistake. In other words, while the refusal to execute or acknowledge such trust may constitute fraud, in a certain sense, it is not such fraud as will render parol evidence admissible to establish the trust. Any other rule would make the statute of frauds practically ineffective. But where there is fraud in obtaining the conveyance, or in the means used to secure its execution in the particular form in which it is drawn, or where, by accident, or mistake, it fails to express the real intention of the parties, parol evidence may be admitted for the purpose of affording relief to the injured party." To these propositions many authorities are cited. In *Jackson* v. *Myers*, 120 Ind. 504, and 511,—a suit to enforce a parol promise to convey lands,—it was said: "Conceding that he was morally bound to execute a conveyance without demand therefor, his failure so to do would not constitute fraud. To so hold would be to abolish all distinction between fraud and breach of contract." In *Fouty* v. *Fouty*, 34 Ind. 433,—a suit for like purpose,—it was said: "Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterwards." *Richter* v. *Irwin*, 28 Ind. 26, presented a like question, and was decided in the same way. So in *Peterson* v. *Boswell*, 137 Ind. 211. But it is insisted by appellants that there is a distinction between deeds and wills, as to the fraud necessary to construct a trust. It is probably true, upon the English cases, that where a testator has by his will made an absolute devise, and subsequently has formulated, in writing or by parol, a trust which he desires to ingraft upon such devise, or desires to make a new will expressing such trust, and is by the fraudulent representations and promises of the devisee prevented or wrongfully dissuaded from doing so, equity would construct that trust, and deny the devisee the fruits of the fraud perpetrated. This may be true as to a will, but could not be true as to a deed, because, in the first such trust can be ingrafted, and in the last all control has passed from the grantor. We have already shown that we have here no case parallel to that of the testator just supposed, nor have we any reason for concluding that the same conduct following the execution of a will should be more effective as a fraud and in raising a trust *ex maleficio*, than if it had been exerted to procure the execution of a deed, and is followed, as in the case of the will, with the mere omission or refusal to execute the parol promise. That the parol promise of one to convey to another in the event of a conveyance to him will not, upon refusal to comply, take the case out of the statute of trusts, has frequently been decided by this court. *Peterson* v. *Boswell*, and *Fouty* v. *Fouty*, *supra*; *Montgomery* v. *Craig*, 128 Ind. 48; *Pearson* v. *Pearson*, 125 Ind. 341; *Wright* v. *Moody*, *supra*; *Mescall* v. *Tully*, 91 Ind. 96; *Rooker* v. *Rooker*, 75 Ind. 571; *Irwin* v. *Ivers*, 7 Ind. 308, 63 Am. Dec. 420. In *Sands* v. *Thompson*, 43 Ind., on page 28, this court quotes with approval the following extract from Browne on the Statute of Frauds: "Sec. 439. The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, but which, by reason of the statute, the party is not bound to perform for want of its being in writing. This was clearly laid down by Lord Macclesfield, Chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should

enjoy all her own estate, to her separate use after the marriage, which promise, as one made 'upon consideration of marriage,' could not regularly be enforced. His lordship declared that 'in cases of fraud, equity should relieve, even against the words of the statute, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere.' " *Irwin* v. *Hubbard*, 49 Ind. 350 (see page 355), 19 Am. Rep. 679; *Hayes* v. *Burkam*, 51 Ind. 130; *Mescall* v. *Tully*, *supra*; *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222; *Green* v. *Groves*, 109 Ind. 519; *Pearson* v. *Pearson*, *supra*; *Stonehill* v. *Swartz*, 129 Ind. 310.

Upon the assumption that the letter, with the parol promise to comply with the wishes therein expressed, constitutes a contract to provide for William M. Orth, by the will of Mrs. Orth, the case of *Wallace* v. *Long*, *supra*, is pertinent, not only upon the question of fraud, but also upon the question of the recovery of damages by his heirs for a violation of any such contract. In that case a child had gone into the family of Fette, to live with and as a member of such family, upon the parol promise of Fette that, if she would so live with his family during the lives of himself and his wife, "they would treat and deal with and towards her as their child, they would make her their heir, and at their death, or at the death of the survivor of the two, they would will, bequeath, and give her the entire estate of which they were possessed." She remained in the family, complying with her part of the contract, until Fette and wife had both died, they having made no provision by will or otherwise for the child. This court, speaking by Mitchell, J., said: "The evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by will, may be conceded, but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for the sale of real estate, and for the transfer of personal property exceeding in value $50, such agreement was subject to the operation of the statute of frauds, equally with all other agreements for like sales. Because the agreement was not withdrawn from the operation of the statute by part performance, it cannot be specifically enforced, neither can it be the foundation of an action for damages." So with relation to the obligation supposed to exist from the letter and parol promise to assist William from time to time, and to convey to William's daughter the house and lot in which he lived with his family. However as to these elements of the alleged promises, there is no charge of violation by Mrs. Orth, and should be considered neither as supplying an element in the alleged fraud nor of the claim for damages. Another line of decisions in this state is probably violated by the claim of the appellants, and that is that equity will not enforce, in behalf of a mere volunteer, an executory parol trust. *Noe* v. *Roll*, 134 Ind. 115; *Peterson* v. *Boswell*, *Stonehill* v. *Swartz*, *Pearson* v. *Pearson*, and *Wright* v. *Moody*, *supra*; *Gaylord* v. *Lafayette*, 115 Ind. 423; *Mescall* v. *Tully*, *supra*; *Dunn* v. *Dunn*, 82 Ind. 42; *Fouty* v. *Fouty*, and *Irwin* v. *Ivers*, *supra*. If any of these cases were correctly decided, the case falls within the rule suggested. However, we do not rest our decision upon this suggestion, but adhere to the rules which directly affect the principal questions in the case.

The judgment of the Circuit Court is affirmed.

Howard, J.:

I concur in the decision reached by the court in this case. I think the record shows that the testator, in devising his property to his wife, did not thereby create a trust in favor of any of his children, but that he gave his property, without reservation, to her, relying upon her judgment and discretion to do with it as might seem best. He indicated to her what he thought would be best, but the discretion to act in the matter was wholly left to her. It is evident that he was not clear in his own mind as to what should be done. The future might make that plain, and he left the matter in her hands, asking her, as she promised, to do what should be right when the time came for her to act. That she might be able to exercise this discretion, the property was given absolutely to her. There was no trust imposed upon it. In so far, however, if at all, as the opinion holds that one who, without consideration paid, receives title to real estate, under promise to reconvey, may afterwards refuse to convey, and justify such refusal under cover of the statute against frauds, I must dissent. There is a well-recognized exception to the application of the statute, namely, that one cannot seek to justify his own fraud by a plea of the statute against frauds. A court of equity will not hear him make such a plea. Attempts to retain possession of property received with a promise to reconvey will also be overthrown, on the ground that the conveyance was without consideration. In any event, a court of equity will seek to do justice, within the lines of law, and will not sanction so gross a perversion of a statute enacted to prevent injustice. See *Baird* v. *Baird*, 145 N. Y. 659, 28 L. R. A. 375; *Davis* v. *Whitehead* [1894] 2 Ch. 133; also 6 Chicago L. J. 562, 720.

A petition for rehearing was subsequently filed, in response to which **Hackney**, Ch. J., on May 28, 1896, filed the following opinion:

One contention on behalf of the appellants is that at common law a parol trust in personal property was permitted, and that, as our statute of trusts relates to real estate alone, they have maintained their claim to a trust in the personal estate of the testator, alleged to have been of the value of $100,000. It may be conceded that at common law a trust in personal property may be created by parol. Bispham, Eq. § 63; 1 Perry, Tr. § 86; Lewin, Tr. § 53; Hill, Trustees, § 57. Our statute of trusts and powers probably does not deny the common-law rule in this respect. But in this case the controversy is as to whether the testator, who made a plain and unequivocal devise of his personal estate to his wife, did in any manner not forbidden by law revoke that devise, and create a new disposition of said estate.

Revocation cannot be made except by intentionally destroying the will, or by the execution of a writing, subscribed and attested in manner as required in the execution of wills. Rev. Stat. 1894, § 2729 (Rev. Stat. 1881, § 2559). Certainly, a partial revocation, or an amendment by way of codicil, falls within this statutory rule. The rule with relation to precatory trusts, so fully fortified by the authorities cited in the original opinion, recognizes no distinction between real and personal property. The rule which denies force to language relied upon to cut down an unequivocal disposition of property, unless it clearly and unmistakably discloses the testator's intention to do so, admits of no distinction between devises and bequests. The rule which forbids evidence in parol to contradict instruments of writing knows no difference between writings as to real and those as to personal property. To our minds it seems clear that no question arises in this case as to the power to create a trust in personal property by parol. The question is as to a method of destroying the force of a valid testamentary disposition of such property. If no will exists, it is doubtful if the letter and the promise of Mrs. Orth as to the personal property would avoid the statute of frauds and perjuries (Rev. Stat. 1894, § 6635; Rev. Stat. 1881, § 4910). *Wallace* v. *Long*, 105 Ind. 522. But of this we need not decide.

It is further contended that the rule that one occupying a fiduciary relation to another, and obtaining an advantage by reason of that relation, is presumed to have obtained that advantage fraudulently, applies in this case. We are not prepared to sanction the doctrine that a devise to the wife by her husband is presumptively fraudulent, and that, therefore, equity will charge the property with a trust in favor of those who may stand in the relation of heirs. The rule stated by the learned counsel for appellants exists, but it has never been applied, so far as our observation and researches have disclosed, to the case of a testamentary provision by a husband for his wife, in the absence of fraud, undue influence, or some positive advantage taken to induce the husband, against his free will, to make such provision. That a man shall make liberal provision for his wife is not unnatural, but is a duty. That Godlove S. Orth should have given his whole property, in his financially embarrassed condition, to his wife, in the hope that, by prudence and careful management, and the disposition of her separate property, she might save from the wreck something, first of all, for her maintenance, was not unnatural, nor suggestive of undue influence or overreaching. See *Montgomery* v. *Craig*, 128 Ind. 48.

The questions to which we have referred were not argued upon the original hearing, nor was the further contention that the trust sought to be enforced was such as the statute of trusts and powers excepted from its operation as a constructive or implied trust. The latter contention we regard as in conflict with the position originally assumed, as disclosed by our former opinion. We do not, therefore, consider that contention.

Having again considered the questions originally passed upon, and finding no sufficient reason to reverse the conclusions there reached, *the petition for a rehearing is overruled.*

Daniel McDONALD, *Appt.*,
v.
PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY.

(.....Ind.....)

The father of an illegitimate child has no right of action for the child's death under Rev. Stat. 1894, § 237, giving a father a right of action for the death of a "child," although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him.

(April 2, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover damages for the alleged wrongful killing of plaintiff's illegitimate child. *Affirmed.*

The facts are stated in the opinion.

Messrs. **O. H. Montgomery** and **J. B. Brown** for appellant.

Mr. **S. Stansifer,** for appellee:

It is only by virtue of our statute that an action for death can be maintained.

Ohio & M. R. Co. v. *Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Pittsburgh, Ft. W. & C. R. Co.* v. *Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Mayhew* v. *Burns*, 103 Ind. 328; *Louisville, N. A. & C. R. Co.* v. *Wright*, 134 Ind. 509.

Even adoption under the statute does not make the adoptive parent a "father" or "mother" within the meaning of the terms of section 266.

The common law did not even take notice of adoption as giving one any permanent family rights.

Cooley, Torts, 42; Broom, Legal Maxims, 7th ed. 515.

There being no right of action for death at common law, it follows that the death statute must be strictly construed.

Indianapolis, P. & C. R. Co. v. *Keely*, 23 Ind. 133; *Stewart* v. *Terre Haute & I. R. Co.* 103 Ind. 44; *Hecht* v. *Ohio & M. R. Co.* 132 Ind. 512; *Thornburg* v. *American Strawboard Co.* 141 Ind. 443.

The adoptive father cannot inherit from the child and an adopted child cannot inherit from the widow of the adoptive father. Indeed, the legislature has no power to make an adopted child a natural child.

Krug v. *Davis*, 87 Ind. 590; *Isenhour* v. *Isenhour*, 52 Ind. 328; *Humphries* v. *Davis*, 100 Ind. 274, 50 Am. Rep. 788.

If the words of a statute are subject to two different meanings, the court will adopt that sense which will not lead to an absurdity.

Jeffersonville v. *Weems*, 5 Ind. 547.

Monks, J., delivered the opinion of the court:

Appellant brought this action against ap-

NOTE.—As to the right to inherit property from an illegitimate child, see *note* to Croan v. Phelps (Ky.) 23 L. R. A. 753.

pellee under § 266, Rev. Stat. 1881 (Rev. Stat. 1894, § 267), to recover damages for the death of a minor, alleging in his complaint that said deceased was his son. Appellee filed an answer alleging, in substance, that the deceased was a bastard, begotten and born out of wedlock, and that appellant never married the mother of said deceased, and never adopted him by the order of any court. A demurrer for want of facts, to this answer, was overruled. To this answer appellant filed a reply alleging, in substance, that the allegations of said answer are true, but that the deceased was his illegitimate child, and that, when but six months old, appellant received him from his mother, and relieved her of his care and custody, and acknowledged him as his son, and afterwards discharged every duty as a parent towards him, and received from him all the services, obedience, and respect due from a legitimate son; that his mother abandoned him, and is deceased; that said deceased son has no guardian or next of kin, except only appellant. To this reply appellee filed a demurrer for want of facts, which was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellee. The errors assigned call in question the action of the court in overruling appellant's demurrer to the answer, and in sustaining appellee's demurrer to the reply.

Section 266, Rev. Stat. 1881 (Rev. Stat. 1894, § 267), upon which this action is predicated, is as follows: "A father, or in case of his death or desertion of his family or imprisonment the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward." As the right to recover damages for the death of a human being is purely statutory, the statute must be strictly construed; and, before appellant can recover, he must bring himself clearly within its terms. When the statute specifies who may bring such action, only those persons named can maintain it. If no such person exists, then no recovery can be had. *Thornburg* v. *American Strawboard Co.* 141 Ind. 443, and cases cited. At common law a bastard has no father, and was considered the son of nobody. He was sometimes called *filius nullius*, and sometimes *filius populi*. 1 Bl. Com. 458, 459; 2 Kent, Com. 212; *Simmons* v. *Bull*, 21 Ala. 501, 56 Am. Dec. 257, and note 258; *Blacklaws* v. *Milne*, 82 Ill. 505, 15 Am. Rep. 339; *Marshall* v. *Wabash R. Co.* 120 Mo. 275. It is said in Bl. Com. 459: "A bastard cannot be heir to anyone, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived." It is a rule of construction that prima facie the word "child" or "children," when used either in a statute or will, means legitimate child or children; that is, that bastards are not within the meaning of the term "child" or "children." *Thornburg* v. *American Strawboard Co.*, and *Marshall* v. *Wabash R. Co. supra*, and 46 Fed. Rep. 269, 273; *Dickinson* v. *Northeastern R. Co.* 2 Hurlst. & C. 735; *Harkins* v. *Philadelphia & R. R. Co.* 15 Phila. 286; *Gibson* v. *Midland R. Co.* 2 Ont. Rep. 658; *Good* v. *Towns*, 56 Vt. 410, 48 Am. Rep. 799; *Blacklaws* v. *Milne*, *supra*; *Dorin* v. *Dorin*, 13 Moak, Eng. Rep. 90, L. R. 7 H. L. 568; *Hill* v. *Crook*, 7 Moak, Eng. Rep. 1, L. R. 6 H. L. 265; *Barnes* v. *Greenezebach*, 1 Edw. Ch. 41; Wait, Act. & Def. 49; 3 Am. & Eng. Enc. Law, p. 229, and notes on pages 230–233; 11 Am. & Eng. Enc. Law, p. 770; 1 Beven, Neg. 250; Patterson, Railway Accident Law, p. 492, § 409; Tiffany, Death by Wrongful Act, § 85; 1 Shearm. & Redf. Neg. § 13. *Dickinson* v. *North Eastern R. Co. supra*, was an action brought under Stat. 9 & 10 Vict. chap. 93, known as "Lord Campbell's Act," passed in 1846. That act provides "that every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been caused." Pollock, C. B., said: "But beyond all doubt in the construction of this act of Parliament the word 'child' means legitimate child only." This case is cited and approved in *Gibson* v. *Midland R. Co. supra*. *Marshall* v. *Wabash R. Co. supra*, was an action brought to recover damages for the death of another, under § 4425, Mo. Rev. Stat. 1889. That part of the statute providing who should sue and recover when the deceased was a minor was as follows: "Third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, . . . then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor." The court held that the father of an illegitimate child did not come within the meaning of the act, and could not maintain such action. In *Harkins* v. *Philadelphia & R. R. Co. supra*, it was held, under the statute of Pennsylvania which enacts that the persons entitled to recover damages for any injury causing death "shall be the husband, widow, children or parents of the deceased and no other relative," did not give any one the right to recover damages for the death of an illegitimate child. The court said that "the words, 'husband, widow, children, parents of the deceased, and no other relative,' had in view the family relation as constituted and recognized by law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships." We think it clear, both upon principle and the authorities cited, that the father of an illegitimate child cannot recover damages for the death of such child, under the provisions of § 266, Rev. Stat. 1881. Rev. Stat. 1894, § 267. The court did not err, therefore, in overruling appellant's demurrer to the answer, or in sustaining appellee's demurrer to the reply.

Judgment affirmed.

MARYLAND COURT OF APPEALS.

James F. FAILEY, Receiver of The Order of Iron Hall, *Appt.*,
v.
William H. FEE *et al.*

(.....Md.....)

1. **The validity of a policy or certificate constituting a contract** between a benefit society and a member thereof is not destroyed by the adoption of some impracticable scheme for the execution of the contract.
2. **Holders of matured certificates** of a benefit society become creditors thereof and remain so notwithstanding the subsequent insolvency of the order.
3. **A provision in a certificate of membership** in a benefit society as to the time of payment will control a different provision in a by-law, where the charter provides for payment as provided either by the by-laws or certificate.
4. **Debts established in a proceeding for the receivership** of an insolvent foreign corporation will be paid out of the assets in the receiver's hands before sending the remainder of the assets to a receiver at the domicil of the corporation.

(March 26, 1896.)

APPEAL by intervener from a decree of the Circuit Court of Baltimore City refusing to turn over to him funds of the Order of Iron Hall which were in possession of local receivers. *Affirmed.*

Joseph F. Lloyd and others instituted a proceeding in the courts of Maryland to wind up the affairs of the Order of Iron Hall and Charles J. Wiener and Joseph C. France were appointed receivers. They collected funds which they deposited in a bank, and which were subsequently attached by holders of matured certificates in that order. James F Failey who had been appointed receiver of the order in the state of its domicil made application to have the attachment set aside and the funds turned over to him for distribution. The court decreed that the attachment claims were preferred and that they must be paid before he was entitled to any of the funds. From that decree he appealed.

Further facts appear in the opinion.

Messrs. **Cowen & Cross** and **H. R. Preston,** for appellant:

The time given for the payment had not expired in any of the cases and the claims were not due, and attachments would not lie.

Steen v. *Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297; *Spare* v. *Home Mut. Ins. Co.* 17 Fed. Rep. 568; *Vette* v. *Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Barber* v. *Fire & Marine Ins. Co.* 16 W. Va. 658, 37 Am. Rep. 800; *Ellis* v. *Council Bluffs Ins. Co.* 64 Iowa, 507; *New York* v. *Hamilton F. Ins. Co.* 39 N. Y. 45; *Bauer* v. *Sampson Lodge, K. of P.* 102 Ind. 266; Bacon, Ben. Soc. § 185; *Bergards* v. *Farmers' Mut. Ins. Co.* 79 Mich. 440.

If the attachments had been brought after the claims were payable, a member of a mutual company cannot thus acquire a priority over his fellow members.

Fry v. *Charter Oak L. Ins. Co.* 31 Fed. Rep. 197; *Weingartner* v. *Charter Oak L. Ins. Co.* 32 Fed. Rep. 315.

The fact that matured certificate holders are called creditors does not bring them within the reason of the rule in *Booth* v. *Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164.

Parsons v. *Charter Oak L. Ins. Co.* 31 Fed. Rep. 305.

When the assets and fund to be distributed are common ones, derived from the payments made by all creditors, as in the case of an insurance company, the fact that part or the whole of the assets may be invested in any one state does not give to the creditors residing in such state a superior right thereto.

Life Asso. of America v. *Rundle*, 103 U. S. 222, 26 L. ed. 337; *Rundle* v. *Life Asso. of America*, 10 Fed. Rep. 720; *Davis* v. *Life Asso. of America*, 11 Fed. Rep. 781; *Taylor* v. *Life Asso. of America*, 13 Fed. Rep. 493.

The reason for sending the funds to Indiana to be distributed—that the proper place to make distribution among the members of a corporation is at the domicil of the corporation, and that is the only place where the fund can be equitably distributed,—applies to matured as well as unmatured certificates.

Re Order of Tonti's Estate, 173 Pa. 464; *Christian's Appeal*, 102 Pa. 184; *Fraternal Guardians' Assigned Estate*, 159 Pa. 594.

Messrs. **W. A. Fisher** and **Charles J. Wiener,** for appellees:

The holders of matured certificates are creditors of the corporation.

2 Bacon, Ben. Soc. & Life Ins. § 478, p. 955; *Vanatta* v. *New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 15; *Com.* v. *Massachusetts Mut. F. Ins. Co.* 112 Mass. 116, 119 Mass. 45; *Mayer* v. *Atty. Gen* 32 N. J. Eq. 815; *Stamm* v. *Northwestern Mut. Ben. Asso.* (Mich.) 8 West. Rep. 767; *Baltimore & O. R. Co.* v. *Baltimore & O. Employés Relief Asso.* 77 Md. 566.

The existing liabilities must be cleared off just as much as if they were debts to persons who have supplied goods to the society. The outside debts must, of course, be paid, and in the same way the claims which have matured of any policy holder must be discharged.

Re Great Britain Mut. L. Assur. Soc. L. R. 19 Ch. Div. 45.

Being creditors of a nonresident debtor we had the right to attach.

Cohen v. *Supreme Sitting, O. of I. H.* (Mich.) 2 Det. L. N. 93; *Day* v. *Postal Teleg. Co.* 66 Md. 354.

The appointment of a receiver does not have the effect of changing any rights of action, or of changing the contract relations existing between the original parties, against whom the receiver is appointed, and their debtors.

High, Receivers, § 204.

NOTE.—For other cases respecting receiverships of the Order of Iron Hall, see Buswell v. Supreme Sitting, O. of I. H. (Mass.) 23 L. R. A. 846; Fawcett v. Supreme Sitting, O. of I. H. (Conn.) 24 L. R. A. 815; and Baldwin v. Hosmer (Mich.) 25 L. R. A. 739.

32 L. R. A.

See also 41 L. R. A. 367.

The receivers, here and in Indiana, were appointed on August 23, 1892, and their appointment dates from the time of their qualification and not from the day of the application or the filing of the petition.

Until the appointment has been perfected and the receiver is actually in possession, a creditor is not debarred from proceeding to execution.

Cook v. *Citizens' Nat. Bank*, 73 Ind. 260.

The title of the receiver exists by relation from the date of the order directing his appointment.

People v. *Central City Bank*, 35 How. Pr. 428; *Smith* v. *New York Consol. Stage Co.* 28 How. Pr. 377; *Artisans' Bank* v. *Treadwell*, 34 Barb. 553.

The order for the appointment of a receiver in a creditor's suit, followed up by the consummation of the appointment by his giving security, vests the personal estate and equitable interests of the judgment debtors in such receiver as of the date of the order.

Porter v. *Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

As regards the rights of third parties, the appointment of a receiver will not be allowed to take effect or date back by relation to a period prior to his appointment.

High, Receivers, § 108; Beach, Receivers, § 129.

In order that the parties to a contract may be excused from performance on the ground of impossibility the impossibility must be inherent in the contract itself at the time it was made, resulting from its being contrary to law or from an objective physical impossibility.

Brantly, Cont 258.

"Insolvency" is an inability to meet one's obligations as they mature in the ordinary course of business. Solvency does not require that the assets should equal the liabilities.

Castleberg v. *Wheeler*, 68 Md. 277.

It is common to find persons whose assets exceed their liabilities insolvent, because they can't meet their liabilities as they become due; and on the other hand we frequently find merchants and others meeting their liabilities as they fall due whose assets are far less than their liabilities.

People v. *Security Life Ins. & A. Co.* 78 N. Y. 125, 34 Am. Rep. 522.

Amendment of the by-laws made after the issuance of these certificates providing a grace of ninety days does not apply to these certificates.

Cohen v. *Supreme Sitting of O. I. H.* (Mich.) 2 Det. L. N. 93.

The days of grace do not affect the maturity of the certificates.

Bacon, Ben. Soc. & Life Ins. § 478; *Vanatta* v. *New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 18; *Re Educational Endowment Asso.* 56 Minn. 176.

The claims of the appellees were debts (because their certificates had matured) to be preferred to the claims of nonmatured certificates.

Vanatta v. *New Jersey Mut. L. Ins. Co. supra; Baltimore & O. R. Co.* v. *Baltimore & O. Employés Relief Asso.* 77 Md. 574; *Re Great Britain Mut. L. Assur. Soc.* L. R. 19 Ch. Div. 45; *Hennighausen* v. *Tischer*, 50 Md. 585.

The funds ought not to be sent out of this jurisdiction until appellees are paid their just claims.

Day v. *Postal Teleg. Co.* 66 Md. 354; *Catlin* v. *Wilcox Silver Plate Co.* 123 Ind. 477, 8 L. R. A. 62; *Hurd* v. *Elizabeth*, 41 N. J. L. 1; *Chafee* v. *Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345; *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Barnett* v. *Kinney*, 147 U. S. 481, 37 L. ed. 249; *Holbrook* v. *Ford*, 153 Ill. 633, 27 L. R. A. 324; *Felch* v. *Bugbee*, 48 Me. 9, 77 Am. Dec. 203; *Wright* v. *Gilbert*, 51 Md. 155; *Williams* v. *Williams*, 5 Md. 467; *Dalrymple* v. *Gamble*, 66 Md. 306.

Fowler, J., delivered the opinion of the court:

The Order of the Iron Hall is a beneficial association, and was incorporated under the laws of the state of Indiana. A bill was filed in the superior court of Marion county, of that state, by Albert R. Baker and others against said corporation for the appointment of receivers, and for its dissolution and winding up. On the 23d of August, 1892, the appellant, James F. Failey, was appointed receiver of the said corporation, with power to receive all its property of every kind within and without the state of Indiana, and on the same day Charles J. Wiener and Joseph C. France were duly appointed receivers by the circuit court of Baltimore city, with power to take charge and possession of the property of said corporation in this state. It appears that four of the general officers of the order are citizens of Maryland, residing in the city of Baltimore, and that there are twenty six of its branch associations established in that city. No objection has been made to the exercise of its jurisdiction by the Maryland court in the appointment of receivers. Some months subsequent to their appointment, the appellant filed his petition in the circuit court of Baltimore city, in which he fully set forth the decree of the Indiana court by which he was appointed, and prays that the Maryland receivers may be required to account for and hand over to him all the property and funds of said corporation in their possession and under their control. The Maryland receivers answered this petition on the 10th of April, 1894, and in their answer, among other things, they admit that they have in their hands a large sum of money, which they allege was paid to them solely by the branches of said order and the members thereof in this state, and that they are entitled to have the same distributed among such members as reside here, and that the same should not be sent out of this state for distribution, to their prejudice. They also set up in their answer the claims of certain attaching creditors who issued their attachments before the appointment of receivers in either state, and who claim that, as holders of matured certificates, they cease to be members of said order, and have become creditors thereof. Subsequently the circuit court of Baltimore city ordered its receivers to transmit the funds in their hands to the appellant, in Indiana, retaining here, however, sufficient to meet the claims of the attaching creditors whose claims had not then been, but were reserved for future adjudica-

tion. On the 9th of December, 1895, the circuit court of Baltimore city ordered that the claims of the attaching creditors should be paid in full. From this order James F. Failey, the Indiana receiver, has appealed.

It thus appears that the only question presented is as to the correctness of the allowance of the attachment claims, and this depends mainly upon the further question whether these claimants are to be considered as members of the order, or, being holders of matured certificates, they are to be considered creditors. If they are members, they must, as was decided by the court below, go to Indiana, and seek payment from the receivers appointed there. From this decision no appeal has been taken, and all of the funds which were in the hands of the Maryland receivers have been transmitted to Indiana, except the sum involved in this particular controversy, which, as we have seen, was ordered to be returned here to pay creditors, and not members in this state. The appellant bases his claim to the fund in question upon the following grounds: First, that the attachments were premature, the benefits claimed under the matured certificates not being payable at the time the attachments were issued; second, that the holder of a matured certificate does not become such a creditor upon the maturity of his certificate as to enable him to attach the funds of the association when insolvent, nor such a creditor as is contemplated by the rule that requires domestic creditors to be paid before sending the fund out of this jurisdiction; and, lastly, that the contract with the order relied on by the holders of matured certificates is not capable of performance, and will not, therefore, be recognized nor enforced in a court of equity.

We will first consider the nature of the contract which is found in the policy or certificate issued by the order to each of its members, and one of which is held by and is the basis of the claims of each of the appellees. Without setting forth the certificate in full, it is sufficient for the present purpose to say in general terms that it provides that the holder shall be a member of the order, entitled to all the rights and privileges properly belonging to his rank and standing, including a benefit of not exceeding $1,000, provided he shall obey all lawful commands of the order, pay all lawful assessments, and comply with all the laws and usages of the order, and all laws which may hereafter be enacted, and especially with the conditions set forth in the certificate, which, so far as we need now refer to them, are contained in paragraph first, which is as follows: "In case the said member shall continue to pay all assessments and demands which may be legally made against him on this certificate for the full term of seven years from its date, . . . then the said member shall be entitled to a sum not exceeding the principal amount named herein, less the amount he has already received as benefits from the order on account of sickness or other disability or otherwise." We do not think that there is any element of impossibility apparent upon the face of or inherent in the contract as set forth in the certificate. The fact that the business of the order ended disastrously, appears, as far as we can judge from the meager information upon this subject given in the record, to have resulted from a combination of circumstances; and it is probable that the impracticability of the plan or scheme of the order set forth in the by laws had much to do in producing this unfortunate result. The officers in this state representing the order say in their answer to the bill that they have confidence in the organization and plans of the order, and believe that the present difficulties are the result simply of local mismanagement; and the appellant, in a statement under oath, shows that the order was not without valuable assets. It is as follows: Cash on hand, $715,577.33; notes and other securities, $33,148.68; real estate, $25,325; money deposited in bank, $713,333.70; reserve fund in various states and Canada, $1,238,643.18, making a total of nearly $3,000,000. He says, however, that he believes he would not be able to realize more than $200,000 from the large amount deposited in bank, because of the insolvency, and that it would depend very much upon the decisions of the courts of the various states growing out of suits which followed the appointment of receivers in Indiana, as to the amount he would be able eventually to recover from the reserve fund. It would seem, therefore, that the statements made in the bill that the effect of the allegation in the answer in the Indiana suit that the local mismanagement had destroyed the order were not altogether without foundation. But the record does not contain sufficient information as to the actual work done by this order to enable us to say with certainty what was the cause of its downfall. It is true, we have the result; but we are not disposed, as the case is now presented, to say that the impossibility of performing the contract set forth in the certificate is the sole cause of that result. The *Case of Bordley* (*Re Order of Tonti's Estate*, 173 Pa. 464), lately decided in the supreme court of Pennsylvania, and not yet officially reported, adopts the report of the auditor made in the court from which that case was appealed, and supports the view so strongly urged by the appellant in regard to the nature of the contract. But it seems to us that there is a broad distinction between the contract itself and the mode which the parties may adopt to execute it. The contract may be perfectly valid and capable of execution, while the scheme adopted to execute it may be impracticable; but it does not necessarily follow that the fatal defects of the latter attach to and totally destroy the contractual rights secured by the former. The contract here is not, as suggested by the appellant, to pay $1,000 at the end of seven years upon the payment in the meantime by the member of certain assessments which could not, upon any calculation, produce $500, but it was to pay a sum not exceeding $1,000 within seven years upon the payment during that time of all lawful assessments, and the performance of the other conditions set forth in the certificate. Of course, if the contract in question were the one suggested, the order could not perform it, and live for

any extended period, for it is apparent it could not long continue to pay out $1,000 for every $500 received. Such a condition of things, as we have already intimated, does not necessarily result from the contract, however much it may be the result of the plan adopted for assessments or other mismanagement complained of by some of the officers. Under such circumstances, especially where, as here, entire good faith is conceded to the appellees, it would seem to be much more reasonable to leave the parties subject to their contract so far as it applies to the changed conditions, than to entirely ignore it. If, then, we are correct in supposing that the contract is still in existence, what are the rights of the appellees, the holders of matured certificates of membership of the said order? This brings us to the consideration of the second reason upon which the appellant rests his claim, namely, that the appellees, as such holders of matured certificates, do not become such creditors upon the maturity thereof as to attach the funds of the order when insolvent, or to give them any standing to demand that they be paid before sending the fund to Indiana. But the weight of authority is against this view. In 2 Bacon, Ben. Soc. § 478, it is said: "In mutual companies, however, claims founded on policies matured before the receivership, are to be perferred to claims on policies not matured, for the maturity of the policy changes the status of the policy holder. He stands to the company in the same place that a creditor stands to the firm; he is to be preferred to members of the firm." The same principle is announced in the case of *Vannata* v. *New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 19. In the case just cited it was urged that the holders of unmatured certificates and the holders of unpaid matured certificates should stand upon the same plane, but this contention was thus disposed of: "The difference," said the chancellor, "between the cases is that, in the one, the claim was, when the decree was made, the claim of a creditor, and, in the other, there was no claim but that of a member, which was upon the assets, after payment of creditors." And to the same effect are *Com.* v. *Massachusetts Mut. F. Ins. Co.* 112 Mass. 116, 119 Mass. 45; *Mayer* v. *Atty. Gen.* 32 N. J. Eq. 815; *Stamm* v. *Northwestern Mut. Ben. Asso.* (Mich.) 8 West. Rep. 767. But in the case of *Baltimore & O. R. Co.* v. *Baltimore & O. Employés Relief Asso.* 77 Md. 566, this court expressed a similar view. We there held that a claim which had matured by death before dissolution of the association was a preferred claim. And in regard to claims based upon disability caused by sickness or accident, which, under the Constitution and by-laws of that association, entitled a member to the payment of a sum of money as benefits, we said in the same case, we do not see upon what principle the right of a member to claim for a disability that occurred before the dissolution of the association can be held to terminate with its dissolution. Some question has been made as to the effect of the insolvency of the order on the claims of the appellees, but it does not appear to us that the validity or status of the claims can be affected by an insolvency which did not exist until after the maturity of the certificates. Being creditors, the insolvency of the order would have no more effect upon their claims than upon those of any other creditors. When the certificates matured, the holders thereupon became creditors, and they remain so notwithstanding the subsequent insolvency of the order. But, again, it was urged that the attachments cannot stand because they were issued on claims of uncertain amounts, the certificates held by the attaching creditors not providing for the payment of any definite sum of money, but for a sum not greater than $1,000. It appears, however, by the agreed statement of facts found in the record that at the time when the receivers were appointed there was an amount of money in the hands of the order sufficient to pay all the matured certificates at the times when the same were due and payable according to their tenor; that the receiver also had an amount sufficient to pay the same, and that by the law of the order the maximum amount named in the certificate would have been payable, and it would have been paid if the receivers had not been appointed, and the business brought to an end. Hence the amount which each attached creditor was entitled to had become certain and fixed before the attachments issued.

Finally, it was urged that the attachments were prematurely issued, because the benefits were not payable at the time those proceedings were instituted. This view is based upon the theory that the time for payment specified in the certificate is controlled by the provisions of a by-law regulating the time of payment, which it is conceded was adopted subsequent to the issuing of the certificates. The latter provides that, upon certain conditions, which have been complied with, benefits shall be paid at the end of seven years, while the by-law provides that such benefits shall, when found correct, be adjusted within ninety days from the expiration of the certificate. While it is true, the certificate is accepted subject to all laws which might, after its date, be enacted by the order, yet, inasmuch as by the third section of the charter it is provided that benefits shall be paid as may be provided either by the by-laws or in the certificate of membership, the provision as to time of payment when found in the latter should govern. In the recent case of *Cohen* v. *Supreme Sitting of O. I. H.* (Mich.) 2 Det. L. N. 93. In construing a similar certificate, it was said: "The reference to the laws of the association in the present case cannot be said to relate to the time of payment, but rather to the affirmative obligations assumed by the holder of the certificate. Especially is this so in view of the fact that the articles of association expressly provide that the amount shall be paid at such times as may be provided by the laws governing such payment or in the certificate of membership. The fundamental law, therefore, recognized the time of payment as fixed by the certificate, and the by-law subsequently passed applied only to such certificates as by their terms made the sum payable at the time fixed by the by-law."

In addition to this, being creditors, the appellees are entitled to payment whether their attachments are valid or not, and under our ruling in the case of *Day* v. *Postal Teleg. Co.* 66 Md. 354, it is clear the fund should be distributed by the Maryland receivers to the payment of debts established in this proceeding, and the balance, if any, should be paid over to the Indiana receiver. It follows that the order appealed from must be affirmed.

Order affirmed, with costs.

SOUTH DAKOTA SUPREME COURT.

Samuel NIXON *et al.*, *Respts.*,
v.
James G. REID *et al.*, *Appts.*

(.....S. D.....)

1. **The power to grant ferry leases or licenses belongs to the police power** of the state, and may be exercised upon navigable rivers, subject to the power of Congress to supersede the subordinate control.

2. **A ferry lease granted under a statute** which allows to all who choose the privilege of bidding therefor is not within the prohibition of the organic act of Dakota territory as to "granting private charters or especial privileges;" or the constitutional provision against "private or special laws" authorizing ferries.

3. **The right to establish a ferry at a certain place** on a river within the jurisdiction of county commissioners may be granted by them so far as their jurisdiction goes, although the opposite side of the river is within an Indian reservation.

4. **A ferry lease for five years** with a privilege of five or ten more years at the option of the licensee is not in excess of the power to grant a lease for a term not exceeding fifteen years.

5. **An assignment of a ferry lease** is not invalid, at least when it is made with consent of the state by its agents.

6. **A ferry license is exclusive** of the right to operate any other ferry within the limits prescribed where the law provides that no other license shall be granted within 2 miles on either side.

(April 18, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Potter County in favor of plaintiffs in an action to enjoin the defendants from operating the ferry across the Missouri river at Forest City. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Crawford & DeLand** and **John A. Holmes,** for appellants:

A franchise is not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the method by which the transfer may be effected and such method must be followed in making a sale and transfer of franchise.

Munroe v. *Thomas*, 5 Cal. 470; *Thomas* v. *Armstrong*, 7 Cal. 286; *Wood* v. *Truckee Turnp. Co.* 24 Cal. 474; *Montgomery* v. *Multnomah R. Co.* 11 Or. 344; *Stewart* v. *Jones*, 40 Mo. 141; Morawetz, Priv. Corp. §§ 924, 925, 928, 929; *Day* v. *Stetson*, 8 Me. 370; *Memphis & L. R. Co.* v. *Berry*, 112 U. S. 609, 28 L. ed. 837; *State, Atty. Gen.*, v. *Sherman*, 22 Ohio St. 411; *Randolph* v. *Larned*, 27 N. J. Eq. 557; *Palestine* v. *Barnes*, 50 Tex. 538; *Carpenter* v. *Black Hawk Gold Min. Co.* 65 N. Y. 43; *Pierce* v. *Emery*, 32 N. H. 484; *Branch* v. *Jesup*, 106 U. S. 468, 27 L. ed. 279; *Knott* v. *Frush*, 2 Or. 237; *Ragan* v. *McCoy*, 29 Mo. 367; *The Maverick*, 1 Sprague, 24; *Ammant* v. *New Alexandria & P. Turnp. Road Co.* 13 Serg. & R. 210, 15 Am. Dec. 593; *Lombard* v. *Cheever*, 38 Ill. 473; *Sullivan* v. *Lafayette County Supers.* 58 Miss. 791; *Seal* v. *Donnelly*, 60 Miss. 662; Herman, Executions, §§ 131, 361; Ang. & A. Priv. Corp. 191; Redf. Railways, §§ 419, 422; Freem. Executions, § 179.

Where the mode of contracting is prescribed and limited by statute that mode is exclusive and must be pursued or the contract will not bind the corporation.

Dill. Mun. Corp. § 499.

The construction of a legislative grant emanating from the sovereign power is taken most strongly against the grantee where there is doubt as to the meaning of the statute.

Mills v. *St. Clair County*, 27 Ill. 197; Cooley, Const. Lim. 396.

Where the charter or incorporating act requires officers to award contracts to lowest bidders a contract made in violation of its requirements is illegal and the corporation may plead its illegality in defense.

Dill. Mun. Corp. § 466; *Brady* v. *New York*, 20 N. Y. 312; *Stuart* v. *Cambridge*, 125 Mass. 102.

If the lowest bidder is required to give security, and the law requires public notice of proposals, any contract without a compliance with the law is unauthorized and void.

Dickinson v. *Poughkeepsie*, 75 N. Y. 65; *Re Eager*, 46 N. Y. 100; *Maxwell* v. *Stanislaus County Supers.* 53 Cal. 389; *Bigler* v. *New York*, 5 Abb. N. C. 51; *San Francisco & O. R. Co.* v. *Oakland*, 43 Cal. 503; *Mitchell* v. *Milwaukee*, 18 Wis. 93; *Wells* v. *Burnham*, 20 Wis. 113; *Hasbrouck* v. *Milwaukee*, 21 Wis. 218; *Nash* v. *St. Paul*, 11 Minn. 174.

A ferry franchise is real estate and can be transferred in accordance with the provisions of the statute in reference to conveyances.

Dundy v. *Chambers*, 23 Ill. 369; 3 Kent, Com. p. 458; 1 Hilliard, Real Prop. 1; *Price* v. *Price*, 6 Dana, 107; *Mullis* v. *Cavins*, 5 Blackf. 77; *Jeffersonville* v. *Louisville & J. S. Ferry Co.* 27 Ind. 100, 89 Am. Dec. 495; *Horsley* v. *Damon*, 1 Blackf. 491.

Granting a ferry license does not authorize the holder thereof to use the land of another without his consent or without due compensation.

Prosser v. *Wapello County*, 18 Iowa, 327; *Prosser* v. *Davis*, 18 Iowa, 367; *Sandford* v. *Martin*, 31 Iowa, 67.

NOTE.—As to the obligation to operate a ferry under a franchise, see Brownell v. Old Colony R. Co. (Mass.) 29 L. R. A. 169.

This lease does not in terms nor in legal effect grant an exclusive ferry privilege.

Fanning v. *Gregoire*, 57 U. S. 16 How. 524, 14 L. ed. 1043.

A legislative grant is not necessarily exclusive, nor is the one in question.

Power v. *Athens*, 99 N. Y. 592; High, Inj. § 595; 2 Washb. Real Prop. pp. 272, 273; *Proprietors of Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. 59; *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 7 Pick. 344, 36 U. S. 11 Pet. 420, 9 L. ed. 773; *Richmond, F. & P. R. Co.* v. *Louisiana R. Co.* 54 U. S. 13 How. 71, 14 L. ed. 55; Redf. Railways, 131; *Fall* v. *Sutter County*, 21 Cal. 252; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 61; *Mohawk Bridge Co.* v. *Utica & S. R. Co.* 6 Paige, 554; *Oswego Falls Bridge Co.* v. *Fish*, 1 Barb. Ch. 547; *Bush* v. *Peru Bridge Co.* 3 Ind. 21; *Perrin* v. *Oliver*, 1 Minn. 202.

A ferry privilege is a franchise.

Rohn v. *Harris*, 130 Ill. 525; 7 Am. & Eng. Enc. Law, pp. 42, 43; *Montgomery* v. *Multnomah R. Co.* 11 Or. 344; 2 Washb. Real Prop. 268, 3d ed. 269; *Truckee & T. Turnp. Road Co.* v. *Campbell*, 44 Cal. 89; *Evans* v. *Hughes County*, 3 S. D. 580; 3 Kent, Com. 459.

Plaintiffs must fully comply with all the provisions of the grant and the laws before they can bring an action for injunction for interference with an alleged vested right.

Norris v. *Lapsley*, 5 Cal. 47; *Walker* v. *Armstrong*, 2 Kan. 198; *Mills* v. *Brown*, 3 Ill. 548.

Where the conditions and requirements of the ferry lease have not been observed by the lessee the lease may be declared forfeited by a court of equity.

Phillips v. *Bloomington*, 1 G. Greene, 498.

Plaintiffs must show an exclusive ferry privilege in order to maintain this injunction.

High, Inj. § 587, 595; *Butt* v. *Colbert*, 24 Tex. 355.

A simple grant of the right to establish a public ferry cannot be construed to be exclusive but is subject to such future grants as the public convenience may require.

Bush v. *Peru Bridge Co.* 3 Ind. 21; *State* v. *Wise*, 7 Ind. 645; *McEwen* v. *Taylor*, 4 G. Greene, 532; *Gales* v. *Anderson*, 13 Ill. 413; Cooley, Const. Lim. 396; *Harrison* v. *State*, 9 Mo. 526; *Cayuga Bridge Co.* v. *Magee*, 6 Wend. 85.

The entire country bordering on the Missouri river opposite the western boundary of Potter county is an Indian country inhabited exclusively by the Sioux tribe of Indians; and Congress had the sole power to regulate commerce with that tribe of Indians as well as among the several states.

Fed. Const. § 8, art. 1.

Whatever traffic existed in that Indian country the same must be presumed to be confined to the Indian tribe and to the maintenance of government relations therewith under the Federal laws.

Ordronaux, Constitutional Legislation, 475, 476; *Worcester* v. *Georgia*, 31 U. S. 6 Pet. 515, 8 L. ed. 483; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 196, 6 L. ed. 70; Story, Const. §§ 1061, 1072; *The Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702; *United States* v. *Holliday*, 70 U. S. 3 Wall. 417, 18 L. ed. 185; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 445, 6 L. ed. 687.

The term "commerce" in the Constitution also includes navigation as well as traffic in its ordinary signification.

People v. *Brooks*, 4 Denio, 469.

The authority of the states is subordinate and subject to the right of the general government to control navigable streams, and the supreme and exclusive control is ultimately in the Federal Congress.

Elliott, Roads & Streets, p. 27; *Weld* v. *Chapman*, 2 Iowa, 524; Comp. Laws, §§ 1361, 1366; *Ross* v. *Page*, 6 Ohio, 166; *Gear* v. *Bullerdick*, 34 Ill. 74.

The statute is in conflict with U. S. Rev. Stat. § 1889, which expressly forbids the granting of exclusive privileges in the then territory of Dakota.

Elk Point v. *Vaughn*, 1 Dak. 108.

A ferry franchise is a special or royal privilege.

1 Bouvier, Law Dict. title, "*Franchise;*" Ang. & A. Priv. Corp. § 4; *California State Teleg. Co.* v. *Alta Teleg. Co.* 22 Cal. 403; *Perris* v. *Higley*, 87 U. S. 20 Wall. 380, 22 L. ed. 383; Cooley, Const. Lim. 44; *Butchers' Union, S. H. & L. S. L. Co.* v. *Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 36 U. S. 11 Pet. 432, 9 L. ed. 779; *Truckee & T. Turnp. Road Co.* v. *Campbell*, 44 Cal. 89; *Atkinson* v. *Marietta & C. R. Co.* 15 Ohio St. 21.

Messrs. **Robert B. Fisk** and **I. J. Eales**, for respondents:

While it may be true that "as a general rule" franchises are not the subject of sale, it is also and equally as true that the state, the sovereign power, in which all franchises primarily rest, may, by law, make them so.

Ferry privileges, or "franchises," do not rest upon exactly the same basis as the charters of private corporations, in other states, created, as a rule, by special and private act of the legislature.

8 Am. & Eng. Enc. Law, p. 585; Morawetz, Priv. Corp. § 922.

A ferry franchise is real estate and must be conveyed as real estate.

Ferry franchises are assignable, or transferable.

2 Bl. Com. 37; Kent, Com. 458; *Bowman* v. *Wathen*, 2 McLean 376; *Felton* v. *Deall*, 22 Vt. 170, 54 Am. Dec. 61; *Benson* v. *New York*, 10 Barb. 223; *Ladd* v. *Chotard*, Minor (Ala.) 366; *Lewis* v. *Intendant*, 7 Ala. 85; *Peter* v. *Kendall*, 6 Barn. & C. 703; *Willoughby* v. *Horridge*, 12 C. B. 742; *Billings* v. *Breinig*, 45 Mich. 65; Comp. Laws, §§ 2675, 2683.

Appellants in this action are not the proper parties to question the right, under that franchise, of the respondents.

Tugwell v. *Eagle Pass Ferry Co.* 74 Tex. 480; *Haynes* v. *Wells*, 26 Ark. 461; *Costar* v. *Brush*, 25 Wend. 628; *People* v. *Babcock*, 11 Wend. 587; 8 Am. & Eng. Enc. Law, p. 624; *Dunham* v. *Isett*, 15 Iowa, 293; *McAllister* v. *Plant*, 54 Miss. 106; *New York* v. *Starin*, 106 N. Y. 1.

The powers exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature.

Hornbuckle v. *Toombs*, 85 U. S. 18 Wall. 655, 21 L. ed. 967; *Clinton* v. *Englebrecht*, 80 U. S.

13 Wall. 441, 20 L. ed. 660; *Territory, McMahon*, v. *O'Connor*, 5 Dak. 405, 3 L. R. A. 355.

The authority to establish ferries lies "within the scope of that immense mass of undelegated powers which are reserved to the states respectively."

Conway v. *Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191; *Swan* v. *Williams*, 2 Mich. 427; *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 434, 20 L. ed. 659.

The legislatures of the territories, Dakota included, have, and always have had, the right and the power, the same as state legislatures, to establish public ferries.

The "or" in § 1889, U. S. Rev. Stat. reading: "The legislative assemblies of the several territories shall not grant private charters or especial privileges," is used as interpretative or explanatory of preceding words.

Arthur v. *Cumming*, 91 U. S. 362, 23 L. ed. 438; *Brown* v. *Com.* 8 Mass. 59; *State* v. *Gilbert*, 13 Vt. 647; *Com.* v. *Grey*, 2 Gray, 502, 61 Am. Dec. 476; *Clifford* v. *State*, 29 Wis. 327.

This section is purely and simply a prohibition against the creation of, or a granting of, "especial privileges" to corporations by private statute.

Elk Point v. *Vaughn*, 1 Dak. 108; *Alger* v. *Hill*, 2 Wash. 344; *Seattle* v. *Yesler*, 1 Wash. Terr. 572.

Congress never intended or understood § 1889 as restricting the territorial legislatures from establishing public ferries.

Wells v. *Oregon & C. R. Co.* 15 Fed. Rep. 531; *Wells, F. & Co.* v. *Northern P. R. Co.* 23 Fed. Rep. 469.

If the legislature is prohibited only from passing "local or special laws," on any given subject, it is allowable to that legislature to pass general laws on the same subject.

Henderson v. *Ogden City R. Co.* 7 Utah, 199; *Southern P. R. Co.* v. *Orton*, 6 Sawy. 157; *Frye* v. *Partridge*, 82 Ill. 267; *Elk Point* v. *Vaughn*, *supra*; *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 36 U. S. 11 Pet. 420, 9 L. ed. 773; *Evans* v. *Hughes County*, 6 Dak. 102.

If the court now decides the law unconstitutional, respondents nevertheless must prevail in this action.

At the October, 1888, term of the territorial supreme court, that court in *Evans* v. *Hughes County*, *supra*, decided the ferry law as not in conflict with § 1889, U. S. Rev. Stat. In April, 1889, and after that decision had been rendered and while that decision still stood undisturbed, as the judicial interpretation of this law, by the highest court of the territory, the county commissioners of Potter county, and Bullard, the grantor of respondents, relying upon the letter and upon the judicial determination of the constitutionality of this law, entered into the contract or lease, for the ferry.

The rights of respondents, acquired at the time they were, cannot be disturbed by the decision of this court.

Graves v. *Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *Rowan* v. *Runnels*, 46 U. S. 5 How. 135, 12 L. ed. 87; *Ohio Life Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 431, 14 L. ed. 1003; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Havemeyer* v. *Iowa County Supers.* 70 U. S. 3 Wall. 294, 18 L. ed. 38; *Thompson* v. *Lee County*, 70 U. S. 3 Wall. 327, 18 L. ed. 177; *Mitchell* v. *Burlington*, 71 U. S. 4 Wall. 270, 18 L. ed. 350; *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594; *Kenosha* v. *Lamson*, 76 U. S. 9 Wall. 477, 19 L. ed. 725; *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678, 21 L. ed. 382; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Douglass* v. *Pike County*, 101 U. S. 686, 25 L. ed. 971; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *State* v. *Miller*, 50 Mo. 129; *Southern P. R. Co.* v. *Orton*, 6 Sawy. 157.

A public ferry is a public highway of special description.

Sullivan v. *Lafayette County Supers.* 58 Miss. 790; *Com.* v. *Bacon*, 13 Bush, 210.

The laying out of roads, highways, and the erection of bridges, and the establishment of ferries rest entirely and exclusively within the realms of the royal prerogative.

An estate in such a franchise and an estate in land rest upon the same principle.

3 Kent, Com. 459.

A ferry is in respect of the landing place and not of the water. The water may be to one, and the ferry to another.

13 Vin. Abr. 208.

A ferry franchise, being a portion of the prerogative of the sovereign, reposed in the subject, is not at all dependent on the ownership of the land at the river's edge; riparian rights and ownership are not elements of the franchise, nor are they sufficient, or any, foundation for the ferry rights.

Columbia Delaware Bridge Co. v. *Geisse*, 38 N. J. L. 39; *Sullivan* v. *Lafayette County Supers. supra; Trustees of Schools* v. *Tatman*, 13 Ill. 27; *Walker* v. *Armstrong*, 1 Kan. 198.

Ferry franchises are granted by the state.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Fanning* v. *Gregoire*, 57 U. S. 16 How. 524, 14 L. ed. 1043; *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Mills* v. *St. Clair County*, 7 Ill. 197.

The privilege of the license may not be as valuable to the grantee, by not extending across the river, but as far as it does extend, he is entitled to all the provisions of the law, the object of which was to secure the exclusive privilege of maintaining a ferry at a designated place.

People v. *Babcock*, 11 Wend. 590; *Bowman* v. *Wathen*, 2 McLean, 377; *Memphis* v. *Overton*, 3 Yerg. 390; *Phillips* v. *Bloomington*, 1 G. Greene, 498; *Hudson County Chosen Freeholders* v. *State, New Jersey R. & T. Co.*, 24 N. J. L. 723; *Mills* v. *St. Clair County*, 49 U. S. 8 How. 569, 12 L. ed. 1201; *Fanning* v. *Gregoire*, *supra*; *New-Port* v. *Taylor*, 6 J. J. Marsh. 134; *Tugwell* v. *Eagle Pass Ferry Co.* 74 Tex. 480; *Columbia Delaware Bridge Co.* v. *Geisse*, *supra*.

All ferries are exclusive.

Mills v. *St. Clair County*, 7 Ill. 197, 49 U. S. 8 How. 569, 12 L. ed. 1201; *Com.* v. *Bacon*, 13 Bush, 210; *California State Teleg. Co.* v. *Alta Teleg. Co.* 22 Cal, 398; *Hanson* v. *Webb*, 3 Cal 237; *Norris* v. *Farmers' & T. Co.* 6 Cal. 594, 65 Am. Dec. 535; *Chard* v. *Stone*, 7 Cal. 117; *Murray* v. *Menefee*, 20

Ark. 561, *Power* v. *Athens*, 99 N. Y. 592; *Walker* v. *Armstrong*, 2 Kan. 198; *Phillips* v. *Bloomington*, *supra*.

With the mere establishment of such ferries, interstate or between a state and an Indian country, with the granting of such franchises, with the character of franchise that the state may grant, Congress has nothing whatever to do, has no concern.

Gibbons v. *Ogden*, and *Fanning* v. *Gregoire*, *supra*; *Conway* v. *Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191; *Carroll* v. *Campbell*, 108 Mo. 551; *Gulf*, *C. & S. F. R. Co.* v. *Dwyer*, 75 Tex. 572; *Tugwell* v. *Eagle Pass Ferry Co.* *supra*; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 27 L. ed. 419; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442; *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Starin* v. *New York*, 115 U. S. 248, 29 L. ed. 388.

The condition of the country on the other side of the river is not a material fact in this case at all.

United States v. *Cook*, 86 U. S. 19 Wall. 591, 22 L. ed. 210; Cooley, Const. Lim. 5th ed. 736.

The propr etary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a state.

West River Bridge Co. v. *Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535; 6 Am. & Eng. Enc. Law, *Eminent Domain*, 512, note, 1.

When a person has bid the highest amount of rent for a ferry franchise, and secured the payment of the same, the county commissioners shall enter into a contract with him, a lease of the ferry franchise, or of the ferry.

The same rule should be applied to the construction of that contract as to any other contract.

Starin v. *New York*, 106 N. Y. 82; *Hussey* v. *Field*, Gale, 165; *Letton* v. *Goodden*, 14 L. T. N. S. 298; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *United States* v. *Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403.

The transfer by the original holder, with the consent of the granting authority, the board of supervisors, transferred the franchise.

People v. *Duncan*, 41 Cal. 507.

Appellants cannot be heard to attack the franchise collaterally.

Bush v. *Peru Bridge Co.* 3 Ind. 21; *Champion* v. *Minnehaha County Comrs.* 5 Dak. 416; *Gales* v. *Anderson*, 13 Ill. 413; *Truckee & T. Turnp. Road Co.* v. *Campbell*, 44 Cal. 89; *California State Teleg. Co.* v. *Alta Teleg. Co.* 22 Cal. 403; *Natoma Water & M. Co.* v. *Clarkin*, 14 Cal. 544; *Capital City Ferry Co.* v. *Cole & C. Transp. Co.* 51 Mo. App. 229; *New Albany & S R. Co.* v. *Huff*, 19 Ind. 315; *Harrell* v. *Ellsworth*, 17 Ala. 576; *Douglass' Appeal*, 118 Pa. 65; *Southern P. R. Co* v. *Orton*, 6 Sawy. 181; 4 Am. & Eng. Enc. Law, p. 198; *Tugwell* v. *Eagle Pass Ferry Co.* 74 Tex. 480; *Starin* v. *New York*, *supra*; *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358, 20 L. ed. 430; *Hanger* v. *Little Rock Junction Railway*, 52 Ark. 61; *Midland Terminal & F. Co.* v. *Wilson*, 28 N. J. Eq. 537; *Carroll* v. *Campbell*, 110 Mo. 557.

Corson, P. J., delivered the opinion of the court:

This is an appeal by the defendants from an order overruling a demurrer to the complaint. The plaintiffs, under a claim to an exclusive franchise for establishing a ferry across the Missouri river at Forest City, in Potter county, instituted this action to enjoin the defendant from maintaining and operating an opposition ferry at that place. The demurrer is interposed upon two grounds, namely, that the complaint does not state facts sufficient to constitute a cause of action, and that the ferry lease, as alleged in said complaint, is illegal and void, under the laws of this state. The complaint states the facts very fully upon which the plaintiffs rely to maintain their actions, but a brief summary is all that will be necessary to an understanding of the questions presented for our determination.

It is alleged that in April, 1889, the board of county commissioners of Potter county granted to one Francis B. Bullard a lease of an exclusive ferry privilege on the Missouri river, at a point on the east side of said river, known as "Steamboat Landing," for a term of five years from and after April, 1889, with the refusal to said Bullard for a further term of five years, and for a second extension of five years; that a contract was duly entered into between said Bullard and the said board of county commissioners, a copy of which is given in the complaint; that said Bullard thereafter set up, operated, managed, and conducted a ferry, and continued to operate the same until March 27, 1894; that, upon the said last date mentioned, the said Bullard duly assigned and transferred to the plaintiffs all his rights and privileges under said lease, a copy of which assignment is made part of the complaint; that in April, 1894, the plaintiffs applied to the board of county commissioners of said Potter county for an extension of said ferry privilege for an additional term of five years, and for an approval of the transfer of said lease to these plaintiffs; that said board duly passed a resolution approving said assignment and transfer of said franchise to the plaintiffs, and extending said lease for the term of five years, which application and resolution are fully set out in the complaint; that the plaintiffs duly executed a bond as required by law, and since March 27, 1894, have been running, managing, operating, and conducting said ferry, with ample facilities for transacting all such ferry business; that they have paid to the county, as provided in said contract, all rents due thereon; that defendants have combined themselves into an association, calling themselves the "Citizens' Ferry Company," and have caused to be built a ferryboat, and, without right or authority, have been running the same from said Steamboat Landing, in opposition to, and in competition with, said ferry of these plaintiffs; and that said defendants threaten to continue to operate said ferry, to the irreparable damage of the plaintiffs. Plaintiffs pray that an injunction may issue restraining the defendants from continuing to operate said opposition ferry.

The appellants contend: First. That the ferry law of this state was passed in contravention of the organic act of the territory, and is in contravention of the Constitution of this state, and is therefore void. Second. The contract, being for a ferry across the Missouri river opposite an Indian reservation, is in contravention of the laws of the United States relating to intercourse with the Indian tribes, and is therefore illegal and void. Third. That the contract in excess of the five years specified as the first term was unauthorized and void; that, at the time this action was commenced, said lease had expired and terminated. Fourth. That a ferry lease is a franchise, and cannot be assigned or transferred; and that the assignment of said lease by said Bullard to the plaintiffs was void, vesting, no right in the plaintiffs. All these propositions are controverted by the respondents, and they urge that, if all the positions taken by the defendants' counsel are conceded to be correct, yet the defendants cannot attack the proceedings or the franchise, as an action could only have been brought by and in behalf of the state.

Appellants contend that the act of the territorial legislature (being §§ 1361–1369, Comp. Laws) providing for the granting of ferry leases was in conflict with section 1889 of the organic act of the territory, which prohibits the territories from "granting private charters or especial privileges." It might be sufficient to say that the territorial supreme court passed upon this question in *Evans* v. *Hughes County*, 6 Dak. 102, and held the law was not in conflict with the organic act. But, as the decision in that case was a memorandum decision, we shall briefly state our reasons for concurring in the views expressed by that court.

The statute relating to the granting of ferry leases was passed substantially in its present form, in 1866. No act of Congress disaffirming it has ever been passed. We may conclude, therefore, that, in the view of Congress, there was nothing in the statute conflicting with the organic act. When an act of the territorial legislature has been in force more than a quarter of a century, and acquiesced in by Congress, it may be safely assumed that the law has received the implied sanction of Congress. In *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 434, 20 L. ed. 659, the Supreme Court of the United States, in speaking of a law of the territory of Utah, says: "In the first place we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the 1st of the next December in each year. The simple disapproval by Congress as any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body." Section 1889 was amended or explained by Congress in several acts, the last, to which we shall refer, being the act of July 30, 1886, in which it was provided that the territories shall "not pass special or local laws in any of the following enumerated cases: . . . Chartering or licensing ferries or toll-bridges." It will be noticed that the terms used are "local or special laws." In our view, the law in controversy is neither local nor special. It is a law applicable to all the counties of the state in which there are rivers or streams of sufficient magnitude to require the establishment of ferries, and the right to bid for the lease is open and free to all. The law, therefore, is neither local nor special, in the sense those words are used in the act. The granting of ferry licenses or leases is peculiarly within the province of state legislation, and not less so of territorial legislation, the territorial legislature being given power to legislate on all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. *Guild* v. *First Nat. Bank*, 4 S. D. 566; *Territory, McMahon*, v. *O'Connor*, 5 Dak. 405, 3 L. R. A. 355; *Conway* v. *Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191. In speaking of ferries, the Supreme Court of the United States, in the latter case, says: "There has been now nearly three quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries; Congress, never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states, respectively,' we think too clear to admit of doubt." In view of the fact, therefore, that the act of the territory relating to leasing ferries has never been disapproved by Congress is general in its character, and does not grant any special privilege, but is open to all who choose to bid for the privilege of establishing a ferry, and that control of ferries is especially within the legislative powers of the state, and equally so within those of territories, we conclude that the claim that the act in question is in conflict with the organic act is untenable. As stated by the supreme court of the territory in *Evans* v. *Hughes County*, *supra*, the power to grant ferry leases or licenses belongs to the police power of the state, and may be exercised upon navigable rivers, subject to the power of Congress to supersede the subordinate control. Tiedeman, Pol. Powers, 626; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Conway* v. *Taylor, supra; Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 27 L. ed. 419; *Parker* v. *Metropolitan R. Co.* 109 Mass. 506; *People* v. *New York*, 32 Barb. 102.

The contention that the west bank of the Missouri river, opposite the steamboat landing where the plaintiffs were authorized to establish a ferry, is embraced within an Indian reservation, and that the lease is therefore void, is equally untenable. The place where the ferry is established being within the jurisdiction of the board of county commissioners of Potter county, that board was authorized to grant the license or lease. Whatever rights the lessees might have to land on the opposite side of the river was

a matter between them and the United States government. But as the government is not complaining of this lease, and the defendants are not asserting any right under the United States so far as the case is now presented, it is not necessary to pass upon the question as to the rights the plaintiffs have under their license to land upon the opposite bank of the river. This is not a matter, however, that affects the validity of the license to the plaintiffs. This was so decided in the case of *People* v. *Babcock*, 11 Wend. 587. In that case, Mr. Justice Nelson, delivering the opinion of the supreme court of New York, says: "The county of Niagara extends westerly to the middle of the Niagara river, and the power of the court of common pleas of that county to license ferries within its limits is without qualification. 1 Rev. Stat. p. 526, § 1. So far as jurisdiction is concerned, it is as complete over this river to the center thereof, as over any other stream within the county. The privilege of the license may not be as valuable to the grantee by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place. The prohibition in the 8th section of the act against using a ferry without a license is, in terms, co-extensive with the power given to grant a ferry." This case is cited with approval, and quoted from, in *Conway* v. *Taylor*, *supra*, which was also a similar case, as the ferry extended from Kentucky to the state of Ohio. And see also *Tugwell* v. *Eagle Pass Ferry Co.* 74 Tex. 480. That the granting of a ferry license is not a regulation of commerce is too well settled to require further discussion. *Gibbons* v. *Ogden*, *Conway* v. *Taylor*, and *Wiggins Ferry Co.* v. *East St. Louis*, *supra*; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Tugwell* v. *Eagle Pass Ferry Co. supra.*

It is next contended that, while the board was authorized to grant a lease for a term not exceeding fifteen years, it did not possess the power to grant a lease for five years, with a privilege of five or ten more years, at the option of the licensee. We are unable to discover any force in this position. So long as the board kept within the limitation of fifteen years, we can discover no legal objection to the board making such a contract as to time, within the limitation, as it might, in its discretion, deem proper. Again, in the case at bar the board made a new contract with the present plaintiffs, and required a new bond, which was given. The lease was made to them in consideration of their agreement to carry out fully the terms and conditions of said original contract, and to secure which a new bond was given. Unless the assignment was void, we can discover no legal objection to the lease on account of the time fixed.

It is next contended that, this being a franchise, it was not assignable. Whether or not such a franchise is ordinarily assignable, so as to bind the state without its consent, it is not necessary now to decide, as the assignment in the case at bar was made with the consent of the state, by its agents, the board of county commissioners. *People* v. *Duncan*, 41 Cal. 507.

It is also contended that the lease or license is not exclusive, and that the defendants had the right to establish and maintain a ferry at the place as alleged in the complaint. But the ferry law provides that no other ferry license shall be granted within a distance of 2 miles thereof across the same stream. As no person is authorized to establish or maintain a ferry without first having obtained a license therefor, the license granted is necessarily exclusive for the 2 miles on either side thereof. Unless the license, when granted was made exclusive by law for the distance specified on either side of the specified point, few persons would be willing to pay a consideration for such license and incur the expense necessary to procure the requisite boats and machinery for the establishment of such a ferry. The evident design and purpose of the ferry law are to afford sufficient inducements to secure proper ferry appliances for the accommodation of the public, and to secure as large a revenue as possible for the county school fund. The whole matter, with certain limitations, is left to the board of county commissioners, as agents of the state (*Evans* v. *Hughes County*, 3 S. D. 580), upon the theory that such board will see that the interests of the public are properly provided for, and the largest possible revenue is obtained for the schools of the county.

The system providing for granting ferry licenses in this state seems to be one usually adopted by the states of the Union. The reasons for holding the ferry license law valid under the organic act applies equally to our state Constitution, in which the language used is different, but in meaning substantially the same. The constitutional provision is: "The legislature is prohibited from enacting any private or special laws in the following cases: . . . Authorizing persons to keep ferries across streams wholly in this state."

Upon the facts stated in the complaint, the court committed no error in overruling the demurrer, and the order overruling the same is *affirmed*.

WEST VIRGINIA SUPREME COURT OF APPEALS.

A. M. JARRETT
v.
Jason S. GOODNOW *et al.*, *Appts.*

(39 W. Va. 602.)

*1. **A party entitled to plead in an action** at law the defenses specified in § 5, chap. 126, Code 1891, need not plead them in the action, but may avail himself of them in equity without any excuse for not using them at law.

2. **In sales of personal property** by one in possession, there is an implied warranty of good title.

3. **One selling personal property,** knowing he has no title, and concealing that fact from the purchaser, is liable for fraud.

*Headnotes by BRANNON, P.

NOTE.—*General equitable jurisdiction in regard to injunctions against judgments.*

I. *In matters of concurrent jurisdiction.*
II. *Where there is a failure to defend at law.*
III. *Where there is negligence in not asserting a legal defense.*
IV. *Where a legal defense was asserted at law.*
V. *For defenses not available at law.*
VI. *On a bill of discovery to aid defense.*
VII. *Where there is a remedy at law.*

I. *In matters of concurrent jurisdiction.*

In the case of JARRETT v. GOODNOW an injunction was granted where the defense of failure of consideration was not made at law, as W. Va. Code, chap. 126, § 5, provided for equity jurisdiction on three grounds,—failure of consideration, fraud in the procurance of a note, and breach of warranty to title of personal property; and § 6 expressly gave the right to make a defense at law or omit that and go to equity as the debtor preferred, without giving excuse for not defending at law. This is in accord with the weight of authority, although in the case of JARRETT v. GOODNOW a statute controlled.

Where the matters set up as grounds for an injunction might have been used as a defense to the action, and of which courts of law and equity have concurrent jurisdiction, the weight of authority is that the failure to use the same at law will not prevent equitable relief of injunction.

So, in Babcock v. McCamant, 53 Ill. 214, an injunction was granted against a judgment that was not defended at law and the grounds were cognizable in law or equity, where the defense was fraudulent alteration of a judgment, although a statute conferred power on the courts of law to quash the execution.

And where the judgment was obtained without notice, and Gantt's (Ark.) Dig. § 2615, provided for quashing an execution, as this was only a concurrent remedy and did not prevent equitable relief. Ryan v. Boyd, 33 Ark. 778.

And where the defense was fraud, as equity could afford more adequate relief. Boyce v. Grundy, 28 U. S. 3 Pet. 210, 7 L. ed. 655.

And where the defense was fraud and no objection was made to equitable jurisdiction. Endicott v. Penny, 14 Smedes & M. 144.

And where the defense was set-off and payment, as the plea of set-off was unknown to the common law, and long before it was admitted by the statute courts of chancery retained jurisdiction for the purpose of setting off accounts. Hughes v. M'Coun, 3 Bibb, 254.

And where the same rule applied to "payment after the day." Harlan v. Wingate, 2 J. J. Marsh. 138.

And where good reason existed why an equitable defense of set-off could not be made at law, although Ga. Code, §§ 3081, 3082, provided that an equitable defense may be set up at law. Radcliffe v. Varner, 56 Ga. 222.

The concurrent remedy in a court of law to set off one judgment against another will not prevent the exercise of equitable jurisdiction of injunction where one of the parties is insolvent. Gridley v. Garrison, 4 Paige, 647.

In Hempstead v. Watkins, 6 Ark, 317, 42 Am. Dec. 696, it was held that a surety who was released by delay was entitled to an injunction where he had made no defense at law, under Ark. Const. art. 6, § 6, providing that "until the general assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the supreme court, in such manner as may be prescribed by law," and Ark. Rev. Stat. chap. 43, § 1, providing that the circuit court shall exercise chancery jurisdiction in all cases where adequate relief cannot be had at law. Where the jurisdiction of courts of chancery and law was concurrent, in consequence of courts of law having enlarged their jurisdiction by act of the legislature without prohibitory words, the party may make his election as to the tribunal in which he will make his defense.

And where a surety was discharged and his defense was refused at law. King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415.

And where Nix. (N. J.) Dig. 669, conferred on a court of law power to administer equitable relief in a case of a judgment recovered against both principal and surety, as this did not abridge the jurisdiction of a court of equity, and the party aggrieved may select his tribunal at his option. Irick v. Black, 17 N. J. Eq. 189.

And where the defense was that the action was for a gambling debt. Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654.

In Power v. Reeder, 9 Dana, 6, it was said that courts of equity have jurisdiction, concurrently with courts of law, of matters of account, and a party does not lose his right to be heard in equity in such a case by being sued and submitting to a judgment, without defense at law.

In Bromley v. Holland, 7 Ves. Jr. 3, it was said that the jurisdiction of a court of equity which is original to that court will not be overthrown by law courts assuming concurrent jurisdiction where complainant prays for an accounting of payments made, and a cancelation of an annuity.

In Overton v. Stevens, 8 Mo. 622, it was said that it was generally true that equity has no jurisdiction where the party had a complete defense and failed to make it. But if the defense be of such a character that it might be made either in law or in equity, a court of chancery would afford relief though the party had neglected to make his defense at law.

But there are some cases which have refused an injunction on the ground that the right to defend at law precludes equitable relief.

And an injunction was refused where a set-off was not used at law, relying upon a separate action, although courts of equity have original jurisdiction in cases of set-off. But a party sued at law has his election to set off his claim or resort to his separate action, and if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination

4. Though generally injunction does not lie against a judgment to let in set-offs, yet it will lie where the judgment creditor is insolvent.

(December 8, 1894.)

APPEAL by defendants from a decree of the Circuit Court for Taylor County overruling a motion to dissolve a temporary injunction enjoining the execution of a judg-

and to resort to a right which he once voluntarily waived. Hendrickson v. Hinckley, 58 U. S. 17 How. 443, 15 L. ed. 123.

And where the defense of an accommodation indorser arose out of a trust and an equitable right to have trust funds applied in discharge of a bill of exchange in suit. Foster v. State Bank, 17 Ala. 672.

And in Glidewell v. Hite, 5 How. (Miss.) 110, and Green v. Robinson, 5 How. (Miss.) 80, it was held that equity will not grant injunctions on the ground that the contract was against public policy, where the defendant through negligence failed to make his defense at law. In all cases of concurrent jurisdiction the court which first exercises it must decide finally. And it will be no exception to the rule that the party neglected to make the defense at law.

In matters of concurrent jurisdiction of law and equity, it seems that an election to assert a defense at law will preclude an injunction for the same cause.

So, an injunction was refused in a case of concurrent jurisdiction after the same grounds had been asserted in the court of law where the defense was release of a surety and was made at law by demurrer to the declaration, as such a defense was an election which precluded equitable interference. Arrington v. Washington, 14 Ark. 218.

And where the defense was that a surety was discharged. Maxwell v. Connor, 1 Hill, Eq. 14.

And where the defense was set-off. Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224; Burton v. Hynson, 14 Ark. 32; Harrison v. Nettleship, 2 Myl. & K. 423, 3 L. J. Ch. N. S. 86.

And where the defense was set-off and the motion for new trial was withdrawn, and there was concurrent jurisdiction in the appellate court, but which was not resorted to. Miller v. Duvall, 26 Md. 47.

And where the judgment was on an award. Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604.

And where the defense of fraud was made, as the whole defense must be made at law. Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121; Smith v. McIver, 22 U. S. 9 Wheat. 532, 6 L. ed. 152.

And where the defense at law was that the action was a gambling debt. Moffett v. White, 1 Litt. (Ky.) 325; Davidson v. Givins, 2 Bibb, 200, 4 Am. Dec. 695.

In Timberlake v. Cobbs, 2 J. J. Marsh. 136, an injunction was refused where the defense that the action was on a gambling debt was not established by the evidence. It was said that chancery courts have concurrent jurisdiction with courts of law in that class of cases.

In Dilly v. Barnard, 8 Gill & J. 170, it was said that "in cases where the court of equity has concurrent jurisdiction with a court of law, as in matters of account, it seems that equity will not relieve on the mere ground of the difficulty of the defense in a court of law; but it must be a case where it is impossible for the party to make an effectual defense before that jurisdiction."

In Overton v. Searcy, Cooke (Tenn.) 36, 5 Am. Dec. 665, it was said that where the jurisdiction of the court is concurrent a fair determination of the question in either court concludes the parties on the point.

In Saunders v. Jennings, 2 J. J. Marsh. 513, it was said that it is a general rule that a party who relies, in a court of law, on a matter of defense (for instance fraud), which is triable either in law or in chancery, will not be allowed again to urge the same ground for relief in equity.

And in Russell v. Stinson, 3 Hayw. (Tenn.) 1, the same was said to be the rule if the judgment was final.

In Harlan v. Wingate, 2 J. J. Marsh. 138, it was said that in matters of concurrent jurisdiction after a defense at law an injunction will not be granted.

In Turney v. Young, 2 Overt. (Tenn.) 266, it was said that equity will take cognizance of a case equitable in its nature originally, though the same matter may have been before a court of law, but this is subject to modification. Where the plaintiff seeks the aid of a court of law and a matter of concurrent jurisdiction is there tried, relief will be denied to him in equity. But where courts of law have taken jurisdiction of a defense equitable in its nature, and it was unavailable at law, no matter for what cause, the defendant is entitled to relief in equity. So in complicated matters of account or investigations of land titles or inheritances.

In Conway v. Ellison, 14 Ark. 360, Bently v. Dillard, 6 Ark. 79, and Howell v. Motes, 54 Ala. 1, it was said that where courts of law and equity have concurrent jurisdiction, a party may make his election as to the tribunal in which he will bring forward his defense, and if he defends at law he will be precluded from coming into chancery. But this rule does not apply where the defense is of an equitable nature.

An injunction was granted where the defense was that a surety was released and complainants in the injunction suit called for an accounting, although a defense was made at law. But it was doubtful if the court of law could grant relief. Rathbone v. Warren, 10 Johns. 587.

For equitable jurisdiction in matters of sureties, see Michener v. Springfield Engine & T. Co. (Ind.) 31 L. R. A. 59, *note*, "*Enjoining judgments against or in favor of sureties.*"

II. *Where there is a failure to defend at law.*

Courts of equity have generally refused to interfere with a judgment at law, where the matters set up as a cause for injunction could have been used as a legal defense, and a good excuse is not given for not asserting the same at law. Williams v. Jones, 10 Smedes & M. 108; Megget v. Lynch, 8 La. Ann. 6; Brooks v. Whitson, 7 Smedes & M. 513; Miller v. M'Guire, Morris (Iowa) 150; Garrison v. Cobb, 106 Ind. 245; Minor v. Stone, 1 La. Ann. 283; Rooks v. Williams, 13 La. Ann. 374; Ricker v. Pratt, 48 Ind. 73; Buchanan v. Lorman, 3 Gill, 57; Allen v. Thornton, 51 Ga. 594; McLaurin v. Parker, 24 Miss. 509; Garrett v. Lynch, 45 Ala. 204; Latimer v. Wharton, 41 S. C. 508; Snipp v. Wheeless, 33 Miss. 646; Threlkelds v. Campbell, 2 Gratt. 198, 44 Am. Dec. 384; Haden v. Garden, 7 Leigh, 157; Stockton v. Briggs, 58 N. C. 309; Edmanson v. Best, 57 Fed. Rep. 531, 18 U. S. App. 288; Peyton v. Rawlens, 4 Hayw. (Tenn.) 77; Noland v. Cromwell, 4 Munf. 155; Haughy v. Strang, 2 Port. (Ala.) 177, 27 Am. Dec. 648; Robinson v. Gilbreth, 4 Bibb, 183; Prewitt v. Perry, 6 Tex. 260; Creath v. Sims, 46 U. S. 5 How. 192, 12 L. ed. 110; Elborough v. Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. N. S. 68, 18 Week. Rep. 913; Butman v. Forshay, 21 La. Ann. 165; Owens v. Van Winkle Gin & M. Co. 96 Ga. 408, 31 L. R. A. 767; Giddens v. Lea, 3 Humph. 133; Dunn v. Holloway, 1 Dev. Eq. 322; Graves v. Houlditch, 2 Price, 147; Robb v. Halsey, 11 Smedes & M. 140; Teague v. Russell, 2 Stew. (Ala.) 420; Barrows v. Doty, Harr. Ch. (Mich.) 1; Smith v. Walker, 8 Smedes & M. 131; Day v. Cummings, 19 Vt. 496; Yeizer v. Burke, 3 Smedes

ment and making the judgment perpetual in plaintiff's favor. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. R. D. Dent** for appellant.

Mr. **John H. Holt** for appellees.

Brannon, P., delivered the opinion of the court:

Jarrett gave a promissory note to Newlon, which Newlon assigned to Goodnow, and Goodnow obtained a judgment against Jarrett

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& M. 439; McRaven v. Forbes, 6 How. (Miss.) 563; Standifer v. McWhorter, 1 Stew. (Ala.) 532; Jones v. Watkins, 1 Stew. (Ala.) 81; Vilas v. Jones, 1 N. Y. 274; Jones v. Kirksey, 10 Ala. 579; Mallory v. Matlock, Id. 595; McCollum v. Prewitt, 37 Ala. 573, 1 Ala. Sel. Cas. 498; McKoin v. Cooley, 3 Humph. 559; Cabell v. Roberts, 6 Rand. (Va.) 580; Donnell v. Parrott, 13 La. Ann. 251; Benton v. Roberts, 3 Rob. (La.) 224; Monroe v. McMicken, 8 Mart. N. S. 510; Lafon v. Desessart, 1 Mart. N. S. 71; Coleman v. Goyne, 37 Tex. 552; Russ v. Wilson, 22 Me. 207; Bateman v. Willoe, 1 Sch. & Lef. 201; Benton v. Crowder, 7 Smedes & M. 185; Gatlin v. Kilpatrick, 1 N. C. Law Repos. 534, 6 Am. Dec. 557; Buckmaster v. Grundy, 8 Ill. 626; Milliken v. Dockray, 80 Me. 82; Muhan v. Accommodation Bank, 26 La. Ann. 34; Thibodeaux, v. Thibodeaux, 5 La. Ann. 598; Kirby v. Kirby, 70 Ala. 370; Casey v. Gregory, 13 B. Mon. 505, 56 Am. Dec. 581; Menifee v. Myers, 33 Tex. 690; Davis v. Bayliss, 51 Iowa, 435; Ballance v. Forsyth, 65 U. S. 24 How. 183, 16 L. ed. 733; Hardinge v. Webster, 1 Drew. & S. 101, 6 Jur. N. S. 88, 29 L. J. Ch. 161; Harmon v. Harmon, 51 Fed. Rep. 113; Hall v. Carroll, 10 La. Ann. 412; Cayce v. Powell, 20 Tex. 767, 73 Am. Dec. 211; Meem v. Rucker, 10 Gratt. 506; Auditor of Public Accounts v. Nicholas, 2 Munf. 31; Bierne v. Mann, 5 Leigh. 364; Price v. Johnson County, 15 Mo. 433; Skirving v. National L. Ins. Co. 59 Fed. Rep. 742, 19 U. S. App. 442; Carney v. Marseilles, 136 Ill. 401; Chaffee v. Granger, 6 Mich. 51; Jones v. Cameron, 81 N. C. 154; Lee v. Hubbell, 20 La. Ann. 551; Monroe v. McMicken, 8 Mart. N. S. 510; Prather v. Prather, 11 Gill & J. 110; Prout v. Gibson, 1 Cranch, C. C. 389; Rider v. Morsell, 3 MacArth. 186; Strong v. Hopkins, 1 Mo. 530; Turpin v. Thomasy, 2 Hen. &. M. 139, 3 Am. Dec. 615; Yancy v. Fenwick, 4 Hen. & M. 423; Quackenbush v. Van Riper, 1 N. J. Eq. 476; Brickell v. Jones, 2 Hayw. (N. C.) 357; Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49; Cummins v. Bentley, 5 Ark. 9; Barnett v. Barnett, 83 Va. 504; Patch v. Collins, 158 Mass. 468; Fannin v. Thomasson, 45 Ga. 533; Dayton v. Commercial Bank, 6 Rob. (La.) 17; Yantis v. Burdett, 3 Mo. 457; Sullivan v. Shell, 36 S. C. 578; Green v. Tittman, 124 Mo. 372; Nevit v. Hamer, 5 Smedes & M. 145; McMicken v. Millaudon, 2 La. 180; Kennard v. Henderson, 9 Rob. (La.) 165; Cook v. Murphy, 7 Gill & J. 282; Standifer v. McWhorter, 1 Stew. (Ala.) 532; Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442; Carlyle v. Long, 5 Litt. (Ky.) 167; Howell v. Motes, 54 Ala. 1; Montgomery v. Griffin, Walk. (Miss.) 453; Foster v. State Bank, 17 Ala. 672; Crow v. Watkins, 12 La. Ann. 845; Winchester v. Grosvenor, 48 Ill. 517; Peytavin v. Winter, 8 La. 271; Nicolson v. Hancock, 4 Hen. & M. 491; Collins v. Clayton, 53 Ga. 649; Duckworth v. Duckworth, 35 Ala. 70; Pearce v. Winter Iron-Works, 32 Ala. 68; De Lizardi v. Hardaway, 8 Rob. (La.) 22; Morgan v. Driggs, 3 La. Ann. 124; Todd v. Fiske, 14 La. Ann. 13; Hart v. Cannon, 10 La. Ann. 721; Matta v. Gayle, Id. 347; Brown v. Toell, 5 Rand. (Va.) 543, 16 Am. Dec. 759; Beaudry v. Felch, 47 Cal. 183; Champion v. Miller, 2 Jones, Eq. 194; Clark v. Clapp, 14 R. I. 248; Garlick v. Reece, 8 La. 101; Gravier v. Roche, 5 La. 441; Greene v. Johnson, 21 La. Ann. 464; Chaffee v. Granger, 6 Mich. 51; Bartlett v. Peck, 5 La. Ann. 670; Curd v. Farrar, 47 Iowa, 504; Dibble v. Pease, 59 Ga. 618; Estis v. Patton, 3 Yerg. 382; Protheroe v. Forman, 2 Swanst. 227.

See *note* to Norwegian Plow Co. v. Bollman (Neb.) 31 L. R. A. 747, "*Injunctions against judgments for defenses existing prior to their rendition*," for the above cases.

And equitable relief of injunction will be refused a garnishee who fails to assert a defense which might have been made at law. Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 390; Sanders v. Fisher, 11 Ala. 812; Braden v. Reitzenberger, 18 W. Va. 286; Ahern v. Fink, 64 Md. 161; Lyday v. Douple, 17 Md. 188.

See *note* to Griggs v. Docter (Wis.) 30 L. R. A. 360, "*Injunctions against judgments in garnishment proceedings*," for the above cases.

III. *Where there is negligence in not asserting a legal defense.*

An injunction will be refused where the complainant in the injunction suit was negligent in not asserting a legal defense at law. Norwegian Plow Co. v. Bollman (Neb.) 31 L. R. A. 747; Elston v. Blanchard, 3 Ill. 420; Raburn v. Shortridge, 2 Blackf. 480; Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; Marsh v. Edgerton, 1 Chand. (Wis.) 198; Parker v. Morton, 5 Blackf. 1; Ragsdale v. Gossett, 2 Lea, 729; Faulkner v. Campbell, Morris (Iowa) 148; Howell v. Motes, 54 Ala. 1; Hall v. Clark, 21 Mo. 415; Desvergers v. Willis, 58 Ga. 388; Mershon v. Bank of the Commonwealth, 6 J. J. Marsh. 438; Rounsaville v. McGinnis, 93 Ga. 579; New York v. Brady, 115 N. Y. 599; Powers v. Butler, 4 N. J. Eq. 465; Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; Sample v. Barnes, 55 U. S. 14 How. 70, 14 L. ed. 330; Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121; Thomas v. Phillips, 4 Smedes & M. 358; Green v. Robinson, 5 How. (Miss.) 80; Glidewell v. Hite, 5 How. (Miss.) 110; Truly v. Wanzer, 46 U. S. 5 How. 141, 12 L. ed. 88; Bibb v. Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; Berry v. Thompson, 17 Johns. 436, Affirming Thompson v. Berry, 3 Johns. Ch. 395; Moran v. Woodyard, 8 B. Mon. 537; Semple v. McGatagan, 10 Smedes & M. 98; Slack v. Wood, 9 Gratt. 40; Floyd v. Jayne, 6 Johns. Ch. 479; Allman v. Owen, 31 Ala. 167; Collins v. Jones, 6 Leigh, 530, 29 Am. Dec. 216; Cabell v. Roberts, 6 Rand. (Va.) 580; Foster v. Wood, 6 Johns. Ch. 87; Grindol v. Ruby, 14 Ill. App. 439; Harding v. Hawkins, 141 Ill. 572; Kinney v. Ogden, 3 N. J. Eq. 168; Lott v. Michel (Miss.) 16 So. 794; Norris v. Fristoe, 3 La. Ann. 646; Mellendy v. Austin, 69 Ill. 15; McRae v. Purvis, 12 La. Ann. 85; Rudman v. Bockel, 28 La. Ann. 276; Sinking Fund Comrs. v. Patrick, Smedes & M. Ch. 110; Tutt v. Ferguson, 13 Kan. 45; Woodfin v. Smith, 1 Dev. & B. Eq. 451; Gorsuch v. Thomas, 57 Md. 334; Stein v. Benedict, 83 Wis. 603; Armsworthy v. Cheshire, 2 Dev. Eq. 234, 34 Am. Dec. 273; Leggett v. Morris, 6 Smedes & M. 723; Crawford v. Wingfield, 25 Tex. 414; Perrine v. Carlisle, 19 Ala. 686; Smith v. Powell, 50 Ill. 21; Lucas v. Spencer, 27 Ill. 15; Cantey v. Blair, 1 Rich. Eq. 41; Morgan v. England, Wright (Ohio) 112; Lansing v. Eddy, 1 Johns. Ch. 49; Buchanan v. Nolin, 3 Humph. 63; Greenfield v. Frierson, 7 Heisk. 633; Cardin v. Jones, 23 Ga. 175; Robbins v. Mount, 3 Ga. 74.

For the above cases, see *note* to Norwegian Plow Co. v. Bollman (Neb.) 31 L. R. A. 747, "*Injunctions against judgments for defenses existing prior to their rendition.*"

See also *note* to Payton v. McQuown (Ky.) 31 L. R. A. 33, "*Negligence as a cause for, and as a bar to, injunctions against judgments.*"

See also *note* to Michener v. Springfield Engine & T. Co. (Ind.) 31 L. R. A. 59, "*Enjoining judgments against or in favor of sureties.*"

And equitable relief of injunction will be refused a garnishee who negligently fails to defend at law. Paynter v. Evans, 7 B. Mon. 420; Carroll v. Parkes, 1 Baxt. 269; Yarborough v. Thompson, 3

by default before a justice, and Jarrett obtained an injunction to restrain its collection; and the court having overruled a motion to dissolve the injunction, and allowed an amended bill to be filed, and later perpetuated the injunction, Goodnow appealed. There is not a single citation of authority in the briefs on either side, and we have not the benefit of this help.

Smedes & M. 291, 41 Am. Dec. 626; Danaher v. Prentiss, 22 Wis. 311; Sanders v. Fisher, 11 Ala. 812; Nevins v. McKee, 61 Tex. 412; Alleman v. Kight, 19 W. Va. 201.

See *note* to Griggs v. Docter (Wis.) 30 L. R. A. 360, "*Injunctions against judgments in garnishment proceedings*," for the above cases.

IV. *Where a legal defense was asserted at law.*

Equity will decline to interfere and an injunction will be refused where a legal defense was asserted in the action at law, and no special ground for equitable interference is shown. Thomas v. Hearn, 2 Port. (Ala.) 262; Moore v. Hill, 59 Ga. 760; Shields v. McClung, 6 W. Va. 79; Hendrickson v. Hinckley, 58 U. S. 17 How. 443, 15 L. ed. 123; Phillips v. Pullen, 45 N. J. Eq. 5; Johnson v. Smokey (Miss.) 4 So. 788; Amey v. Calkins (N. J.) 19 Atl. 388; Cailland v. Estwick, 2 Anstr. 381; Swain v. Sampson, 6 La. Ann. 799; Bias v. Vickers, 27 W. Va. 456; Moffett v. White, 1 Litt. (Ky.) 325; Bumpass v. Reams, 1 Sneed, 595; Hooper v. Rhodes, 7 La. Ann. 137; Garvin v. Squires, 9 Ark. 538, 50 Am. Dec. 224; Burton v. Hynson, 14 Ark. 32; Harrison v. Nettleship, 2 Myl. & K. 423, 3 L. J. Ch. N. S. 86; Buckmaster v. Grundy, 8 Ill. 626; Scofield v. State Nat. Bank, 9 Neb. 316, 31 Am. Rep. 412; Williams v. Sadler, 4 Jones, Eq. 378, 75 Am. Dec. 424; Powell v. Stewart, 17 Ala. 719; Cunningham v. Caldwell, Hardin (Ky.) 123; Briesch v. McCauley, 7 Gill, 189; Huston v. Ditto, 20 Md. 305; Norris v. Hume, 2 Leigh, 334, 21 Am. Dec. 631; Harrison v. Harrison, 1 Litt. (Ky.) 137; Deaver v. Erwin, 7 Ired. Eq. 250; Williams v. Carr, 4 Colo. App. 368; Dunn v. Fish, 8 Blackf. 407; Ede v. Hazen, 61 Cal. 360; Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442; Todd v. Pratt, 1 Harr. & J. 465; Brown v. Street, 6 Rand. (Va.) 1; Gordinier's Appeal, 89 Pa. 528; Moody v. Harper, 38 Miss. 599; Tompkins v. Drennen, 56 Fed. Rep. 694, 13 U. S. App. 308; Bass v. Nelms, 56 Miss. 502; Meredith v. Johns, 1 Hen. & M. 585; Trescott v. Lewis, 12 La. Ann. 197; Peytavin v. Winter, 8 La. 271; Haughy v. Strang, 2 Port. (Ala.) 177, 27 Am. Dec. 648; Glasgow v. Flowers, 1 Hayw. (N. C.) 233; McClanahan v. Stovall, 6 Lea, 505; Continental L. Ins. Co. v. Currier, 58 Vt. 229; Smith v. Durrett, Sneed (Ky.) 236, 2 Am. Dec. 714.

For the above cases, see *note* to Norwegian Plow Co. v. Bollman, 31 L. R. A. 747, "*Injunctions against judgments for defenses existing prior to their rendition.*"

In Brick v. Burr, 47 N. J. Eq. 189, it was said that where the ground for the injunciton was litigated at law, and the question was within the jurisdiction of that court, an injunction will not be granted.

V. *For defenses not available at law.*

An injunction against a judgment will be granted if the grounds for the injunction are not available at law as a defense in the action where the judgment is obtained. Smith v. Coble, Phill. Eq. 332; Ferriday v. Selcer, Freem. Ch. (Miss.) 258; Hager v. Buechler, 6 Ill. App. 462; Harlan v. Wingate, 2 J. J. Marsh. 138; Breeden v. Grigg, 8 Baxt. 163; Perry v. Stiter, 37 Mo. 273; Stark v. Thompson, 3 T. B. Mon. 296; Greames v. Stritho, 2 Dick. 469; Fields v. Carney, 4 Baxt. 137; Scott v. Shreeve, 25 U. S. 12 Wheat. 605, 6 L. ed. 744; Marshall v. Cooper, 43 Md. 46; Merrill v. Souther, 6 Dana, 305; Ellis v. Kerr (Tex.) 23 S. W. 1050; O'Neill v. Perryman, 102 Ala. 522; Markham v. Angier, 57 Ga. 43.

For the above cases, see *note* to Norwegian Plow Co. v. Bollman (Neb.) 31 L. R. A. 747, "*Injunctions against judgments for defenses existing prior to their rendition.*"

And the same rule applies in case of injunctions in favor of sureties. Cornelius v. Thomas, 1 Tenn. Ch. 283; Simmons v. Camp, 65 Ga. 673; Tuscumbia, C. & D. R. Co. v. Rhodes, 8 Ala. 206; Hobbs v. Duff, 23 Cal. 596; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415, Reversing 2 Johns. Ch. 554; M'Haney v. Crabtree, 6 T. B. Mon. 104.

So, an injunction was allowed against a judgment in ejectment where the defendants held a superior equitable title of which they could not avail themselves at law. Johnson v. Christian, 128 U. S. 374, 32 L. ed. 412; Gaines v. Hale, 26 Ark. 168.

And where the defense in ejectment was an equitable title which could not be used at law, and the injunction suit was also a bill for specific performance. McCurry v. Robinson, 23 Ga. 321.

And where the defense in ejectment was equitable and could not by any possibility have been made available as a legal defense, and the complainant was not required to resort to equity before a trial was had at law in a case where he did not know that his defense could not be made available at law. Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732.

And where in ejectment the boundaries of the land were so confused that a defense could not be made at law. Hardcastle v. Shafto, 1 Anstr. 77, and 184.

And where the boundary line was not in issue in ejectment, and the officer threatened to execute the writ of ha. fa. invading the house and running the line through the building, as such damage would be irreparable, and a survey was necessary to determine the line. Jones v. Brandon, 60 Miss. 556.

The refusal to try an equitable set-off by the court in an action at law will entitle the defendant to an injunction against the judgment. Farquharson v. Pitcher, 2 Russ. Ch. 81.

An injunction was granted where the defense was a specific agreement to allow as set-off a note held by complainant, as this could only be enforced in equity. French v. Garner, 7 Port. (Ala.) 549.

And where the defense was that a surety to a sealed note was discharged by the payee by an unsealed writing, and induced to believe he was discharged until the principal became insolvent, as this was an equitable defense and amounted to a fraud. Teague v. Russell, 2 Stew. (Ala.) 420.

And where the ground of defense in behalf of a surety was that his principal had been released by an agreement of all his creditors, but that only one of the plaintiffs at law, who were partners, had executed the release, which would not be a legal defense, and complainant asked for a cancelation of the bond. It was also said that if it was a legal defense it would not prevent a suit in equity, as jurisdiction in equity prevailed in matters of discharge of a surety before that doctrine prevailed at law. Hawkshaw v. Parkins, 2 Swanst. 539.

And where a defense of sureties on an appeal bond on a trial of right of property was that the property was taken out of the hands of the principal by an older execution than that of the prevailing party, who claimed the property by a junior levy as against a trustee, and was not made at law, and it was an equitable defense. Ferriday v. Selcer, Freem. Ch. (Miss.) 258.

And where the defense on a bond for the benefit of a trustee was that the deed was fraudulent, notwithstanding an unsuccessful attempt to defeat the same at law where complainant called for an account of the trust. Billups v. Sears, 5 Gratt. 31, 50 Am. Dec. 105.

One of the grounds on which the injunction rests is that the note on which the judgment was recovered was given for an engine, boiler, and burrs, and that the consideration has wholly failed, inasmuch as Newlon had conveyed them to Durbin, trustee, to secure Newlon's creditors. Goodnow's counsel, in answer to this, contends that this defense ought to

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And where the defense at law was a modification of a written agreement by parol, and it did not clearly appear that relief could have been had at law, and defense was not made at law. Newborn v. Glass, 5 Humph. 520.

And where the defense was a conditional acceptance of the draft in suit, which could not be made at law. Lamb v. Anderson, 1 Chand. (Wis.) 224.

And where adequate relief could only be had in equity on the ground of fraud in the consideration of the debt sued upon, although the court at law erroneously allowed the defense to be made which was unavailing. Appleton v. Harwell, Cooke (Tenn.) 242.

And where the defense was for a rescission of purchase of land on the ground of fraud, as this was an independent ground of equitable relief, although it may have failed at law. Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49.

And where the judgment was in assumpsit on an oil contract, and another action had also been brought, and the defense was that the oil was partnership property between the parties. The question of partnership was a controverted fact arising but not conclusive on the matters in the suit, and in an action to settle the partnership an injunction was granted on the ground of preventing multiplicity of suits. Coville v. Gilman, 13 W. Va. 314.

And where the suit was a mortgage foreclosure and there were grave doubts as to whether the mortgagor upon a rule to foreclose was entitled to make any other defense that that specified in the Georgia judiciary act of 1799, which is "that he is entitled to payments which have not been credited upon the mortgage, or to set-off which in equity ought to be allowed," and the injunction suit was also for cancelation of the notes sued upon, which were void. Clifton v. Livor, 24 Ga. 91.

In Young v. Reynolds, 4 Md. 375, it was said that an injunction will be granted where there are equities cognizable in a court of equity which could not be availed of in a court of law.

In Medart v. Fasnatch, 15 La. Ann. 621, it was held that the rule that a failure to make a legal defense prevents an injunction against the judgment does not apply to married women who are under a disability, and it is a good ground for injunction that the defendant as law was a married woman and the debt was a note on which she was surety for her husband. and which was void at law.

In Howell v. Motes, 54 Ala. 1, it was said that an unsuccessful attempt or an entire omission to assert in a court of law a prior equitable defense does not change the right to relief in equity.

VI. *On a bill of discovery to aid defense.*

A bill of discovery in aid of a defense at law is recognized as belonging to equity jurisdiction. But an injunction will be refused on a bill for a discovery if the same is not filed until after judgment, and the delay in filing the same is not excused. Powell v. Stewart, 17 Ala. 719; Jones v. Kirksey, 10 Ala. 579; Kinney v. Ogden, 3 N. J. Eq. 168; Thompson v. Berry, 3 Johns. Ch. 395, Affirmed, Berry v. Thompson, 17 Johns. 436; Whitmore v. Thornton, 3 Price, 241; Brown v. Swann, 35 U. S. 10 Pet. 497, 9 L. ed. 508.

So, an injunction was refused on a bill of discovery filed after a judgment at law, in aid of a defense to that action, where the discovery was in regard to release and indemnity. Wright v. King, Harr. Ch. (Mich.) 12.

And where the defense was fraud and partial failure of consideration. Marsh v. Edgerton, 1 Chand. (Wis.) 198.

And where the discovery was in regard to payment. Hinrichsen v. Van Winkle, 27 Ill. 334.

And where the discovery was in regard to set-off. Hill v. McNeill, 8 Port. (Ala.) 432.

And where the discovery was in regard to an accounting, and the defense in an action of covenant was performance, Dilly v. Barnard, 8 Gill & J. 170.

And where the discovery was in regard to usury. Mallory v. Matlock, 10 Ala. 595; McCollum v. Prewitt, 37 Ala. 573, 1 Ala. Sel. Cas. 498.

And where the discovery was in regard to a breach of warranty. Faulkner v. Harwood, 6 Rand. (Va.) 125.

And where the discovery was in regard to the title on a trial of the right of property. Donaldson v. Kendall, 2 Ga. Dec. 227.

And where the discovery was in regard to a defense of a surety on a sheriff's bond, that the plaintiff at law had loaned the money to the sheriff after it was collected. Alley v. Ledbetter, 1 Dev. Eq. 449.

And where the discovery was in regard to a defense of an accommodation indorser, that the notes in suit were signed in blank and not filled up until after the death of the principal and without any authority, and were renewals of other notes in judgment. Green v. Massie, 21 Gratt. 356.

And where it was claimed that the defense could only be established by a bill of discovery and the matters in the bill were denied. Overton v. Searcy, Cooke (Tenn.) 36, 5 Am. Dec. 665; Cammann v. Traphagan, 1 N. J. Eq. 28; Fowler v. Roe, 11 N. J. Eq. 367; Vaughn v. Fuller, 23 Ga. 366.

And where the defendant claimed a rescission but did not file a bill for discovery until after judgment, and the nature of the pleas at law were not disclosed by the record. Moore v. Dial, 3 Stew. (Ala.) 155.

And where the bill of discovery against plaintiff or interrogatories could have been and were not filed at law. Drew v. Hayne, 8 Ala. 438.

And where defendant was negligent in not utilizing evidence attainable to prove payment, and sought relief by injunction and bill of discovery. Tapp v. Rankin, 9 Leigh, 478.

And where a defense was not made of a release of a surety, and that the debt was not due, and that there was a usurious extension, as a bill of discovery would have established the defense before judgment if such defense existed. Cheyney v. Wright, 7 Phila. 431.

And where the bill for discovery did not state the matter sought to be discovered or show that it was material, or the nature of the defense at law. Lucas v. Bank of Darien, 2 Stew. (Ala.) 280.

A bill of discovery which is fruitless should be dismissed and not held over as an original bill, where there has been a trial at law. Peace v. Nailing, 1 Dev. Eq. 289.

In Martin v. Spier, 1 Hayw. (N.C.) 369, Robinson v. Wheeler, 51 N. H. 386, and Dilly v. Barnard, 8 Gill & J. 170, it was said that if a discovery was needed to enable a defendant to plead his defense he will be required ordinarily to seek it while the suit is pending, or he cannot obtain relief in equity.

In Paterson v. Bangs, 9 Paige, 627, it was said that where a party has the means of defense within his power, whether those means are available at law, or only available in the court of equity by bill of discovery and relief, and the party knows of the existence of these means before the trial at law and neglects to use them, and goes to trial at law

have been pleaded at law to defeat the recovery of the judgment, and that it cannot be made the subject of equity jurisdiction. This position is not tenable, as § 5, chap. 126, Code, would give jurisdiction to equity on the three grounds of failure of consideration, fraud in the procurance of the note, and that of breach of warranty of title to personal property, and

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upon other proofs and other questions, and fails, the court will not afterwards give him relief.

But in Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732, it was said that the case of Paterson v. Bangs, *supra*, was overruled, and was qualified by the fact that the complainant must know that his defense is not available at law.

If the delay in filing a bill for discovery is excused, or there are peculiar equitable grounds for injunction, the same will be granted.

So, an injunction was granted where it was disclosed on a bill of discovery that complainant had an equitable mortgage by virtue of a bill of sale executed before the bankruptcy of the grantor and surrendered thereafter on delivery of an assignment of the property, but which assignment was held void at law. Hankey v. Vernon, 2 Cox, Ch. Cas. 12.

And where the defense was that the consideration was a gambling debt, and the bill was for a discovery, as equity has complete original jurisdiction in regard to a gaming promise. This is an exception to the general rule, although the judgment and verdict were rendered upon a full and fair trial. The complainant was entitled to relief, under Va. act 1748, pursuing the statute of Anne, chap. 14, giving an action for the recovery of money and allowing a bill for discovery with a provision remitting the penalties and forfeitures incurred. White v. Washington, 5 Gratt. 645.

And where the judgment was against a sheriff for not returning an execution, and it was disclosed on a bill for a discovery that the judgment had been satisfied by a fraudulent arrangement between the creditor and the debtor. Harrison v. Harrison, 1 Litt. (Ky.) 137.

And where the defense to an action on an indemnifying bond for the appointment of a trustee in a deed of trust was that the debt was fraudulent notwithstanding a defense at law, where the bill asked for an accounting and for a discovery, as adequate relief could not be had at law. Billups v. Sears, 5 Gratt. 31, 50 Am. Dec. 105.

In Norton v. Woods, 5 Paige, 249, an injunction was granted after judgment, on complainant filing a bill for discovery, where excuse was given for not filing it before. In this case a court of law had refused to allow complainant to use the evidence of the nominal plaintiffs although they had no interest in the suit, and the only remedy was by a bill for relief where in equity feigned issues could be awarded to determine the real parties in the controversy. And this bill was sufficient to constitute a case for equitable relief.

In Gainsborough v. Gifford, 2 P. Wms. 424, where the answer of the defendant in the injunction suit admitted the equity of plaintiff's claim, showing that she was not liable under a contract for purchase of stock on which a judgment had been obtained, and no defense had been made, the judgment was enjoined. But on affidavits showing that the answer was a mistake leave was given to amend the same though no precedent for such action could be found. This case is usually cited as deciding that the finding of a lost receipt will authorize an injunction, but that is a *dictum*.

In Quackenbush v. Van Riper, 1 N. J. Eq. 476, it was said that equity will relieve against a judgment, on a bill for discovery on equitable defenses that were not known at the time of the trial.

VII. *Where there is a remedy at law.*

It is a well-settled principle in regard to injunctions that a court of equity will not interfere with a judgment at law where there is an adequate and ample remedy at law, although there are some exceptions to this rule; but it is regarded as indispensable that the bill of complaint should allege that there is no adequate remedy at law.

So, an injunction will not be granted where there is a remedy at law. Trieste v. Enslen (Ala.) 17 So. 356; Martin v. Orr, 96 Ind. 27; Armsworthy v. Cheshire, 2 Dev. Eq. 234, 34 Am. Dec. 273; Philan v. Johnson, 80 Iowa, 727; Wilkinson v. Rewey, 59 Wis. 554; Fowler v. Lee, 10 Gill & J. 358, 32 Am. Dec. 172; Gallop v. Allen, 113 N. C. 24; Knox County v. Harshman, 33 U. S. 152, 33 L. ed. 586; McClure v. Colclough, 6 Ala. 492; Reynolds v. Horine, 13 B. Mon. 234; St. Louis & S. F. R. Co. v. Lowder, 59 Mo. App. 3; Wells v. Wall, 1 Or. 295; Mann v. Bamberger, 4 Heisk. 486; Boone v. Poindexter, 12 Smedes & M. 640; Campbell v. Morrison, 7 Paige, 157; Erie Canal Co. v. Lowrie, 5 Clark (Pa.) 464; Gunby v. Bell, 40 Ga. 133; Baldwin v. Murphy, 82 Ill. 485; Menifee v. Ball, 7 Ark. 520.

By appeal. *Ex parte* Christian, 23 Ark. 641; Dupre v. Anderson, 45 La. Ann. 1134; Terrell v. Dick, 1 Call (Va.) 546; Langley v. Ashe, 38 Neb. 53; Muscatine v. Mississippi & M. R. Co. 1 Dill. 536; Neville v. Pope, 95 N. C. 346; Nicklin v. Hobin, 13 Or. 406; Parsons v. Pierson, 128 Ind. 479; Shreveport v. Flournoy, 26 La. Ann. 709; Shaul v. Duprey, 48 Ark. 331; Windisch v. Gussett, 30 Tex. 744; Cobb v. Garner (Ala.) 17 So. 47; Duvac v. Ferrari, 25 La. Ann. 80; Brown v. Chapman, 90 Va. 174; Western v. Woods, 1 Tex. 1; Levy v. Shreveport, 27 La. Ann. 620; Torpedo Co. v. Clarendon, 19 Fed. Rep. 231; Martin v. Pifer, 96 Ind. 245; Paul v. Davidson, 43 Neb. 505; Belt v. Blackburn, 28 Md. 227; Bany v. Green, 5 Hayw. (Tenn.) 67; Holmes v. Remsen, 7 Johns. Ch. 286; Virginia v. Dunaway, 17 Ill. App. 68; Tapp v. Rankin, 9 Leigh, 478; Lackie v. Bramlett, 1 Tex. App. Civ. Cas. (White & W.) § 1129; Rountree v. Walker, 46 Tex. 200; Nichols v. Snow, 42 Tex. 72; Long v. Smith, 39 Tex. 160; Holman v. G. A. Stowers Furniture Co. (Tex.) 30 S. W. 1120; Hart v. Life Asso. 54 Ala. 495; Murphree v. Bishop, 79 Ala. 404; Logan v. Hillegass, 16 Cal. 200; Hunter v. Hoole, 17 Cal. 418; Moore v. Dial, 3 Stew. (Ala.) 155; Phelps v. Peabody, 7 Cal. 50; Murdock v. DeVries, 37 Cal. 527; Merritt v. Daffin, 24 Fla. 320; Wordehoff v. Evers, 18 Fla. 339; Dibble v. Truluck, 12 Fla. 185; Geraty v. Druiding, 44 Ill. App. 440; Turner v. Norton, 31 Ill. App. 423; More v. Bagley, 1 Ill. 60, 12 Am. Dec. 144; Baragree v. Cronkhite, 33 Ind. 192; Earl v. Matheney, 60 Ind. 202; Marshall v. Gill, 77 Ind. 402; De Haven v. Covalt, 83 Ind. 344; Shricker v. Field, 9 Iowa, 366; Smith v. Brownson, 19 La. 313; New Orleans v. Pamela de la Cuesta, 10 La. Ann. 724; Naughton v. Dinkgrave, 25 La. Ann. 538; Brumbaugh v Schnebly, 2 Md. 330; Derickson v. Predeaux, Id. 325, note; Chappell v. Cox, 18 Md. 513; Huston v. Ditto, 20 Md. 305; Connery v. Swift, 9 Nev. 39; Proctor v. Pettitt, 25 Neb. 96; Maxwell v. Connor, 1 Hill, Eq. 14; Clopton v. Carloss, 42 Ark. 560.

By appeal in case of summary proceedings in forcible entry and detainer. Jessurun v. Mackie, 24 Hun, 624; Koster v. Van Shaick, 11 Daly, 205; Broadwell v. Holcomb, 65 How. Pr. 502.

By appeal or motion. Moeschler v. Lochte, 12 N. Y. S. R. 855; Wills Point Bank v. Bates, 76 Tex. 329; Pico v. Sunol, 6 Cal. 294.

By appeal or direct application to the court. Saunders v. Albritton, 37 Ala. 716.

By remedy in an appellate tribunal. Meem v. Rucker, 10 Gratt. 506.

By appeal or writ of error. Central Iowa R. Co. v. Piersol, 65 Iowa, 498; Virginia v. Dunaway, 17 Ill. App. 68; Hahn v. Hart, 12 B. Mon. 426.

§ 6 expressly gives the right to make defense at law or omit that and go to equity, as the debtor prefers, without giving any excuse for not defending at law. *Bias* v. *Vickers*, 27 W. Va. 456. When a sale of chattels is made, there is an implied warranty of good title by the vendor, where the goods are in vendor's possession. *Byrnside* v. *Burdett*, 15 W. Va. 702;

By appeal, writ of error, or supersedeas. Black v. Smith, 13 W. Va. 780.

By appeal or certiorari. Manning v. Hunt, 36 Tex. 118; Comstock v. Clemens, 19 Cal. 77; Gatlin v. Kilpatrick, 1 N. C. Law Repos. 534, 6 Am. Dec. 557; Wolf v. Schleiffer, 2 Brewst. (Pa.) 563; Peace v. Nailing, 1 Dev. Eq. 289; King v. Vaughan, 8 Yerg. 59, 29 Am. Dec. 104; Menifee v. Myers, 33 Tex. 690.

By appeal, or by habeas corpus known in time to be used, as this will bar relief in equity against ca. sa. Turner v. Norton, 31 Ill. App. 423.

By appeal or action of nullity. Cook v. State, 16 La. 288; Morrison v. Crooks, 3 Rob. (La.) 273.

By reviewing an action on appeal and suggesting the death of appellee, or setting aside the order of dismissal. Palmer v. Gardiner, 77 Ill. 143.

By suspensive appeal with a devolutive appeal, as a bond on suspensive appeal is required to be in one half of the amount of the debt, while an injunction bond is only one fourth the amount of the debt. Naughton v. Dinkgrave, 25 La. Ann. 538.

By proceedings in error. Bush v. Craig, 4 Bibb, 168; Cassel v. Scott, 17 Ind. 514; Drake v. Hanshaw, 47 Iowa, 291; Windisch v. Gussett, 30 Tex. 744; Eyster's Appeal, 65 Pa. 473; Alabama Ins. Co. v. Kingman, 21 Ill. App. 493; Blakeslee v. Murphy, 44 Conn. 188; Budd v. Long, 13 Fla. 288; Burke v. Wheat, 22 Kan. 722; Burke v. Gibson, 6 Kulp, 310; Burlington Ins. Co. v. Mortimer, 52 Kan. 784; Muse v. Wafer, 29 Kan. 279; Drake v. Hanshaw, 47 Iowa, 291; Morrison v. Hart, 2 Bibb, 4, 4 Am. Dec. 663; Robuck v. Harkins, 38 Ga. 174; Thompson v. Meek, 3 Sneed, 271; Rogers v. Kingsbury, 22 Ga. 60.

By writ of error or supersedeas. Turpin v. Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615.

By writ of error *coram nobis*. Gunn v. Neal, 2 Heisk. 318; Shepard v. Akers, 3 Tenn. Ch. 215; Robb v. Halsey, 10 Smedes & M. 140; Williamson v. Appleberry, 1 Hen. & M. 206.

By writ of error *coram nobis* or bill of review, or writ of error, or appeal. Herd v. Bewley, 1 Heisk. 524.

By certiorari. Booth v. Koehler, 51 Ill. App. 370; Caruthers v. Hartsfield, 3 Yerg. 366, 24 Am. Dec. 580; Musgrove v. Chambers, 12 Tex. 32; Scanland v. Mixer, 34 Ark. 354; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 452; Ewing v. St. Louis, 72 U. S. 5 Wall. 413, 18 L. ed. 657; Fitzhugh v. Orton, 12 Tex. 4; Fleming v. Nunn, 61 Miss. 603; Halcomb v. Kelly, 57 Tex. 618; Rotzein v. Cox, 22 Tex. 62; Jordan v. Corley, 42 Tex. 284; Kanawha & O. R. Co. v. Ryan, 31 W. Va. 364; Koehl v. Inman, 8 Phila. 234; McNeill v. Hallmark, 28 Tex. 157; Smith v. Moffat, 1 Barb. 65; Stokes v. Knarr, 11 Wis. 390; Texas Midland R. Co. v. Wright (Tex.) 29 S. W. 1134, Affirmed in 31 S. W. 613.

By certiorari, as this prevents an injunction against a judgment and execution void for want of jurisdiction. Texas Mexican R. Co. v. Wright (Tex.) 31 S. W. 613, Affirming 29 S. W. 1134.

By certiorari in summary proceedings of forcible entry and detainer. Armstrong v. Cummings, 20 Hun, 313; McIntyre v. Hernandez, 7 Abb. Pr. N. S. 214; Ward v. Kelsey, 14 Abb. Pr. 106; Marks v. Wilson, 11 Abb. Pr. 87; Duigan v. Hogan, 16 How. Pr. 164, 1 Bosw. 645; Hyatt v. Burr, 8 How. Pr. 168; Bokee v. Hamersley, 16 How. Pr. 461.

By an action of covenant. Swain v. Burnley, 1 Mo. 404; Triplett v. Turner, 2 J. J. Marsh. 475; Wilkins v. Hogue, 2 Jones, Eq. 479.

By an action on a warranty of title. Ponder v. Cox, 26 Ga. 485.

By action of damages. Connery v. Swift, 9 Nev. 39; Bowen v. Clark, 46 Ind. 405.

By an action of damages against the attorney. Piggott v. Addicks, 3 G. Greene, 427, 56 Am. Dec. 547; Conway v. Ellison, 14 Ark. 360.

By an action against an attorney. Albro v. Dayton, 28 Ill. 325; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Harris v. Gwin, 10 Smedes & M. 563; Everett v. Warner Bank, 58 N. H. 340.

By an action against the marshal. Walker v. Robbins, 55 U. S. 14 How. 584, 14 L. ed. 552.

By an action against the sheriff. Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; St. Louis, I. M. & S. R. Co. v. Reynolds, 89 Mo. 146; Taylor v. Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135.

By an action on a constable's bond or against the plaintiff. Williams v. Hitzie, 83 Ind. 303.

By the remedy against the sheriff for false return of process or a remedy by motion to set aside. Stites v. Knapp, 2 Ga. Dec. 36.

By an action of trespass against an officer. Gutierres v. Pino, 1 N. M. 392; St. Louis & S. F. R. Co. v. Lowder, 59 Mo. App. 3; St. Louis, I. M. & S. R. Co. v. Reynolds, 89 Mo. 146.

By an action against an officer. Chappell v. Cox, 18 Md. 513.

By an action against the plaintiff. Harris v. Western & A. R. Co. 59 Ga. 830.

By an action of nullity. Bell v. Francke, 23 La. Ann. 599.

By arresting process. Logan v. Hillegass, 16 Cal. 200.

By affidavit of illegality. Fournoy v. Silman, 59 Ga. 195; Gatewood v. City Bank, 49 Ga. 45; Gunn v. Woolfolk, 68 Ga. 682; Rounsaville v. McGinnis, 93 Ga. 579; Russell v. O'Dowd, 48 Ga. 474; Wordehoff v. Evers, 18 Fla. 339; Hart v. Lazaron, 46 Ga. 396; Lockridge v. Lyon, 68 Ga. 137; Lenoard v. Collier, 53 Ga. 387.

By *audita querela*. Parker v. Jones, 5 Jones, Eq. 276, 75 Am. Dec. 441; Shedd v. Bank of Brattleboro, 32 Vt. 709; McRae v. Davis, 5 Jones, Eq. 140.

By bill of review. Michener v. Springfield Engine & T. Co. (Ind.) *ante*, 59; Ross v. Banta (Ind.) 34 N. E. 865.

By direct proceedings. Gould v. Loughran, 19 Neb. 392.

By ejectment. Harper v. Hill, 35 Miss. 63.

By exception. Barr v. Carpenter, 16 R. I. 724.

By habeas corpus. Lance v. McCoy, 34 W. Va. 416.

By mandamus. Boyd v. Weaver, 134 Ind. 266; Rogers v. Kingsbury, 22 Ga. 60.

By motion. Bowers v. Tallmadge, 16 How. Pr. 325; Crocker v. Allen, 34 S. C. 452; Critchfield v. Porter, 3 Ohio, 518; Fullan v. Hooper, 19 N. Y. Week. Dig. 93, Affirming 66 How. Pr. 75; Ede v. Hazen, 61 Cal. 360; Faison v. McIlwaine, 72 N. C. 312; Goolsby v. St. John, 25 Gratt. 146; Alleman v. Kight, 19 W. Va. 201; Green v. Thomas, 17 Cal. 86; Mason v. Miles, 63 N. C. 564; Mayo v. Bryte, 47 Cal. 626; Sullivan v. Shell, 36 S. C. 578; Parker v. Bledsoe, 87 N. C. 221; Roach v. Duckworth, 95 N. Y. 391.

By motion or appeal. Whitehurst v. Merchants' & F. Transp. Co. 109 N. C. 344.

By an action or appeal, or by motion in the action. Moeschler v. Lochte, 12 N. Y. S. R. 855.

By motion to require satisfaction. Harding v. Hawkins, 141 Ill. 572.

By motion for a new trial. Bateman v. Willoe, 1 Sch. & Lef. 201; Bryorly v. Clark, 48 Tex. 345; Chalmers v. Hack, 19 Me. 124; French v. Garner, 7 Port. (Ala.) 549; Collins v. Butler, 14 Cal. 223; Kersey v. Rash, 3 Del. Ch. 321; Mastick v. Thorp, 29 Cal. 444; Pogue v. Shotwell, 2 Dana, 282; Hendrickson v. Hinckley, 58 U. S. 17 How. 443, 15 L. ed. 123; Yancey

Benjamin, Sales, 6th ed. by Bennett, §§ 627 *et seq.*, and note 11, p. 631; full note to *Scott* v. *Hix*, 62 Am. Dec. 460; 2 Kent, Com. 478. Some old English text-books lay down that there is no implied warranty of title, but Mr. Benjamin says no case was ever so decided there. That old rule, repugnant to reason, if it really existed, was long since "wellnigh eaten

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v. Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Woodward v. Pike, 43 Neb. 777; Gilder v. Merwin, 6 Whart. 522; Reynolds v. Horine, 13 B. Mon. 234; Hintrager v. Sumbargo, 54 Iowa, 604; Robuck v. Harkins, 38 Ga. 174; Jamison v. May, 13 Ark. 600.

By petition for a new trial, or writ of error, *coram nobis*, or by suit in equity for relief. Hurlbut v. Thomas, 55 Conn. 181.

By motion to modify. Parker v. Bledsoe, 87 N. C. 221.

By motion to open judgment. Bohrer v. Fay, 3 MacArth. 145; Bostwick v. Perkins, 1 Ga. 136; Hollinger v. Reeme, 138 Ind. 363, 24 L. R. A. 46.

By motion to quash. Domec v. Stearns, 30 Cal. 114; Goolsby v. St. John, 25 Gratt. 146; Hall v. Taylor, 18 W. Va. 544; Laughlin v. Ferguson, 6 Dana, 111; Stockton v. Ransom, 60 Mo. 535; Sanchez v. Carriaga, 31 Cal. 170; Logan v. Hillegass, 16 Cal. 200.

By motion to recall writ. Gates v. Lane, 49 Cal. 266; Wilkinson v. Rewey, 59 Wis. 554.

By motion to set aside. Wilkinson v. Rewey, *supra;* Borland v. Thornton, 12 Cal. 440; Roebling Sons Co. v. Stevens Electric Co. 93 Ala. 39; Cline v. Lowe, 3 Ind. 527; Connery v. Swift, 9 Nev. 39; Gallop v. Allen, 113 N. C. 24; Jackson v. Patrick, 10 S. C. N. S. 197; Kidwell v. Masterson, 3 Cranch, C. C. 52; Neville v. Pope, 95 N. C. 346; Lafon v. Desessart, 1 Mart. N. S. 71; Lasselle v. Moore, 1 Blackf. 226; Luco v. Brown, 73 Cal. 3; Macy v. Lloyd, 23 Ind. 60; McIndoe v. Hazelton, 19 Wis. 567, 88 Am. Dec. 701; Morris v. Morris, 76 Ga. 733; Murdock v. Devries, 37 Cal. 527; Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Partin v. Luterloh, 6 Jones, Eq. 341.

By motion to set aside or appeal. Schwab v. Madison, 49 Ind. 329.

By motion to set aside or supersede. Anthony v. Shannon, 8 Ark. 52.

By motion to set aside, and appeal or error. Petalka v. Fitle, 33 Neb. 756.

By motion to set aside or to vacate a judgment. Emmons v. McKesson, 5 Jones, Eq. 92.

By motion to set aside or by writ of error. Shelton v. Gill, 11 Ohio, 417.

By motion as upon an *audita querela*. Faison v. McIlwaine, 72 N. C. 312.

By payment and subrogation. Stein v. Benedict, 83 Wis. 603; Grindol v. Ruby, 14 Ill. App. 439.

By motion for subrogation, or a motion for satisfaction and discharge. Ketchum v. Crippen, 37 Cal. 223.

By motion to vacate a judgment. Gage v. Clark, 22 Ind. 163; Critchfield v. Porter, 13 Ohio, 518; Pico v. Sunol, 6 Cal. 294; Roche v. Washington, 7 Humph. 142.

By motion for a rule to show cause why credits should not be entered. Gorsuch v. Thomas, 57 Md. 334.

By an order *nunc pro tunc*. Jillett v. Union Nat. Bank, 56 Mo. 304.

By possessory action. Freeman v. Timanus, 12 Fla. 393.

By writ of prohibition. Stites v. Knapp, 2 Ga. Dec. 36; Ward v. Kelsey, 14 Abb. Pr. 106.

By writ of recordari. Champion v. Miller, 2 Jones, Eq. 194; Gallop v. Allen, 113 N. C. 24.

By petition for rehearing. Russel v. Slaton, 38 Ga. 195.

By retaxation of costs. Whitesides v. Rayle, 3 Humph. 205; Ross v. McCarty, Id. 169.

By stay of proceedings. Rickett v. Johnson, 8 Cal. 34.

By supersedeas. Flanneken v. Wright, 64 Miss. 217; Larkin v. Mason, 71 Ala. 227; Ricks v. Richardson, 70 Miss. 424.

By supplementary proceedings in aid of a set-off. Boley v. Griswold, 2 Mont. 447.

By traverse of an inquisition as to lunacy. Medlock v. Gogburn, 1 Rich. Eq. 477.

By trespass or trover. Davidson v. Floyd, 15 Fla. 667.

By relief in the trial court. Reeves v. Cooper, 13 N. J. Eq. 224, and 498; Whiteside v. Latham, 2 Coldw. 91; Given's Appeal, 121 Pa. 260; Wells v. Wall, 1 Or. 295; Rahm v. Minis, 40 Cal. 421; Morrison v. Speer, 10 Gratt. 228; Chambers v. Penland, 78 N. C. 53; Jones v. Chiles, 3 T. B. Mon. 341; Buell v. San Francisco Sav. Union, 65 Cal. 292; Dyckman v. Kernochan, 2 Paige, 26; Finegan v. Fernandina, 18 Fla. 127.

But in Babcock v. McCamant, 53 Ill. 214, it was held that the remedy by motion to quash an execution where the record has been fraudulently obtained and the judgment increased, will not prevent an injunction against a judgment on account of such fraud as the relief is more complete in equity as it is directed against the judgment itself.

And the remedy by motion will not prevent an injunction where equity can grant more adequate relief. Newman v. Taylor, 69 Miss. 671.

And the remedy by writ of error *coram nobis* will not prevent an injunction against an execution issued on the judgment obtained without notice on a forged note where the defendant was not liable, and the judgment was rendered in a county where he did not reside. Douglass v. Joyner, 1 Baxt. 32.

And the remedy at law of motion for new trial, writ of error, or error *coram nobis*, will not prevent enjoining proceedings upon a judgment, obtained without notice or process, where the time had elapsed for using such remedies before the judgment was discovered. Jeffery v. Fitch, 46 Conn. 601.

If the remedy at law is inadequate to afford relief for fraud in the consideration, equity will grant an injunction. Boyce v. Grundy, 28 U. S. 3 Pet. 210, 7 L. ed. 655.

And the remedy at law under Conn. Stat. 60, ed. 1838, § 63, providing for granting new trials, does not prevent a court of chancery from granting relief by injunction against execution sale when necessary to prevent a sacrifice of complainant's goods. The stay of execution in such a case is a call for extraordinary powers of the court of equity. Carrington v. Holabird, 19 Conn. 84.

Cal. Code Civ. Proc. § 473, providing for a motion in the same court to set aside a judgment, does not apply where there has been no service of process or authorized appearance, and the judgment was obtained by fraud. Baker v. O'Riordan, 65 Cal. 368.

The finding of fact by the court, that there is no adequate remedy at law, is sufficient to retain jurisdiction in chancery to enjoin proceedings on the judgment fraudulently obtained, even if relief at law might be obtained after the levy of an execution. Gainty v. Russell, 40 Conn. 450.

Where the remedy at law was doubtful, an injunction was granted against a judgment, on the ground that a bail was released by indulgence. Rathbone v. Warren, 10 Johns. 587.

The remedy under Gantt's (Ark.) Dig. § 2619, for quashing an execution is only cumulative and concurrent, and will not prevent enjoining a judgment that is void. Ryan v. Boyd, 33 Ark. 778.

The remedy of certiorari will not prevent an injunction against a judgment obtained by fraud, where the court in which it was rendered refuses to grant relief. Merriman v. Walton, 105 Cal. 403, 30 L. R. A. 786.

away," as Lord Campbell well said; and now it is settled in England that there is such implied warranty, and it is universally admitted in America. But there is no implied warranty of soundness or quality of goods sold. *Mason* v. *Chappell*, 15 Gratt. 572; Benjamin, Sales, § 644, and note 13, p. 640. In this case the vendor, at the date of sale, had given a deed of trust on the property, and his warranty was broken at once. He was also guilty of fraud in the sale. Benjamin, Sales, § 628 says: "If the vendor knew he had no title, and concealed that fact from the buyer, he would be liable on the ground of fraud."

A second ground on which the injunction rests is that Newlon once sold to Jarrett a house and lot, with general warranty, and that a lien was found and adjudged to exist against the property, which Jarrett was compelled to pay, and did pay, long after the judgment, and Jarrett asked that what he paid to remove this lien be set off against the judgment. The amount of this lien was ascertained by decree. Equity will not enjoin a judgment to let in a defense pleadable in the action, where the party has had opportunity to do so, unless prevented by fraud, accident, surprise, or some adventitious circumstance beyond the party's control. *Shields* v. *McClung*, 6 W. Va. 79; *Harner* v. *Price*, 17 W. Va. 523, 548. And as set-offs may be pleaded in defense, or made the subject of another action, equity generally will not enjoin a judgment to let them in. But it will do so where the party owing them is insolvent. *Beard* v. *Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *McClellan* v. *Kinnaird*, 6 Gratt. 352; *Marshall* v. *Cooper*, 43 Md. 46, *Levy* v. *Steinbach*, Id. 212; *Lindsay* v. *Jackson*, 2 Paige, 581; 2 High, Inj. § 243. The bill alleged the utter insolvency of Newlon, and the answer does not deny it.

It is assigned as error that the process on the amended bill did not make Goodnow a party to it. It contained no new matter. It only repeats the original bill, and made Durbin, trustee, a party, and he not a necessary party. It contained nothing against Goodnow not in the original bill, and it was dismissed as to the trustee, thus leaving it out of the case, in a legal view, as the decree can be predicated on the original bill alone.

We affirm order and decree.

Dent, J., did not sit.

As to whether or not the proper remedy is to appeal from a judgment rendered without process or appearance, and of which the defendant had knowledge soon after its rendition, was not decided. Taggart v. Wood, 20 Iowa, 236.

As to whether a remedy of motion to quash an execution issued on a transcript filed in the county court from a justice of the peace can be made, was not decided where the complainant did not show the condition of the judgment in the justice court. Gates v. Lane, 44 Cal. 392.

As to whether a remedy by motion will prevent an injunction was not decided. Gillam v. Arnold, 32 S. C. 503.

In Clay County Comrs. v. Markle, 46 Ind. 96, it was said that the fact that there could be no appeal from the decision affords no ground for an injunction to restrain proceedings on a judgment.

The mere fact that the law prohibits an appeal on account of the amount does not of itself afford grounds for an injunction against a judgment or its enforcement. Gulf, C. & S. F. R. Co. v. Henderson, 83 Tex. 70.

For cases on the general rule that a court of equity does not interfere with a judgment at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or agent, see *note* to Merriman v. Walton (Cal.) 30 L. R. A. 786, subd. I., "*Injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress.*"

As to remedy at law in cases of executions and sales, see *note* to Parsons v. Hartman (Or.) 30 L. R. A. 98, subd. XIII., "*Injunctions against execution sales or other proceedings under final process.*"

I. T.

OHIO SUPREME COURT.

COLUMBUS, HOCKING VALLEY, & TOLEDO RAILWAY COMPANY *et al.*, *Plffs. in Err.*,

v.

Stevenson BURKE *et al.*

(.....Ohio.....)

***1. No action can be maintained** on an injunction undertaking except in accordance with its terms; and this is true with respect to the principal as well as the sureties.

2. Where in a suit for specific relief a temporary injunction is allowed on the giving of an undertaking as required by statute (Rev. Stat. § 5576), and subsequently the parties submit the issues of law and fact in the case to arbitrators selected by themselves, and bind themselves to abide the award, it being in no way made subject to the approval of the court; and the arbitrators make an award in pursuance of the submission, that the plaintiff is not entitled to the relief asked in his petition, and award that he dismiss his action; and afterward the action is so dismissed by consent of the parties and the injunction dissolved,—such award is not a judicial determination that the injunction ought not to have been granted, and will not support an action on the undertaking; nor will such dismissal by consent estop the defendants from making such defense.

3. Where, in such case, the submission

*Headnotes by the COURT.

NOTE.—The above case is a peculiar one in respect to the termination of an action for an injunction on which is based a claim on the injunction undertaking. The voluntary dismissal of the action pursuant to an award of arbitrators upon the merits of the case presents a novel question.

As to the right to recover damages caused by an injunction generally, see *note* to Mark v. Hyatt (N. Y.) 18 L. R. A. 275.

to arbitration stipulates that its execution should not impair the liability of the obligors on the undertaking, the obligors are not, in an action on the undertaking, precluded from claiming that the award does not furnish a predicate for the action.

4. Where an action is dismissed by consent, and a temporary injunction pending in it dissolved without any judicial action of the court, but as a consequence of the dismissal, such dissolution is of no avail in an action on the injunction undertaking.

(*Burket and Shauck, JJ., dissent.*)

(January 21, 1896.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to enforce certain injunction bonds. *Reversed.*

Statement by **Minshall,** Ch. J.:

The action below was commenced in the court of common pleas of Lucas county upon two injunction undertakings. The undertakings were given in a suit brought by the Columbus, Hocking Valley, & Toledo Railway Company against Stevenson Burke *et al.* in the court of common pleas of Franklin county, claiming to be the owner of certain stocks and bonds as against the defendants; and asking that the defendants be restrained from disposing of them until the further order of the court. A temporary injunction was allowed on the giving of one of the undertakings mentioned, which, after reciting the making of the order and its terms, is as follows:

"Now, therefore, we, the Columbus, Hocking Valley, & Toledo Railway Company, by J. W. Shaw, president, P. W. Huntington, and Walter Crafts hereby undertake to the said Stevenson Burke, Charles Hickox, and others in the sum of $100,000 that the said plaintiff, the said the Columbus, Hocking Valley, & Toledo Railway Company, shall pay to the said Stevenson Burke, Charles Hickox, and others all damages which they, the said defendants, may sustain by reason of the issuing of said injunction if it should be finally decided that the said injunction ought not to have been granted.

"(Signed) The Columbus, Hocking Valley, & Toledo Railway Company, by J. W. Shaw, President.

"P. W. Huntington,
"Walter Crafts."

On motion of the defendants the venue of the action was changed to Licking county, where, upon their application, an additional undertaking in the sum of $100,000, was required and given. Its terms are similar to the first, being conditioned for the payment of all damages the defendants may have sustained, "in case it be finally decided that the injunction ought not to have been granted." Afterwards, as appears from the petition, the parties on July 11, 1888, entered into a written agreement whereby they referred all the issues of law and fact between them in the action to the arbitrament of certain persons. The agreement is as follows:

"Whereas, the said plaintiff (the railway company) and said defendants have each and all agreed to submit and refer all the issues of law and of fact joined between the parties in said action to the award and determination of James C. Carter, of New York, Lawrence Maxwell and E. W. Kittredge, of Cincinnati, Ohio. Now, therefore, we, the said Columbus, Hocking Valley, & Toledo Railway Company and Stevenson Burke, Charles Hickox, Charles G. Hickox, William J. McKinnie, Chauncey H. Andrews, Wm. M. Greene, as administrator of M. M. Greene, deceased, and the Toledo & Ohio Central Railway Company, have nominated and appointed and do hereby nominate and appoint James C. Carter, of New York; E. W. Kittredge and Lawrence Maxwell, Jr., of Cincinnati, Ohio, to be arbitrators between us, to whom we refer all the issues of law and of fact joined by the pleadings in said action, to hear and determine the same, and we severally agree that we will each, so far as the same concerns itself or himself respectively, stand to, abide by, and perform the award and determination of the said arbitrators concerning the premises, so as said award be made in writing under the hands of the said arbitrators, and to be ready to be delivered to the parties, or to such of them as shall desire the same, on or before the 1st day of November, 1888. We further agree that the hearing before the said arbitrators shall be conducted under the pleadings and proofs in all respects in the said manner as though said issues were regularly tried in the court of common pleas of the state of Ohio, and that said arbitrators shall hear and determine said issues as a judicial court, with the same powers to permit amendments to said pleadings as might be done in the court wherein said action is now pending, providing that no amendment shall be allowed which shall substantially change cause of action now alleged in said petition; that the said parties, respectively, shall and will produce before said arbitrators all such books, papers, writings, and accounts relating to the matters in issue as shall be in their power or custody respectively, and they shall be notified by any party to produce; that the evidence already taken or that may be taken hereafter by deposition in said action may be used at the hearing before said arbitrators, subject to all objections for incompetency or irrelevancy, and either party shall be at liberty to offer further evidence at said hearing; that such hearing shall be commenced at such time not earlier than the 15th day of August, 1888, and at such place in the town of Saratoga, N. Y., as said arbitrators may appoint, they giving five days' notice thereof to the several parties or their counsel, which notice and all others which may become necessary to give during said arbitration may be given by letter addressed to said counsel or parties at their postoffice addresses, namely, . . . and that said arbitrators shall have the right and authority to adjourn such hearing from time to time, or place to place, until the final conclusion thereof. We do now further agree that said action now pending in said court of common pleas of Licking county, Ohio, shall remain on the docket of said court, and in case said submission should on any account not proceed or said award of said arbitrators shall not be made on or before the 1st day of No-

vember, 1888, then said action may proceed to trial. And we do further agree that if for any cause said arbitrators shall fail and not proceed to final award, then and in that case the cause now pending in the court of common pleas of Licking county shall have precedence and be tried before the cause now pending in the circuit court of Franklin county in which the parties hereto are litigants. We do further agree that no proceeding for the vacation of the preliminary injunction granted in said action shall be pressed for hearing until said award shall be made or this submission shall expire or be vacated. And the said the Columbus, Hocking Valley, & Toledo Railway Company hereby agrees that upon the making of said award, or the expiration or vacation of this submission, the parties enjoined by said preliminary injunction may apply to said court for such adjudication or order concerning said injunction as they may be entitled to; provided, however, that if the award shall be in favor of the plaintiff, and shall adjudge to it an interest in or lien upon the stock and bonds covered by the pending injunction or any of the same, the pending injunction shall continue, except as to stock not affected by said award, until the award shall have been fully performed. And we further agree that neither this submission nor the execution thereof, shall in any wise impair the liability of the said railway company or of P. W. Huntington or Walter C. Crafts upon the undertaking given by them upon the granting of said injunction, nor the liability of said railway company or of P. W. Huntington or E. L. Hinman upon the undertaking given by them as additional security against damages by reason of the granting of said injunction. And we further stipulate and agree that the award so to be made by said arbitrators must be made by them unanimously, and that when so made in accordance with this submission their award shall be final and conclusive upon the parties."

The hearing was had at Saratoga, and on September 17, 1888, the arbitrators made their award in writing as follows:

"We, James C. Carter, E. W. Kittridge, and Lawrence Maxwell, Jr., arbitrators by reason of the agreement of arbitration entered into by and between the Columbus, Hocking Valley, & Toledo Railway Company and Stevenson Burke, Charles Hickox, Charles G. Hickox, Wm. J. McKinnie, Chauncey H. Andrews, Wm. M. Greene, as administrator of the estate of M. M. Greene, deceased, and the Toledo & Ohio Central Railway Company, dated July 11, 1888, after due notice to all the parties as provided in the said agreement, and their attendance before us at Saratoga, N. Y., in pursuance thereof, and having heard the evidence adduced and the arguments of counsel of all of the said parties, and having duly considered the same, do find the issues joined by the pleadings in the action between the said parties in said agreement mentioned in the court of common pleas of Licking county, Ohio, in favor of the defendants in said action, and we do hereby decide, award, and direct that the said the Columbus, Hocking Valley, & Toledo Railway Company is not entitled to and shall not recover in any wise, and shall not have, any moneys, damages, account, or other relief from the said Stevenson Burke, Charles Hickox, Charles G. Hickox, William J. McKinnie, Chauncey H. Andrews, Wm. M. Greene, administrator of the estate of M. M. Greene, deceased, or the Toledo & Ohio Central Railway Company, or either of them, for or on account of any of the matter and things alleged in the pleadings in said action and submitted to us for award by said agreement. And we award that the said Columbus, Hocking Valley, & Toledo Railway Company shall be forever barred from prosecuting said action in the court of common pleas of Licking county, Ohio, or any action whatsoever against the said Stevenson Burke, Charles Hickox, Charles G. Hickox, William J. McKinnie, Chauncey H. Andrews, Wm. M. Greene, administrator of the estate of M. M. Greene, deceased, or the Toledo & Ohio Central Railway Company, or either of them, for or on account of any of the matters and things alleged for cause of action in the pleadings in said action. We further award that the plaintiff therein dismiss said action at its costs." Signed by the arbitrators.

Afterward, on November 13, 1888, the following entry in the action was made on the journal of the court:

"This day came the parties by their attorneys and, by consent, showed to the court that on the 11th day of July, 1888, the parties submitted all the facts and issues joined in the pleadings in this case to the arbitrament and award of James C. Carter, Esq., of New York, and E. W. Kittredge and Lawrence Maxwell, Esqs., of Cincinnati, Ohio, and that said arbitrators have heard the parties and their counsel and all the evidence that they had to submit in the case, and carefully and fully considered the same, did on the 17th day of September, 1888, award and decide that the plaintiff has no right to any relief from the defendants or either of them; that this suit be dismissed at plaintiff's costs, and the plaintiff be forever barred from hereafter prosecuting any other action against the defendants or either of them for any of the same causes of action.

"Thereupon the plaintiff in pursuance of said submission and award duly dismissed its said petition and action.

"By the agreement of the parties, no record shall be made in said action except at the request of some one of the parties, and at the cost of the party requesting it, and by like agreement, reference may be had and use made of the pleadings and journal entries and all other documents in said action properly matter of record, the same as if the said proceedings were duly recorded.

"And thereupon upon motion it is ordered and adjudged that the injunction that was granted in this action while the same was pending in the court of common pleas of Franklin county be vacated, dissolved, and dismissed, and that the plaintiff pay the costs of this action and of all the proceedings in this action in this court and in the court of common pleas of Franklin county, and in default of payment execution issued."

And the plaintiffs then allege "that it was then and there decided by said court of common pleas of Licking county, Ohio, that said injunction ought not to have been granted, and

that said injunction was wrongfully obtained." Averments are then made as to the damages sustained by the plaintiffs.

The defendant, the railroad company, in its answer averred, that the order entered on the journal of the court after the arbitration had been had "was made and entered by the agreement of the parties, and at the instance of the plaintiffs and solely in consequence of said award, and only for the purpose of carrying into effect the decision thereof that said plaintiffs should dismiss said action, which was all that said award decided as to the disposition of said action; and that said part of said order dissolving and dismissing said injunction was added merely for the formal dissolution of said injunction, which dissolution necessarily resulted from said dismissal of the action by the plaintiffs as incidental thereto." In reply the plaintiff's admitted, "that no special motion for the dissolution of said injunction was ever submitted to the court of common pleas of Licking county, and that there has been no adjudication of said court concerning said injunction since the making of said award except as set out in said answer." And also admitted "that said injunction was not submitted to said arbitrators, nor the question whether or not it was properly allowed, and admit that said arbitrators did not consider the same, but considered and passed upon only the issues of law and fact joined by the pleadings in said action." There is no denial of the averment that the entry was made by agreement of the parties and at the instance of the plaintiff.

The issues in this action were tried to the court, which found for the plaintiffs, and rendered judgment for the full amount of both undertakings, which, on error, was affirmed by the circuit court.

A number of questions have been raised and argued on the question of damages; but from the view taken of the case, their statement is unnecessary.

Messrs. **J. B. Foraker** and **J. K. Richards,** for plaintiffs in error:

The suit is on the bond and can be sustained only by showing that the terms of the bond have been fulfilled.

The only question is whether in view of the facts stated it has been "finally decided that the injunction ought not to have been granted."

The decision required by the bond is the decision of the court—a tribunal created by and acting under sanction of the law, and it must be final, terminating the action.

Shearman v. *New York Central Mills*, 11 How. Pr. 269; *Ninth Ave. R. Co.* v. *New York Elev. R. Co.* 3 Abb. N. C. 22; *Musgrave* v. *Sherwood*, 76 N. Y. 194.

The decision must be that the injunction "ought not to have been granted" at the time it was granted; in other words, must look to and turn upon the facts as they were when the suit was brought, and not upon facts intervening since.

Palmer v. *Foley*, 71 N. Y. 106; *Neugent* v. *Swan*, 61 How. Pr. 40; *Shearman* v. *New York Central Mills*, *supra*.

The award and determination did not amount to the decision of a court because it was made in a common-law arbitration purposely entered into by the parties to put a speedy end to the suit without judicial determination, by settling the controversy outside of court and according to the opinion of the arbitrators whether right or wrong.

In order that the parties may secure the benefits of a statutory arbitration the submission and the proceedings of the arbitrators must comply with the statute in every essential particular.

Strum v. *Cunningham*, 3 Ohio, 287; *Western Female Seminary* v. *Blair*, 1 Disney (Ohio) 370; *Estes* v. *Phillips*, 2 Cin. Sup. Ct. Rep. 3.

Common law arbitration obtains in Ohio. This was a common-law award and it had no judicial force.

Tullis v. *Sewell*, 3 Ohio, 511; *Brown* v. *Kincaid*, Wright (Ohio), 37; *Bradly* v. *Sneath*, 6 Ohio, 490; *Ormsby* v. *Bakewell*, 7 Ohio, pt. 1, p. 99; *Conner* v. *Drake*, 1 Ohio St. 166; *Swasey* v. *Laycock*, 1 Handy (Ohio), 335; *Childs* v. *Updyke*, 9 Ohio St. 333; *Western Female Seminary* v. *Blair*, and *Estes* v. *Phillips*, *supra*; *State* v. *Jackson*, 36 Ohio St. 281; *Hassenpflug* v. *Rice*, 11 Week. L. Bull. 200; *Daniels* v. *New London*, 58 Conn. 156, 7 L. R. A. 563.

The judgments of dismissal and vacation did not amount to the required decision (1) because they were entered by consent in pursuance of an agreement to comply with the award, and (2) because they were based upon facts (to wit, the submission and award) which occurred long after the injunction was granted and were not in contemplation when the bond was given.

A judgment of dismissal has been held equivalent to a final decision that the injunction ought not to have been granted, but to have that effect it must be made under circumstances amounting to an admission or confession on the part of the plaintiff that his case was bad from the start; that he never had a cause of action.

Such admission may be made:

1. On motion of defendant for want of prosecution the plaintiff having abandoned the case.

Dowling v. *Polack*, 18 Cal. 625.

2. On *ex parte* application of the plaintiff, the defendant not consenting.

Pacific Mail S. S. Co. v. *Toel*, 85 N. Y. 646.

3. On motion of the plaintiff against the resistance of the defendant.

Amberg v. *Kramer*, 32 N. Y. S. R. 177; *Wynkoop* v. *Van Beuren*, 63 Hun, 500.

4. By stipulation of parties because of some action of the court in the case upon the merits demonstrating that the plaintiff had and has no cause of action.

New York City Suburban Water Co. v. *Bissell*, 78 Hun, 176.

There is no case where a dismissal by agreement of parties not predicated on or presumably occasioned by any action of the court upon the merits of the controversy has been held equivalent to the final decision required.

Palmer v. *Foley*, 71 N. Y. 106; *Johnson* v. *Elwood*, 82 N. Y. 362; *Prefontaine* v. *Richards*, 47 Hun, 418; *Amberg* v. *Kramer*, *supra*.

By the terms of the submission the *status in quo* was to be preserved so that in case settlement out of court by arbitration should fail litigation in court might proceed as before.

There was no stipulation as to the effect of the execution of the award either upon the injunction or liability on the bond.

Messrs. **Elihu Root, Thomas McDougall, C. O. Hunter, S. B. Clarke, Bissell & Corrill,** and **E. A. Guthrie** also for plaintiff in error.

Messrs. **Stevenson Burke** and **Doyle, Scott, & Lewis** for defendants in error.

Minshall, Ch. J., delivered the opinion of the court:

The case gives rise to the following questions, and, if any of them cannot be answered in the negative, the judgment must be affirmed.

1. Is the award of the arbitrators the decision contemplated by the undertaking?

2. Did the dismissal of the action by the consent of the parties estop the defendants from insisting on the terms of their undertaking?

3. Does the provision in the agreement of submission that its execution should not impair the liability of the defendants on either of the undertakings, preclude them from insisting that it has not been judicially decided that the injunction ought not to have been granted?

4. Was the dissolution of the injunction after the award and the dismissal of the action, such a decision?

We will consider these questions in their order, and shall hereafter, speak of these undertakings as bonds, and for convenience use the singular, as what is true of one is true as to both.

1. No action can be maintained on the bond except in accordance with its terms. The liability of the principal and sureties is the same —it is on the bond; and no action on it will lie against the principal where it would not lie against the sureties. This may be regarded as settled law. In *Bein* v. *Heath*, 53 U. S. 12 How. 168, 13 L. ed. 939, it is said by Taney, Ch. J., that, "in a proceeding upon a bond, the liability of the principal cannot be extended beyond that of the sureties," and the bond there under consideration was an injunction bond. This case was followed and approved by this court in *Krug* v. *Bishop*, 44 Ohio St. 221. See also, in this connection, the cases of *Palmer* v. *Foley*, 71 N. Y. 106, and *Johnson* v. *Elwood*, 82 N. Y. 362, 365. As observed by counsel, this is conceded by the form of the present action. It is on the bond and the contention of the plaintiffs is, that the terms of the bond have been complied with. No action can be maintained on the bond without a decision that the injunction ought not to have been granted. And this presents the question whether the award of the arbitrators is the decision required by the terms of the bond, in an action on it for damages. We think it is not. The decision contemplated by the bond, without doubt, had reference to a decision by the court on the merits of the case, in which the action was pending. It was required and given in pursuance of the statute, § 5576, Rev. Stat., and could have had reference to no other decision by any known rule of construction. There is a marked difference, as we shall presently show, between such a decision and the award of the arbitrators in this case. There has been much discussion as to whether the arbitration had, was a common-law or statutory one. If it were material to decide this we should be compelled to hold that it was a common-law arbitration. *Western Female Seminary* v. *Blair*, 1 Disney (Ohio), 370; *Estes* v. *Phillips*, 2 Cin. Sup. Ct. Rep. 3; *Childs* v *Updyke*, 9 Ohio St. 333; *Swasey* v. *Laycock*, 1 Handy (Ohio), 335; *Brown* v. *Kincaid*, Wright (Ohio), 37.

These cases show that common law arbitration exists in this state, notwithstanding the statute; and if the arbitration had in this instance was not such, it would be difficult to define the difference in the two methods. If there is any, it must be in the fact that one is made under, and substantially conforms to, the statute. But the submission under consideration conformed in no particular to the statute —was as oblivious of the statute as if it had no existence.

This evidently was not a matter of oversight—it was according to the deliberate purpose of the parties—they bound themselves to stand to and abide the award whether right or wrong, the obligation being assumed without qualification. It was not made a rule of court, for it was not the agreement that it should. The cases cited show that, as a statutory award, it would have been of no avail, for want of conformity to the statute; and that the only way effect could be given it, was to treat it as a common-law award, as was done by the parties on the award being made. The principle of common-law awards was preserved to save such as could not be given effect under the statute; and many awards have been sustained by the courts, on the ground that they conform to the liberal principles of the common law, where they could not have been sustained as awards made under the statute. *Childs* v. *Updyke*, *supra*.

But the question here is, not what the arbitration had should be called, but whether the decision by the arbitrators is the decision, or its equivalent, required by the bond in an action on it. In a decision by a court the law requires that it shall conform to the law and the facts of the case, if it do not, by taking the proper steps, its judgment may be reversed by the proper tribunal at the suit of the party aggrieved. But such is not the case as to the award made by the arbitrators in this instance, under the agreement of submission between the parties. It is true that the issues of law and fact between the parties in the case were referred to the arbitrators to be heard and determined as a court. But whether they so heard the case or not, whether they erred both as to the law and the facts, no remedy was provided and none could be had, however erroneous their award might be in point of law and fact. They heard the case as a quasi court at most, not as ministers of justice appointed by the law; and their judgment was to be, and is, final and irreversible by any tribunal. If there had been a provision that the award should be made a rule of court, and subject to be set aside or confirmed by it on a review of the law and facts on which it was made to rest, there would be some ground for the argument that it is the equivalent of the decision required by the bond. But we have shown that such is not the case, that it is sim-

ply a common-law award and, as said by Scott, J., in *Childs* v. *Updyke*, has no judicial force. We have been cited to what is said in Morse on Arbitration, 487, that an award, as between the parties, has the effect of a final judgment. This may be true in the sense that it concludes the parties on all matters submitted by their agreement. But this is so because it is the result of their agreement, and not because of any judicial character the award may have. The railway company cannot again maintain an action for, or claim, the stocks and bonds in question. This is so because it is bound not to do so by the agreement under which the award to that effect was made, and not because it has been so judicially decided by the court that allowed the injunction. This has not yet been so decided; and, notwithstanding the award, it may be true as a matter of law and fact that the injunction was rightly allowed. If so, the intervention of the arbitration has not, with respect to the bond, changed the rights of the company from what they were at the allowance of the injunction. If, as a matter of law and fact, it was not liable then on the bond, it is not liable now. For there has been no judicial determination conclusive upon that question. The only judicial determination that has been made in the case touching the merits was the ruling of the court of common pleas, in which the action was commenced, on a motion to dissolve the temporary injunction that had been granted. The motion was overruled. *Columbus, H. V. & T. R. Co.* v. *Burke*, 19 Week. L. Bull. 27. This holding has never been reversed, nor the injunction dissolved by the judicial action of any court, as will be hereinafter shown.

2. It is, however, claimed that the plaintiff, after obtaining the injunction, voluntarily dismissed its action, and is thereby estopped from insisting on the terms of the bond; and a large number of authorities are cited in support of this proposition. We have carefully examined these cases, and see no reason to question the decision in any of them. When a plaintiff obtains an injunction by giving a bond to answer for such damages as may be caused the defendant by its allowance, and afterward, voluntarily and without the consent of the defendant, dismisses his action, there is much reason for holding that he should be estopped to say, in an action on the bond for the recovery of damages, that it has not been decided that the injunction ought not to have been granted. For, in such case, he, by his own act, has prevented the defendant from having such a decision. And such is the substance of the holding in the various cases cited by counsel for the defendant in error. But none are cited, and we have found none, that the same rule applies, where the dismissal is with the consent of the defendant. And there is not the same reason for holding that it should. In such case the defendant has an opportunity to insist that, before the dismissal is had, the court determine whether the injunction ought to have been granted, so that an action may be prosecuted on the bond, if such is his purpose. If he fail to do this, and consents to the dismissal of the action, his conduct is consistent with the inference that he intends to waive any right he may have on the bond. It may be, and no doubt frequently happens, that in such case the defendant is content to be left with a recognition of his right by the plaintiff to the subject of dispute, without further litigation, and consents to the dismissal for such reason. But whether such be his intention or not, in such case he cannot, for want of a predicate, maintain an action on the bond. For it has not been determined that the injunction was wrongfully granted, and the defendant is not estopped from insisting on the fact. The dismissal in this case, as shown by the record, was by consent of the parties. The effect of the entry so made, is not varied by the fact that the entry shows that the plaintiff dismissed its action because it had been awarded that it had no cause of action, and should dismiss its case; for if the award had not the effect of a judicial determination of that fact, such effect was not imparted to it by stating it as the reason for dismissing the action, unless it may be claimed that, by doing this, the plaintiff admitted that the award is right. There is no such express admission, nor can this be inferred from the entry. All the entry admits is that such award had been made, not that it is right, and that by it he is required to dismiss the action; and, if he does not, the defendant can, by pleading the award in a supplementary answer, cause the suit to be dismissed, because he had made a binding agreement to dismiss it if it should be so awarded. And if the latter course had been pursued it would then be quite clear that the dismissal by the defendants would not have availed them in an action on the bond, unless the award of itself would be a sufficient predicate, which we have shown it is not. The entry only conformed to the agreement, and relieved the defendants from the necessity of filing a supplementary answer, and causing the action to be dismissed on the award made in pursuance of the arbitration agreement. It is the substance of the thing done, and not its form, that is to be considered and have effect. In all the cases with which we are familiar, or that have been cited in argument, the courts have required, as a necessary predicate, in an action on the bond, a judicial determination of the merits of the case in favor of the defendant in the action in which the bond was given, either in a trial on the merits or on a motion to dissolve the injunction, except those where the plaintiff dismisses his action without the consent of the defendant. In the excepted cases, for reasons just given, he is estopped from insisting on the terms of the bond, and in none others. Thus in *Krug* v. *Bishop* the suit was dismissed on motion of the defendants because the plaintiffs had failed to make and perfect the appearance of certain new parties in accordance with the order of the court, and it was held that such dismissal did not warrant an action on the bond. It is true that the dismissal was without prejudice, but this was not a controlling circumstance. It was not a part of the *ratio decidendi*. The reason of the decision is that considering the ground of the dismissal, it was not determined thereby that the injunction ought not to have been granted. In *Johnson* v. *Elwood*, 82 N. Y. 362, it appears an action had been brought to restrain the defend-

ants from entering upon certain lands and cutting timber and a temporary injunction was granted. This was dissolved by stipulation on the determination of another suit determining the title to the land; and a motion was then made, under the practice in that state, for a reference to ascertain the damages sustained by reason of the injunction. On appeal it was held that there was no breach of the condition of the undertaking, which provided for the payment of such damages in case the court should finally decide that the plaintiff was not entitled to the injunction. In the opinion by Miller, J., it is said, "The undertaking provides for the payment of damages in the event, only that the court shall finally decide that the plaintiff was not entitled to the injunction. There has been no breach of the condition in this respect, and no final determination which warrants a reference to compute the amount of damage. In *Palmer* v. *Foley*, 71 N. Y. 106, the defendant had consented to a discontinuance, and that an order to that effect might be entered, which was done; and it was held that this was not equivalent to a final decision of the court and there was no breach and no right of action, and that an order of reference to ascertain damages was improperly granted. It was laid down that there was no judicial determination or opinion given upon the merits of the action, or the right of the plaintiff in the action to the injunction at the time it was granted, and that it was never finally determined by a judicial decision. An amicable and voluntary agreement to discontinue was not enough. This case," says the judge, "is directly in point, and the granting of the order discontinuing the action because the plaintiff failed to proceed, as required by a prior order, is not sufficient to establish that there was a decision." The injunction had been dissolved by stipulation on the determination of another action involving the title to the land in dispute. Speaking in reference to this, the judge said: "It does not alter the case because the injunction was dissolved, or that in another action the court held that the plaintiff has no title to the premises; and it is a sufficient answer to the application to ascertain the damages, to say that there has been no determination in this case as to the right of the plaintiff to the injunction originally." This being true as to the judgment of a court in another case on the question of title to the subject in dispute, *a fortiori* it must be true as to an award made by arbitrators on a submission *in pais*.

In *Myres* v. *Parker*, 6 Ohio St. 504, it was held that no action could be maintained on an appeal bond when, by its terms, the liability of the obligors was made to depend on the judgment of the supreme court of the county, that court having been superseded by the district court, and, in which court the case was heard and determined.

In *Prefontaine* v. *Richards*, 47 Hun, 418, Prefontaine being about to foreclose a chattel mortgage for $1,000, given him by Richards, the latter secured an injunction claiming that Prefontaine owed him $923. The action came on for trial, when Richards and Prefontaine met and settled the matters in difference, agreeing that Richards was indebted to Prefontaine in the sum of $571, and that judgment might be entered against Richards for that amount and with costs. It was also stipulated that the injunction should be dismissed. Accordingly, judgment for the amount named was entered against Richards and the injunction was dissolved. Held, that there was no decision of a court that Richards was not entitled to the injunction at the time when he obtained it. And the court observed that "the defendants are liable according to the terms of their undertaking, and not otherwise."

Benedict v. *Benedict*, 15 Hun, 305, was an appeal from an order directing a reference to ascertain damages. The suit had been brought for a reconveyance of lands on the claim of a verbal agreement, that it was to be reconveyed if not paid for, and an injunction had been granted restraining the defendant from encumbering the land or collecting rents. It was referred to a master, who found the fact of the verbal agreement, but held the same void under the statute of frauds, but held the plaintiff had a lien for the purchase money and ordered a sale, but ruled and decided nothing as to the injunction. The court reversed the order because no final decision had been made authorizing a reference; and used this language: "According to the conditions of the undertaking, there must be a final decision,—that is, one made at the determination of the action; and the decision, in order to authorize an action on the undertaking, must be in effect that the plaintiff was not at the time of obtaining the injunction entitled thereto," citing cases. See also *Weeks* v. *Southwick*, 12 How. Pr. 170; and, particularly, *Palmer* v. *Foley*, 71 N. Y. 106, cited by Miller J., in *Johnson* v. *Elwood*, *supra*.

These cases, and many similar ones, all illustrate the principle heretofore stated, that no recovery can be had on a bond or undertaking except in strict accordance with its terms—there must be a showing that it has been determined by the court that the injunction should not have been granted; and, also, that any agreement between the parties, subsequent to the allowance of the injunction, by which the action is dismissed and the injunction dissolved, is not sufficient in an action on the bond, where there has been no judicial determination that the injunction should not have been allowed; and, consequently, an award made by arbitrators selected by the parties, and in no way subject to the control of the court, cannot have that effect, for it only binds the parties as an agreement, not as a judgment rendered by the court, in the exercise of its jurisdiction, upon the case made by the parties and submitted to it. The bond contemplated such a judgment, and none other.

In an application for a rehearing it has been strenuously insisted that there is nothing in the record to show that the case was dismissed by consent; and that the point is a new one, not presented below, and, for the first time, presented here in the opinion of the court. This is certainly a grave mistake of counsel. It is presented in the answer of the company and not denied by the reply. The averment

of the answer being "that it," the entry, "was by agreement of said parties and at the instance of said plaintiffs," entered of record in the case. This is not denied by the reply, and could not have been without contradicting the record—the language of the entry being, "This day came the parties by their attorneys and by consent showed to the court" the matters contained in the entry, which include the dismissal of the action and the dissolution of the injunction. We are unable to see how, in the face of this entry, it can be claimed that the dismissal was without the consent of the defendants. And as often as the case has been argued in this court, the point has been made and insisted on by counsel for plaintiffs in error.

3. The defendants in error also rely on the provision in the agreement of submission, that its execution should not "in any wise impair the liability" of the obligors on the bond. But this stipulation cannot be so construed as to impair any of the rights of the obligors. To insist on the terms of the bond is one of their rights, and does not impair their liability. It was wisely inserted, as without this provision it might have been contended, and in fact has been, that the submission to arbitration of itself worked a discontinuance of the action. This has been held by many respectable courts in the case of a common law submission. Morse, Arbitration, 267; *Mooers* v. *Allen*, 35 Me. 276, 58 Am. Dec. 700; *Bigelow* v. *Goss*, 5 Wis. 421; *Larkin* v. *Robbins*, 2 Wend. 505; *Green* v. *Patchen*, 13 Wend. 293.

4. As to the dissolution of the injunction, this, we think, is of no avail to the plaintiff, in their action on the bond, for several reasons: (1) It was a useless act and determined nothing. The temporary injunction perished with the dismissal of the action, so that there was nothing to dissolve. It was a mere incident to the action and could not survive it. *Krug* v. *Bishop, supra; Swan Twp. Trustees* v. *McClannahan*, decided at the last term, 53 Ohio St. 403. (2) It is averred in the answer and expressly admitted by the reply, that the court took no judicial action in the dissolution of the injunction. It was done by consent and as a consequence of the award. The dissolution then decided nothing on the important question, whether the injunction ought to have been granted.

Judgments of the Circuit Court and of the Common Pleas reversed; and judgment for the defendants below upon the pleadings and the admitted facts in the case.

Burket, J., dissenting:

I concede that under the conditions of the bonds, it was the right of the railway company to have the question as to whether or not the injunction ought to have been granted, decided by the court, and that this right would continue until waived by agreement of the parties.

The right to have the court decide whether the injunction ought to have been granted or not, is a right which may be waived by the parties and changed by contract. In civil cases any right may usually be waived, unless otherwise provided by statute. A party whose insured property is destroyed by fire has a right to have the value thereof ascertained by a court and jury, yet this right may be waived by agreement of the parties in the policy, to the effect that such value shall be fixed by appraisers or arbitrators, and such agreements are held valid and conclusive. *Hamilton* v. *Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419.

The right to a trial by jury may be waived, and even the unconstitutionality of statute may be waived. *Tone* v. *Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438.

In this case the parties, by their agreement, submitted all the issues of law and fact to the arbitrators for their decision and determination, and bound themselves to stand by and perform their award, and agreed that the submission award and its performance should not in any way impair the liability of the railway company upon the bond, and thereby the parties waived a decision of the merits of the case by the court and agreed that the decision should be by the arbitrators.

A decision of the merits of a case is necessarily a decision as to whether the injunction ought to have been granted or not, because injunctions ought to be granted only in cases wherein the plaintiff succeeds on the merits. A decision on the merits in favor of the defendant is a decision that the injunction ought not to have been granted. An injunction is always granted to remain in force until otherwise ordered, and when the case is decided in favor of the defendant it is by force of the judgment of its own vigor otherwise ordered, without saying anything about the injunction or the dissolution thereof, although the usual and better practice is to dissolve the injunction by specific order in the judgment entry. Such is the effect of the holding by this court in *Roberts* v. *Dust*, 4 Ohio St. 502. In that case there was a decision on the merits of the case in favor of the defendant, and nothing was said as to the injunction, and yet this court sustained a recovery on the injunction bond. In *Hoyt* v. *Carter*, 7 How. Pr. 140, it was held that a dismissal of the action by the court was of its own force a disposition of the injunction.

So that while the submission says nothing about submitting to the arbitrators the question as to whether or not the injunction ought to have been granted, that question was necessarily included within the merits of the case—"the issues of law and fact"—and was necessarily submitted therewith, and was necessarily passed upon and decided by the award. The rule that the greater includes the less is here applicable. An injunction is one of the provisional remedies provided for in division 6 of the Practice Act in the Revised Statutes, and such provisional remedies are incidents to actions in which they are allowed, and a disposition of the action on its merits necessarily disposes of the merits of the incident, because the incident cannot survive the final disposition of its principal, unless by special order, as is sometimes done, some question of the incident is retained for future disposition and decision, as in the case of the final distribution of funds in the hands of a receiver. But the usual and better practice is

to dispose of the merits of the provisional remedy in the same entry with the final judgment on the merits and as a part thereof, as is usually done in cases of attachment. When the incident is disposed of with the principal in the same entry, the judgment as to the incident is of as much binding force as the judgment as to the principal.

The submission was in writing, and the question as to whether thereby the matter of the injunction was submitted to the arbitrators, was a question of law to be determined by a construction of the legal effect of the submission itself, and this construction could not be varied, altered, or changed by the averments or admissions of the parties in their pleadings. Properly construed the submission carried the merits of the whole controversy to the arbitrators, which necessarily included the merits of the injunction; and the award when it decided the merits of the case, necessarily decided the merits of the injunction included therein. And this result was not and could not be changed by the averment on one side, and the admission on the other, that the question as to whether the injunction ought or ought not to have been granted, was not submitted to nor decided by the arbitrators. This averment and admission contradict the legal effect of the submission and award, and cannot be true, and should be disregarded.

A decision by a court having been thus waived, and a final decision procured by a board of arbitrators agreed upon, it cannot be fairly said that the question as to whether the injunction should have been granted or not is still open and undecided. The contracts contained in the bond and in the submission, were as to the principals two written contracts as to the same case and same subject-matter, and should be construed together, and when so construed the submission modified the conditions of the bond, to the extent that the whole merits of the case, including the injunction, should be decided by the arbitrators, and by the award this question was fully decided, and it matters not to this court whether it was decided right or wrong. It was just as competent for the parties to stop with the decision of the question by the arbitrators, as to stop with the decision of the common pleas court. A judgment need not be reviewed and passed upon by a higher court to make it binding. A release of errors and the right of appeal, while it cuts off the right of review in a higher court, does not invalidate or weaken the force of the judgment, even though it should appear upon looking into the judgment in a collateral proceeding, that there was error therein. The conditions of the bond have therefore been broken, and the contingency upon which the damages were to be paid has arisen. By the court agreed upon and selected by the parties —the arbitrators—it has been decided that the plaintiff had no cause of action against the defendant, and therein was included a decision that the injunction ought not to have been granted. This decision the railway company bound itself to stand to and perform, and it cannot now be heard to say, or even suggest, that there was error in that decision. As between the parties that decision is conclusive, and is a final determination of all their rights.

In none of the cases cited was there an agreement that the submission, award, and its performance, should not impair the liability of the plaintiff on the injunction bond, and for that reason those cases are not applicable here.

After the award of the arbitrators was made, the case was disposed of in the court of common pleas by the entry of the following judgment:

"This day came the parties by their attorneys, and by consent showed to the court that on the 11th day of July, 1888, the parties submitted all the facts and issues joined in the pleadings in this case to the arbitrament and award of James C. Carter, Esq., of New York, and E. W. Kittredge and Lawrence Maxwell, Jr., Esqs., of Cincinnati, Ohio, and that said arbitrators having heard the parties and their counsel and all the evidence that they had to submit in the case, and carefully and fully considered the same, did on the 17th day of September, 1888, award and decide that the plaintiff has no right to any relief from the defendants or either of them; that this suit be dismissed at plaintiff's costs, and the plaintiff be forever barred from hereafter prosecuting any other action against the defendants, or either of them, for any of the same causes of action. Thereupon the plaintiff, in pursuance of said submission and award, duly dismissed its said petition and action. By the agreement of the parties no record shall be made in said action, except at the request of some one of the parties and at the cost of the party requesting it, and by like agreement reference may be had and use made of the pleadings and journal entries and all other documents properly matter of record the same as if said proceedings were duly recorded, and thereupon, upon motion, it is ordered and adjudged that the injunction which was granted in this action while the same was pending in the court of common pleas of Franklin county be vacated, dissolved, and dismissed, and that the plaintiff pay the costs of this action and of all the proceedings in this action in this court and in the court of common pleas of Franklin county, and in default of payment execution issue."

It will be noticed by reading this final judgment entry, that the fact of submission and the result of the award were shown to the court by consent of the parties, that there was an agreement as to the final record and the use of the files in the case, that the dismissal of the action was by the plaintiff, in pursuance of the submission and award, that nothing appears in the entry as to whether the defendant consented to the dismissal or not, that the injunction was dissolved by the court on motion of defendant.

There are many cases which hold that if the case is settled or disposed of by agreement of the parties, an action on the injunction bond cannot be sustained, and a dismissal of the action by mutual consent of both parties may be included in the principle of such cases; but I doubt it. By the dismissal, the plaintiff concedes that he has no cause of action against the defendant, and where there is no cause of action there can be no cause for an injunction. The defendant, by consenting, agrees with the

plaintiff that there is no cause of action or cause for injunction in favor of the plaintiff against the defendant. The legal effect of such dismissal is therefore the equivalent of a determination by the court, upon the confession of the parties, that there existed no cause of action and that the injunction ought not to have been granted. To shield a plaintiff from an action on the bond, the dismissal must be in the nature of a compromise, and that fact must appear of record.

I think that, when closely examined, none of the cases conflict with this theory, and if any of them do I should refuse to follow them, because they cannot be sustained on principle.

But in the case under consideration it does not even appear that the dismissal was by consent or agreement of the parties. The record of the final judgment entry shows that the railway company itself dismissed the action. The reason that it gives for the dismissal is not that the defendants consented thereto, but it is "in pursuance of said submission and award." This is the only reason disclosed by the record, and we cannot look outside of the record for another or different reason. No consent of defendants to such dismissal is found in the submission or award. The submission is silent as to the dismissal, and the award directs the plaintiff to dismiss its action, and says nothing about the defendants consenting thereto, so that when the plaintiff dismissed its action, it did it, not because the defendants consented, but because the plaintiff had bound itself to stand to and perform said award, and this is expressed in the judgment entry, wherein plaintiff says that the dismissal is in pursuance of said submission and award. If the dismissal had been by reason of the consent of the defendants, that fact should and would have been stated in the judgment.

Suppose that upon a trial of the case to the court upon the merits, the court should find in favor of the defendant, and he should accept such decision in his favor and join with the plaintiff in putting on a journal entry dismissing the case. If the judgment entry in such case should recite that the court found the facts and equities in favor of the defendant, and that thereupon the plaintiff in pursuance of such findings dismissed his action, it could not be said that defendant consented to such dismissal, and that he was thereby precluded from sustaining an action on the injunction bond. Such construction of the record is not sustained by any of the cases cited, and is in conflict with all rules of construction as applied to judgments. The plain words of the judgment entry must be disregarded in order to extort therefrom a mutual consent of the parties to such dismissal.

The record, as well as the submission, shows that proceedings for the vacation of the temporary injunction were pending, and both parties agreed that these proceedings should not be pressed for hearing during the time to be occupied by the arbitration, and that thereafter the defendants might apply to the court for such order concerning said injunction as they might be entitled to. This clearly shows that the defendants were insisting upon the dissolution of the injunction. When a defendant is clamoring for the dissolution of an injunction against him, and the plaintiff seeing defeat staring him in the face, dismisses his action, it cannot in legal reason be said that such dismissal is consented to by defendant, in the sense that it is by mutual agreement of the parties. Such a dismissal, instead of being by consent of parties, is obtained by the force and vigor of defendant's motion, and the concession of the plaintiff that he has no cause of action. If it were otherwise, the defendant instead of clamoring for the dissolution of the injunction on his motion, would be compelled to withdraw his motion the moment that the plaintiff should propose to dismiss his case. The moting being withdrawn, the plaintiff might well refuse to dismiss. The motion being renewed, the proposal to dismiss would be renewed, and thus there would be a see sawing back and forth, *ad nauseam*. The sensible course would be to allow the defendant, by his motion, to drive the plaintiff to a dismissal of his action, or to a hearing of the motion as he might prefer, and award to the defendant the fruits of his effort, and not deprive him thereof by a strained construction not thought of by either of the parties. So much for the effect of the act of the railway company in dismissing its action "in pursuance of said submission and award."

The latter part of the judgment entry purports on its face to be the action of the court. It is in these words: "And thereupon upon motion, it is ordered and adjudged that the injunction which was granted in this action while the same was pending in the court of common pleas of Franklin county, be vacated, dissolved, and dismissed, and that plaintiff pay the costs of this action."

This is on the face of it, and by its very words and effect, a decision by the court vacating, dissolving, and dismissing the injunction; and by all the authorities this is held to be, in effect, deciding that the injunction ought not to have been granted. Such an order of the court is upon the merits of the injunction, and not as in *Krug* v. *Bishop*, 44 Ohio St. 221, cited in the opinion of the majority, where, as shown by the judgment entry, the dismissal was for the reason that the plaintiff refused to obey the order of the court requiring him to bring in new parties. In that case the judgment entry showed on its face that the dismissal was not upon the merits, while in this case the judgment entry shows that it was upon the merits.

The actions taken by the parties and by the court all take place before the judgment entry is prepared, and the judgment stands as a whole, and all therein expressed as having taken place at the same time. It cannot be held in construing judgments that what appears in the beginning or in the middle of the entry took place in point of time anterior to what appears in the latter part of the judgment entry. The judgment for costs at the end of the entry is, in point of time, as early as the appearance of the parties at the beginning, when the whole entry purports to be of the same day, as in this case.

A judgment is a unit. *Buckingham* v. *Commercial Bank*, 21 Ohio St. 131. As such unit the whole and every part takes effect at the same instant.

The dismissal by the plaintiff, and the dissolution of the injunction by the court, occurred at one and the same instant, and as a matter of legal construction it cannot be said that the dissolution of the injunction by the court was a useless act and determined nothing, nor that the temporary injunction perished with the dismissal of the action so that there was nothing to dissolve. As the dissolution of the injunction by the court was as early in point of time as the dismissal of the action by the plaintiff, it cannot be said that the dismissal had any effect whatever upon the injunction. The injunction was dissolved by the same act of the court and at the same moment of time that the dismissal by the plaintiff was made effective by leave of the court in permitting the dismissal.

The only dismissal of an action which a plaintiff has power to make, either in vacation or term time, without leave of the court, is a dismissal without prejudice. All other dismissals are required to be upon the merits, and upon the adjudication of the court. Rev. Stat. § 5314. The dismissal in question was not without prejudice, and was therefore upon the merits. The submission and award were upon the merits, and the dismissal was "in pursuance of said submission and award," and was therefore also upon the merits.

That the dismissal in question could not be made by plaintiff without the permission of the court seems to be conceded by the opinion of the majority when in speaking of the dismissal it is said: "In such case the defendant has an opportunity to insist that before the dismissal is had the court determine whether the injunction ought to have been granted, so that an action may be prosecuted on the bond." This may be true in theory, but in real practice, while a defendant might insist upon such a course, no court would stop to hear evidence for a day, an hour, or even a minute, in order to determine such question, upon or after a dismissal of the action by the plaintiff. The court would say in short order, that it would refuse to hear evidence or consider the question, but along with the dismissal by the plaintiff would dissolve the injunction, and that would show that it ought not to have been granted. It is safe to say that this is the universal course pursued by courts in such cases. The dissolution of the injunction in the judgment entry is all that has heretofore been required, and this is always taken as conclusive of the question that the injunction ought not to have been granted.

To depart from the old forms in this regard, and hold that a judgment of a court dissolving an injunction does not decide and determine that the injunction ought not to have been granted, is in the nature of judicial legislation on a vital point of practice. In rendering judgment upon a trial on the merits the usual form has always been to provide for a dissolution of the injunction after that part of the judgment entry which is in favor of the defendant on the merits. As well might it be held in such cases, as in this one, that the temporary injunction perished with the decision of the case on the merits in favor of the defendant, that there was nothing to dissolve, that the temporary injunction could not survive the decision of the merits, and that therefore the question as to whether the injunction ought to have been granted or not was left undetermined.

If a dissolution of an injunction by the court is a determination to the effect that the injunction ought not to have been granted as has heretofore always been held, then the record shows that at, not after, the dismissal by the plaintiff, the defendant "insisted" by his motion upon a dissolution of the injunction, and that the court sustained the defendant in his insisting, and dissolved, vacated, and dismissed the injunction, and thereby determined in the usual form that the injunction ought not to have been granted. And yet the railway company has so far successfully taken refuge behind the point that it has not been determined that the injunction ought not to have been granted; and when the adjudication of the court dissolving the injunction in the usual and ordinary form of adjudging the question is brought forward and insisted upon by the defendants in error, the adjudication and the record thereof are lightly swept aside, and the defendants in error are told that the adjudication, although correct in form, and upon the very point in question, "determined nothing," that the injunction "was a mere incident to the action and could not survive it." The defendants did not ask that the injunction should be held to survive the action, but only that as both the action and the injunction were ended at the same moment, and by the same judgment of the court, the same force and effect should be given to that part of the judgment which dissolved the injunction as to that part which permitted the dismissal of the action. A judgment is a unit, and equal force and effect should be given it as a whole and to every part thereof.

But as a final reason for disregarding the judgment of the court as to the dissolution of the injunction, it is said in the opinion that "it is averred in the answer and expressly admitted by the reply, that the court took no judicial action in the dissolution of the injunction." At first blush this would seem to be so, but a careful consideration of the answer and reply will show that they bear no such construction.

After setting out in its answer the said submission and award, the railway company says "that no proceedings were had upon said award except as follows: That on or about the 13th day of November, 1888, in pursuance of said award and by reason of the same adjudging that said plaintiff should dismiss its said action, as aforesaid, the following order was, by agreement of said parties and at the instance of said plaintiff, duly entered of record in said court of common pleas of Licking county, as and for the final entry in said action, the same being the order partially set forth in the petition in this action, to wit:" Then follows and is set out in full the final judgment entry as the same is hereinbefore set out. Then the answer states in substance that said order was made in consequence of said award and only for the purpose of carrying into effect the decision thereof that plaintiff should dismiss its said action; that the part of said order dissolving said injunction was added

merely for the formal dissolution of said injunction, which dissolution necessarily resulted from said dismissal of the action by the plaintiff, as incidental thereto, that said award was not submitted to the court was not passed upon by the court, and that the question as to whether or not said injunction was properly allowed was never in any way submitted to or considered by the court. To this answer thus containing a full copy of the final judgment entry, the plaintiff in that case replied as follows: "For reply to the answer of the railway company the plaintiffs admit that no special motion for the dissolution of the injunction was ever submitted to the court, and that there has been no adjudication of said court concerning said injunction since the making of said award, except as set out in said answer. And plaintiffs deny the other allegations in said answer not herein admitted to be true."

The copy of the judgment set out in the answer, and which could not be varied or changed by averment, admission, or proof, showed that the question as to the dissolution of the injunction was on motion ordered and adjudged, dissolved, vacated, and dismissed. This conclusively shows submission to, and consideration by the court, and that part of the answer which is to the contrary is not admitted by the reply, but is denied by the general denial at the end thereof. The general admissions in the reply are qualified by the words "except as set out in said answer." And in said answer we find set out the full judgment entry which shows that there was both a motion and an adjudication as to the injunction by the court. The judgment entry says that "upon motion it is ordered and adjudged that the injunction be dissolved." It could be ordered and adjudged by the court only. No one else could order and adjudge. Unless the record can be falsified and impeached, it must follow that the said ordering and adjudging was by the court and not by the parties.

The force and effect of such judgment cannot be cut down, enlarged, or in anywise changed by an averment or admission in a pleading, or proof upon the trial. Such is the uniform holding of courts as to the construction of judgments, statutes, and written instruments. Freem. Judgm. § 275, and cases there cited; Black. Judgm. § 276; *Kellogg* v. *Larkin*, 3 Pinney, 123, 56 Am. Dec. 164; *State, Fay*, v. *Archibald*, 52 Ohio St. 1.

This last case involved the construction of a statute in which it was claimed there was an error and mistake, and that the intention of the legislature was different from what appeared on the face of the statute. Averments to that effect were made in the petition, to which there was a demurrer. In the opinion appears the following: "The demurrer does not admit the truth of the allegation as to the error or mistake, nor as to the intention of the legislature." The syllabus concurred in by the whole court is as follows: "The force and legal effect of a statute cannot be altered or changed by averment in a pleading."

A judgment stands upon the same plane as a statute, and when the whole judgment is set out in a pleading its force and effect cannot be altered or changed by averment or admission in such pleading. In such case no averment or proof can give to a judgment a character which, on its face, it has not, and no admission can take from it the character which, on its face, it has. The force and legal effect must be determined by the judgment and record alone, unaided by averment, admission, or proof.

Again, to destroy the force and effect which this judgment has on its face, by saying that the court took no judicial action in the dissolution of the injunction, is to attack and impeach the judgment in a collateral proceeding, which it is well known cannot be done. The force and effect of the judgment are destroyed and brushed aside, not by a construction of its language, but by a collateral attack founded upon the claim that it is averred in the answer and admitted in the reply that the court took no judicial action on the dissolution of the injunction, while the copy of the judgment set out in the answer conclusively shows the contrary to be true. For these reasons, I think that the judgments of the courts below are right and should be affirmed.

Shauck, J., concurs in this dissenting opinion.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

William W. WRIGHT, Admr., etc., of Joseph Wright, Deceased.

(....Ohio.....)

*1. **Where during the trial of a civil action exceptions are taken** to a ruling of the court in respect to its charge to the jury, and such ruling is afterwards embodied in a motion for a new trial, which is overruled, the time (Rev. Stat. § 5301, 90 Ohio Laws, 203) within which a bill of exceptions may be taken, setting forth such action of the court, should be computed from the date when the motion for a new trial was overruled.

2. **In the absence of evidence on the subject, a child or youth of any given age should be held to that degree of intelligence** common to persons of his age. The circumstance that a boy of about the age of fourteen years is accustomed to perform labor, earn wages, and go to and from his work along the streets of a populous city, unattended, raises no presumption that he is more intelligent, or has greater capacity to discern and avoid danger, not connected with his occupation, than is common to other boys of the same age.

3. **Contributory negligence, to defeat a recovery for injuries received on account of the negligence of another,** should consist of some act or omission of the party himself, or of some third person to whom such party bore the relation of master or superior. One who, uninvited or without the knowl-

*Headnotes by the COURT.

NOTE.—As to the duty imposed on street railroad companies to avoid injuring children, see *note* to Wallace v. City & S. R. Co. (Or.) 25 L. R. A. 663; and as to injury by street car collision with a vehicle or horses, see *note* to Hicks v. Citizens' R. Co. (Mo.) 25 L. R. A. 508.

edge of the driver of a private vehicle, gets upon such vehicle for the purpose of riding, and rides thereon, does not thereby assume the relation of master or superior towards such driver; and therefore he is not chargeable with the negligence of the driver in driving or managing such vehicle.

(February 25, 1896.)

ERROR to the Circuit Court for Hamilton County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action to recover for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by **Bradbury**, J.:

Action by William W. Wright against the Cincinnati Street-Railway Company, in the superior court. This action was brought to recover damages sustained by reason of the death of his intestate, which death, he alleged, was caused by the negligence of plaintiff in error. The case was tried to a jury and resulted in a verdict and judgment in favor of plaintiff in error, defendant below. Proceedings in error were instituted in the circuit court of Hamilton county, where the judgment was reversed, and a new trial ordered in the superior court, on the ground that the latter court had erred in giving to the jury certain instructions requested by the defendant below, and in refusing to instruct the jury as requested by the plaintiff below; whereupon the cause was brought to this court by the street-railway company to obtain a reversal of the judgment of the circuit court.

Messrs. **Paxton, Warrington, & Boutet** and **Kittredge & Wilby** for plaintiff in error.

Messrs. **John W. Wolf** and **Thomas L. Michie**, for defendant in error:

Thorogood v. *Bryan*, 8 C. B. 115, has been repudiated in England where it originated.

Beach, Contrib. Neg. 2d ed. §§ 105–112; Shearm. & Redf. Neg. 4th ed. § 66; *Little* v. *Hackett*, 116 U. S. 366, 29 L. ed 652; *Covington Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *St. Clair Street R. Co.* v. *Eadie*, 43 Ohio St. 91.

It makes no difference whether the injured party was a passenger conveyed by a common carrier or riding in a private vehicle; and whether the intestate was on this truck with or without the permission of its driver could not affect the duty of the plaintiff in error to exercise due care in operating its car at a public street crossing.

Cleveland Rolling Mill Co. v. *Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385.

Bradbury, J., delivered the opinion of the court:

The circuit court reversed the judgment of the superior court, upon the ground that the latter court erred in instructing the jury as requested by the street-railway company, and in refusing to give certain instructions asked to be given by the administrator, plaintiff in that court. The plaintiff in error contends that the bill of exceptions taken to the rulings of the superior court was not perfected within the time prescribed by statute, and therefore, not being warranted by law, was inoperative, and gave no jurisdiction to the circuit court to hear the questions upon which it reversed the judgment of the superior court. It is conceded that this objection was not made in the circuit court, and for that reason contention is made that this court should not listen to it now. The general rule, doubtless, is for this court to disregard questions not made in the court whose judgment is under review. However, if the court whose judgment is under consideration was without jurisdiction over the subject-matter in contention, the rule does not apply, and that question may be raised here, although not brought to the attention of the lower court. Doubtless, an orderly course of procedure, and thorough fairness towards that court, would require the question of its jurisdiction to be made there in the first instance; but a failure to do so is not fatal to the right to contest the question here.

The exceptions to the ruling of the trial court in giving and refusing certain special instructions requested by the parties were made on the 8th day of February, 1894, the day that the jury were instructed. A motion for a new trial was filed February 10, 1894, including, among other grounds of error, the action of the court in giving and refusing to give the jury such special requests, which motion was overruled, and a judgment entered on the verdict on March 3, 1894. On April 17, following a period of forty-five days after the motion for a new trial had been overruled, and sixty-eight days from the day the exceptions were noted, the plaintiff below presented the bill of exceptions to the trial court for allowance; and the court then extended the time therefor ten days beyond the time allowed by statute, which was then fifty days; and on April 24, 1894, within the period of the ten-days extension, the bill of exceptions was signed, sealed, allowed, and ordered to be made a part of the record in the cause. This statement of the dates upon, and the order in, which the several material events occurred, show that the bill of exceptions was presented to the trial judge, for an extension of time for signing it, on the forty-fifth day from the overruling of the motion for a new trial, and the sixty-eighth from the day the charge was made and exceptions thereto noted; and it was signed by the judge seven days later.

The statute by its own force allows fifty days for perfecting a bill of exceptions, and provided it is presented to the trial judge at least five days before the fifty days have expired, he may allow ten days more for the purpose of signing the same. *Pugh* v. *State*, 51 Ohio St. 116. It is therefore apparent that the validity of the bill of exceptions in this case depends upon the event from which the computation of time shall be made. If from the overruling of a motion for a new trial, it is valid, because it was presented to the trial judge on the forty fifth day thereafter, that being at least five days before the expiration of the fifty days; the judge then extended for ten days the period for signing the same, which gave for that purpose a total of sixty days. On the seventh day after the extension was granted, or the fifty-second day from that on which the motion for a new trial was overruled, the bill of exceptions was signed by

him. If, however, the computation be made from the day on which the charge was given and the exception to it noted, then the application for an extension of time, and the subsequent signing of the bill of exceptions, were both too late; the former having been made sixty-eight days after, and the latter act occurring seventy-five days after, the exceptions had been noted. This court held in *Earp* v. *Pittsburg, Ft. W. & C. R. Co.* 12 Ohio St. 621, that a party who, on the trial of action, takes exceptions to the decision of the court upon the admission of testimony, and to the charges of the court to the jury, and has those exceptions reduced to writing, and signed by the judge, may allege error in a petition filed in the district court, without filing a motion for a new trial in the trial court upon those grounds. Doubtless, the law is the same now, for in this respect the existing statute is similar to the one then in force. Counsel contend that, because a motion for a new trial is not necessary to preserve the right to review a charge of the court, the time within which a bill of exceptions should be taken for that purpose begins to run from the day the charge was given. This contention would be sound in a case where a motion for a new trial was not made, and the party excepting chose to rely upon the exception taken during the course of the trial. The choice, however, is with him. By the express terms of § 5301, Rev. Stat., he may include these grounds of error in the motion for a new trial. The language of the "section referring to this matter is: Where "the exception is to the decision of the court on a motion . . . for a new trial for misdirection by the court to the jury, . . . the party excepting must reduce his exceptions to writing, and present them to the trial judge or judges for allowance within fifty days after the overruling of the motion for a new trial." The language of this section, we think, fully authorizes a party excepting to a charge of the court to include the alleged error in the motion for a new trial. It is just and reasonable to afford, by that means, an opportunity to the trial judge to review his rulings, which oftentimes must be made without access to authorities or time for deliberation; and, where this ground of error is included in the motion for a new trial, the time within which the bill of exceptions must be taken runs from the overruling of such motion. We are not aware of any holding of this court that can be construed as militating against these views. It follows, therefore, that the bill of exceptions was allowed and filed within the time allowed by law.

The bill of exceptions discloses that the intestate of the plaintiff below was a boy about fourteen years old, who had steady employment in a type foundry in Cincinnati, and was accustomed to go to and from his work unattended; that the deceased and two or three other boys, on the evening of the accident, just at dark, were riding along one of the public streets of Cincinnati on a four-wheeled dray, without the knowledge of the driver; that, while the boys were so riding, a street car of the defendant below collided with the dray, and thereby caused the death of the intestate. There was evidence tending to prove, and other evidence tending to rebut, negligence in running the street car, and in the driver of the dray contributing to the collision. The record, however, discloses no evidence of any act whatever done by deceased that contributed to produce the collision. Nor was there any evidence whatever of negligence on his part that contributed to his injury, unless the simple fact that he was riding in a private vehicle without the knowledge of the driver, along a public street, whereon the electric street railway was operated, and was killed by a collision between such vehicle and a street car, affords grounds from which contributory negligence might be inferred against him.

After the evidence had been introduced, the defendant below requested the court to give, and the court did give, to the jury over the objections of plaintiff below, the following special instructions:

"(I.) If you find that Joseph Wright was fourteen years old and upwards at the time of the accident, and was intrusted with the performance of work, so that he was earning ordinary wages of such a boy, and was accustomed to going without guidance or assistance of his parents to and from his place of business or employment, you may then find that he was chargeable with the responsibility of such age and discretion, and to the observance and performance of ordinary acts of care; that is to say, he was bound to know the danger, if there was danger, in riding upon the dray in the way described by the evidence, and especially the danger, if there was danger, that would be encountered in case of collision between the dray and any other vehicle or car when riding in such a position. And if you find that Joseph Wright, at the time of the accident, was sitting or riding upon the dray in question in a hazardous or dangerous position, then I charge you that it will be your duty to consider and determine whether he was guilty of contributory negligence; and, if you find he was, then the plaintiff cannot recover."

Conceding that the danger to be apprehended from the act of riding upon a dray along a public street of a populous city, upon which an electric railway was being operated, was so great that from such act alone negligence might be inferred against an adult person who should do so in the manner and at the time intestate did, nevertheless the degree of responsibility imposed by the foregoing proposition upon intestate was too high. We know of no rule of law that imposes upon a boy of fourteen who may go out to work, and earn wages, and go about the streets of a city unattended, a higher degree of care concerning his safety, than a boy of the same age and equal intelligence who, unattended, may go to and from school, or roam about the street unemployed. The record does not show any attempt to prove that the intestate was unusually bright and intelligent. There is no presumption that a boy who goes out to work for wages can discern danger more readily than one who does not. He may have been sent out to earn wages for the very reason that he was dull at his books, or from his own necessities or those of his parents. The subject is purely speculative. Doubtless, certain occu-

pations tend to quicken the preceptions and ripen the judgment. Whether any particular occupation has accomplished this end for a boy in any case is a question of fact for the determination of the jury, and not one of law to be decided by the court. The intestate, in the absence of proof that he was specially intelligent, was bound to no higher care respecting his personal safety than other boys of his age were accustomed to exercise under similar circumstances. *Cleveland Rolling Mill Co.* v. *Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385.

The plaintiff below requested the trial court to give the following proposition to the jury:

"(II.) If the jury believe from the evidence in this case that the plaintiff's intestate, Joseph Wright, was at the time he lost his life riding in the rear part of a wagon or dray driven by one Albert Kees, and that the said intestate, Joseph Wright, had nothing to do in any way with the driving, control, or management of said wagon or dray by said Kees, that then the negligence of said Kees, if any has been proved, in driving said vehicle across Elm street at the said intersection of Fifteenth street, cannot be imputed to the said intestate, so as to charge him with contributing to his own injury.

"(III.) The jury are instructed that if they believe from the evidence in this case that the plaintiff's intestate, Joseph Wright, while lawfully riding on a wagon or dray driven by Albert Kees across the intersection, was, on his (Joseph Wright's) part, killed by a collision between said wagon or dray on which he was then riding and one of the defendant's street cars, and that such collison was caused by the negligence of the defendant, its agents or servants, in running its street cars at and across the public crossing at the intersection of Elm and Fifteenth streets, then the defendant is liable to the plaintiff in this action. If the jury should find that such collision, under the circumstances stated above, killed the plaintiff's intestate, Joseph Wright, without any negligence on the part of the said intestate, and was caused by the joint and concurring negligence of the defendant, its agents or servants in charge of the street car, and of the driver of the wagon or dray on which the said intestate was then riding, that then the defendant, the Cincinnati Street-Railway Company, is liable to the defendant in this action."

The court declined to submit this proposition to the jury, which ruling the circuit court held to be erroneous.

In *Thorogood* v. *Bryan*, 8 C. B. 115, the court held that one who took passage in an omnibus, and was injured by the concurring negligence of the driver of the vehicle in which he was riding and of the driver of another omnibus, could not recover on the ground that by selecting the omnibus in which he made his journey he became identified with it, Coltman, J., saying: "The passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense" for an injury caused to such passenger by the carelessness of the driver of another carriage. This case was the progenitor of this branch of the doctrine of imputed negligence. It seems impossible to maintain the doctrine as announced by that case except by assuming that the party injured, by selecting the vehicle in which he was riding, made its driver his servant. This notion was expressly repudiated in 1887, by the English court of appeals, and the case of *Thorogood* v. *Bryan* overruled in *The Bernina*, L. R. 12 Prob. Div. 58, Lord Esher saying (Id. 68): "In truth the judgments in *Thorogood* v. *Bryan* all amount to saying that by what the plaintiff did [taking passage in an omnibus], he made the driver his agent so as to be liable for his acts, as if he [the plaintiff], had himself done those acts. But if he did make him his agent at all, he must in consistency not only be by reason of such liability deprived of his remedy against third persons, but must be affirmatively liable to third persons. In truth the driver in the case is not the servant or the agent of the passenger, and has not even any one of the attributes which are evidence of being even like a servant or agent." This later view of the doctrine of imputed negligence has been adopted in this state. *Covington Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *St. Clair Street R. Co.* v. *Eadie*, 43 Ohio St. 91; *Davis* v. *Guarnieri*, 45 Ohio St. 470; *Cleveland, C. C. & I. R. Co.* v. *Manson*, 30 Ohio St. 451; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175. The same view of the question was adopted by the Supreme Court of the United States in *Little* v. *Hackett*, 116 U. S. 366, 29 L. ed. 652, and the doctrine of the case of *Thorogood* v. *Bryan* repudiated upon the ground that contributory negligence to defeat a recovery must be that of the party injured, or of some one to whom he stood in the relation of master or superior, and that such relation did not exist between the driver of a public hackney coach and one who hired it for driving about a city for recreation and pleasure In the course of his opinion, Justice Field says: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the neglience or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it." This, we think, places the doctrine of contributory negligence upon a sound foundation. In order that it shall operate to defeat a recovery, it should be some act or omission of the party himself, or of some one towards whom he stood in the relation of master or superior. 1 Shearm. & Redf. Neg. 66. The driver of a private vehicle, upon which another may be riding, with-

out the driver's knowledge, is in no proper sense the servant or agent of the latter. The relation of the person so riding may be that of a trespasser to the owner of the vehicle, or even to the driver; but he is in no sense of the term the master or superior of the driver. Nor is the act of such character that on account of it he should be denied a remedy for injuries sustained by the negligence of another.

The intestate in this case, even if he was, without the knowledge of the driver, riding upon a wagon or dray along the streets of Cincinnati, did not thereby violate any duty he owed to the street railway company. It was a matter affecting himself, on one side, and the owner or driver of the vehicle, on the other. Whether the latter had some just grounds of complaint or not, did not concern the street-railway company. True, it is possible that the driver might have used greater care than he did had he known the intestate was on the vehicle. That, however, is purely speculative, and therefore too uncertain to become a predicate for affecting the respective rights of the parties. However, if it should be conceded that the driver would have been more careful if he had known the boy was on the dray, no principle is apparent by which the street railway company could be relieved. The basis of its liability is its own wrongful conduct; and in such case we have seen its only way of escaping from the consequences of this wrongful conduct is through some wrongful contributory act or omission of the injured person himself, or by some one to whom he bore the relation of master or superior; and that relation is not created by the simple act of boarding a private vehicle without the knowledge of the driver.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.* Fred. G. EINSFELD, *Appt.*,
v.
Joseph MURRAY *et al.*, Commissioners of Excise, *Respts.*

(149 N. Y. 367.)

1. **The restriction on appropriations of public moneys for local purposes** without the assent of two thirds of the members elected to each branch of the legislature, made by Const. art. 3, § 20, is not violated by the act of March 3, 1896, giving two thirds of the excise taxes thereby imposed to the towns and cities in which they are raised, since such funds, which never reach the state treasury, have by long course of legislation been treated like revenues levied for local purposes, and not as public moneys of the state within the meaning of that constitutional provision.

2. **A statute exacting the payment of a sum called a tax,** and also the giving of a bond, as conditions precedent to the right to engage in the sale of intoxicating liquors, is an exercise of the police power, rather than a tax law in the proper sense.

3. **A general state excise law, although it graduates excise taxes in cities** according to their population, but does not follow the classification of cities in the Constitution, is not a general or special city law, and does not relate to the "property, affairs, or government" of cities, so as to bring it within the provisions of Const. art. 12, § 2, respecting the classification of cities and the reference of special city laws to the mayors of the cities affected thereby.

(May 26, 1896.)

APPEAL by relator from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for the City of New York dismissing a writ of certiorari to review proceedings of defendants refusing to grant relator a license to sell intoxicating liquor. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Joseph H. Choate, Samuel Untermyer, Louis Marshall,** and **Ashbel P. Fitch,** for appellant:

The act under consideration is a taxing law as distinguished from an act licensing the liquor traffic.

Adler v. *Whitbeck*, 44 Ohio St. 539; *Anderson* v. *Brewster*, Id. 576; *Youngblood* v. *Sexton*, 32 Mich. 406, 20 Am. Rep. 654; Cooley, Taxn. chap. 18.

The act is unconstitutional because it was passed in violation of N. Y. Const. art. 3, § 20.

The act appropriates money.

State v. *Bordelon*, 6 La. Ann. 68; *State, Campbell*, v. *Steele*, 37 La. Ann. 353; *People, McCauley*, v. *Brooks*, 16 Cal. 11; *Carr* v. *State, Coetlosquet*, 127 Ind. 204, 11 L. R. A. 370; *Ristine* v. *State, Sinking Fund Comrs.*, 20 Ind. 328; *Campbell* v. *State Soldiers & S. Monument Comrs.* 115 Ind. 591; *Sweet* v. *Syracuse*, 129 N. Y. 316.

The act appropriates public moneys.

Phelps v. *People*, 72 N. Y. 334; *Exempt Firemen's Benev. Fund* v. *Roome*, 93 N. Y. 313; *Sweet* v. *Syracuse, supra; Rumsey* v. *New York & N. E. R. Co.* 130 N. Y. 88; *Seneca County Supers.* v. *Allen*, 99 N. Y. 532; *Richland County* v. *Richland Center*, 59 Wis. 591; *Rock County* v. *Edgerton*, 90 Wis. 288; *People, Adsit*, v. *Allen*, 42 N. Y. 378; *People* v. *Fitch*, 148 N. Y. 71; *Maxmilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Metropolitan Bd. of Excise* v. *Berrie*, 34 N. Y. 662; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People, Presmeyer*, v. *Brooklyn Police & E. Comrs.* 59 N. Y. 96.

NOTE.—For a division of license taxes between the state and counties as affected by a different constitutional provision, see State v. Camp Sing (Mont.) *post*, —.

For the general question as to public purposes for which money may be appropriated or raised by taxation, see *note* to Daggett v. Colgan (Cal.) 14 L. R. A. 474; also Waterloo Woolen Mfg. Co. v. Shanahan (N. Y.) 14 L. R. A. 481; Bourn v. Hart (Cal.) 15 L. R. A. 431; Patty v. Colgan (Cal.) 18 L. R. A. 744 Conlin v. San Francisco (Cal.) 21 L. R. A. 474.

See also 32 L. R. A. 635.

The act appropriates moneys for local purposes.

People, Adsit, v. *Allen, supra; People, Purdy*, v. *Marlborough Highway Comrs.* 54 N. Y. 276; *People, Lee*, v. *Chautauqua County Supers.* 43 N. Y. 10.

The unconstitutionality of § 13 avoids the whole statute.

People, Purdy, v. *Marlborough Highway Comrs. supra; Pollock* v. *Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108; *Warren* v. *Charlestown*, 2 Gray, 84; *Poindexter* v. *Greenhow*, 114 U. S. 279, 29 L. ed. 185; *Spraigue* v. *Thompson*, 118 U. S. 90, 30 L. ed. 115; *Lawton* v. *Steele*, 119 N. Y. 241, 7 L. R. A. 134; *Slauson* v. *Racine*, 13 Wis. 398; *Jones* v. *Jones*, 104 N. Y. 234; *People* v. *Allen*, 42 N. Y. 404; *People, Wood*, v. *Draper*, 15 N. Y. 540; *State* v. *Dousman*, 28 Wis. 541; *Reed* v. *Omnibus R. Co.* 33 Cal. 212; *State* v. *Pugh*, 43 Ohio St. 124; *People, Miller*, v. *Cooper*, 83 Ill. 585.

The act is also unconstitutional because § 11, which fixes the excise taxes upon the business of trafficking in liquors, creates a classification of cities at variance with that created by N. Y. Const. art. 12, § 2.

Re New York Elev. R. Co. 70 N. Y. 327; *Treanor* v. *Eichhorn*, 74 Hun, 58; *Re Church*, 92 N. Y. 1; *Re East River Bridge Co.* 75 Hun, 122; *People, Henderson*, v. *Westchester County Supers.* 147 N. Y. 130 L. R. A. 74; *Worcester Nat. Bank* v. *Cheney*, 94 Ill. 430; *State, Atty. Gen.*, v. *Anderson*, 45 Ohio St. 247; *Ayar's Appeal*, 122 Pa. 266, 2 L. R. A. 577; *State, Richards*, v. *Hammer*, 42 N. J. L. 435; *State, Anderson*, v. *Trenton*, Id. 486; *State, Goldberg*, v. *Dorland*, 56 N. J. L. 364; *State, Alexander*, v. *Elizabeth*, Id. 71, 23 L. R. A. 525.

The act is likewise unconstitutional because it has not been submitted to the several cities affected by its provisions as required by the cities article.

State, Sutterly, v. *Camden County Common Pleas Ct.* 41 N. J. L. 495; *People* v. *Central P. R. Co.* 83 Cal. 393; *Pasadena* v. *Stimson*, 91 Cal. 239; *Desmond* v. *Dunn*, 55 Cal. 242; *State, Atty. Gen.*, v. *Anderson, supra.*

The act is likewise unconstitutional because it is a tax law, and imposes upon different individuals engaged in the same class of traffic taxation which is not uniform throughout the state, and makes such taxes a lien on the property of the person carrying on the traffic.

Exchange Bank v. *Hines*, 3 Ohio St. 1; *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 675, 22 L. ed. 232; *United States* v. *Singer*, 82 U. S. 15 Wall. 111, 21 L. ed. 49; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 592, 39 L. ed. 823; *Senior* v. *Ratterman*, 44 Ohio St. 661; *People, Bolton*, v. *Albertson*, 55 N. Y. 50; Cooley, Const. Lim. 6th ed. pp. 206, 207; *Curtis* v. *Whipple*, 24 Wis. 356; *Tyson* v. *Halifax Twp. School Directors*, 51 Pa. 9; *Freeland* v. *Hastings*, 10 Allen, 570; *Opinion of the Judges*, 58 Me. 590; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; Cooley, Taxn. 169, 170; *Nashville* v. *Althrop*, 5 Coldw. 554; *Gordon* v. *Cornes*, 47 N. Y. 612; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 Am. Rep. 86; *Rockwell* v. *Nearing*, 35 N. Y. 302.

The act is also unconstitutional because it denies to persons within the jurisdiction of the state "the equal protection of the laws."

Williams v. *People*, 24 N. Y. 405; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

The act is unconstitutional because by § 23 it prohibits persons from trafficking in liquors who are nonresidents of the state of New York, and likewise prohibits any copartnership from trafficking unless one or more members owning at least a one half interest in the business are residents of the state.

Walling v. *Michigan*, 116 U. S. 446, 29 L. ed. 691.

Mr. **T. E. Hancock,** for respondents:

The act did not require the assent of two thirds of the members of the legislature, and was not a bill appropriating public moneys or property for local or private purposes.

Metropolitan Bd. of Excise v. *Barrie*, 34 N. Y. 662; *People, Williams*, v. *Dayton*, 55 N. Y. 367; *Fort* v. *Burch*, 6 Barb. 73; *People* v. *Quigg*, 59 N. Y. 86; *Power* v. *Athens*, 99 N. Y. 602; *People, Presmeyer*, v. *Brooklyn Police & E. Comrs.* 59 N. Y. 96; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *Seneca County Supers.* v. *Allen*, 99 N. Y. 532; *People* v. *Alden*, 112 N. Y. 121.

The act in question is an assertion of the ordinary police power of the state, and in no manner conflicts with the Constitution of the United States.

License Cases, 46 U. S. 5 How. 504, 12 L. ed. 256; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Mugler* v. *Kansas*, 123 U. S. 627, 31 L. ed. 205; Cooley, Const. Lim. 6th ed. 716; *Re Hoover*, 30 Fed. Rep. 51; *Walton* v. *State*, 62 Ala. 197; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Metropolitan Bd. of Excise* v. *Barrie*, 34 N. Y. 657; *Block* v. *Jacksonville*, 36 Ill. 301; *Com.* v. *Brennan*, 103 Mass. 70; *Calder* v. *Kurby*, 5 Gray, 597; *Wynehamer* v. *People*, 13 N. Y. 378; *Com.* v. *Certain Intoxicating Liquors*, 115 Mass. 153; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

The alleged inequality of punishments for violating certain provisions of the law is in no way in contravention either of the state Constitution or of the Constitution of the United States.

Re Bayard, 25 Hun, 546; *Williams* v. *People*, 24 N. Y. 405; *People* v. *Havnor, supra.*

It is undoubtedly within the police powers of the legislature and the state to prohibit certain persons from trafficking in liquors in this state, and it should be borne in mind that no person has a natural right to retail spirituous liquors to be used as a beverage.

Adler v. *Whitbeck*, 44 Ohio St. 539; *Meyers* v. *Baker*, 120 Ill. 567, 60 Am. Rep. 580; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Sarris* v. *Com.* 83 Ky. 327; *State* v. *Duggan*, 15 R. I. 403; *Crowley* v. *Cristensen*, 137 U. S. 86, 34 L. ed. 620; *Re Hoover*, 30 Fed. Rep. 51; Black, Intoxicating Liquors, § 117; Cooley, Const. Lim. 6th ed. p. 587; *Genet* v. *Brooklyn*, 99 N. Y. 307; *People* v. *Fitch*, 148 N. Y. 71; *People, Griffin*, v. *Brooklyn*, 4 N. Y. 426, 55 Am. Dec. 266; *Gordon* v. *Cornes*, 47 N. Y. 611;

Guilford v. *Chenango County Supers.* 13 N. Y. 143; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

The restrictions upon the issuance of tax certificates, which are contained in § 23 of the law, do not conflict with either § 2 of art. 4, or § 1 of art. 14, of the Constitution of the United States.

Mugler v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Austin* v. *State*, 10 Mo. 591; *Kohn* v. *Melcher*, 29 Fed. Rep. 433; *Welsh* v. *State*, 126 Ind. 71, 9 L. R. A. 664; *Mette* v. *McGuckin*, 18 Neb. 323.

It was not necessary to submit the bill to the cities of the state for their approval and acceptance.

Metropolitan Bd. of Excise v. *Barrie*, 34 N. Y. 657; Sedgw. Stat. & Const. L. 2d ed. 409.

Mr. **Julius N. Mayer,** also for respondents:

The statute is a licensing law. It is an exercise of the police power of the state. It permits the conduct of a traffic which, without such permission, it declares unlawful. It taxes the privilege of trafficking in liquor, and does not tax the liquor itself. It does not tax property. The excise taxes need not be uniform.

Leavenworth v. *Booth*, 15 Kan. 627; *State* v. *Hipp*, 38 Ohio St. 199; *Butzman* v. *Whitbeck*, 42 Ohio St. 223; *King* v. *Cappellar*, Id. 218; *State* v. *Sinks*, Id. 345; *Pleuler* v. *State*, 11 Neb. 547; *Chilvers* v. *People*, 11 Mich. 43; *Youngblood* v. *Sexton*, 32 Mich. 419, 20 Am. Rep. 654; *Adler* v. *Whitbeck*, 44 Ohio St. 559; *Metropolitan Bd. of Excise* v. *Barrie*, 34 N. Y. 657.

A law taxing liquor dealers within 5 miles of a town at one price, and liquor dealers at wayside inns at a less price, was held not invalid for lack of uniformity.

Territory v. *Connell* (Ariz.) 16 Pac. 209.

The court recently decided that a law which made it a crime to do an act in one part of the state and sanctioned it in another was constitutional within the police power of the state.

People v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

With the wisdom of a law the court has no concern. Its inquiry is addressed solely to its constitutionality.

Bertholf v. *O'Reilly*, 74 N. Y. 516, 30 Am. Rep. 323.

The classification in the bill is not repugnant to the Constitution.

It was not necessary to submit the bill to the mayors of the cities of the first class.

Re New York Elev. R. Co. 70 N. Y. 327; *Re Church*, 92 N. Y. 1; *Tonnele* v. *Hall*, 4 N. Y. 140; *District Twp. of Dubuque* v. *Dubuque*, 7 Iowa, 262.

The liquor tax law is a general or state law, and not a compilation or classification of special laws.

People v. *Havnor, supra; Williams* v. *People*, 24 N. Y. 405; *Re Bayard*, 25 Hun, 546.

Local option has been repeatedly declared to be constitutional.

Weil v. *Calhoun*, 25 Fed. Rep. 865; *State* v. *Parker*, 26 Vt. 357; *Gloversville* v. *Howell*, 70 N. Y. 287; *State, Sandford*, v. *Morris County Common Pleas Ct.* 36 N. J. L. 72; *State, Maggard*, v. *Pond*, 93 Mo. 606; *Feek* v. *Bloomingdale Twp. Bd.* 82 Mich. 393, 10 L. R. A. 69; Black, Intoxicating Liquors, § 45; *State, Atty. Gen.*, v. *Anderson*, 44 Ohio St. 247; *McGill* v. *State*, 34 Ohio St. 270; *Scranton School Dist.'s Appeal*, 113 Pa. 176; Pa. Pub. Laws 1889, 133, § 1.

Two thirds of the excise taxes to be collected under the act are not public moneys of the state, and the provisions of § 13 are not in contravention of N. Y. Const. art. 3, § 20.

Ristine v. *State, Sinking Fund Comrs.*, 20 Ind. 338; *State* v. *Bordelon*, 6 La. Ann. 69; *Carr* v. *State*, 127 Ind. 204, 11 L. R. A. 370; *Campbell* v. *State Soldiers & S. Monument Comrs.* 115 Ind. 591; *People, McCauley*, v. *Brooks*, 16 Cal. 11.

Andrews, Ch. J., delivered the opinion of the court:

The sole question involved in this appeal is the constitutionality of the act of the legislature, approved March 23, 1896, entitled "An Act in Relation to the Traffic in Liquors and for the Taxation and Regulation of the Same and to Provide for Local Option." The constitutionality of the act is assailed on three principal grounds: (1) That it appropriates the public moneys or property of the state to private and local purposes, and not having been passed by a two-thirds vote of the legislature, is void under art. 3, § 20, of the state Constitution; (2) that section 11 of the act, which fixes the excise tax upon the business of trafficking in liquors, creates a classification of cities at variance with that created by art. 12, § 2, of the Constitution; (3) that the act is a special city law as to each of the cities of the state, which, under art. 12, § 2, of the Constitution, was required to be submitted to the mayor for acceptance or rejection before final enactment. These questions are considered in the opinion of the appellate division of the first department in the decision from which the appeal is taken. We concur in the conclusions reached, and can add but little to the very cogent and satisfactory opinion of Judge Patterson in the case. We shall, however, in view of the great public interest in the subject, make some observations upon the several questions in the order in which they have been stated.

First. Art. 3, § 20, of the Constitution prescribes: "The assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." It is insisted that § 13 of the act of 1896, which provides that one third of the revenues derived under the act, less the amount allowed for collecting the same, shall be paid to the treasurer of the state to the credit of the general fund, as a part of the general tax revenue of the state, and that the "remaining two thirds thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which the revenues were received, and shall be paid by the county treasurer of such county and by the special deputy commissioners to the supervisor of such town or to the treasurer or fiscal officer of such city, and such revenues shall be appropriated and expended by such town or city in such manner

as is now or may hereafter be provided by law for the appropriation and expenditure of sums received for excise licenses, or in such other manner as may hereafter be provided by law," is in contravention of this section of the Constitution as respects the disposition made by the act of two thirds of the revenue to town and city purposes. This latter clause, it is insisted, is an appropriation of public money to local purposes within this section of the Constitution, and it being conceded that the act did not receive a two-thirds vote of the members of the legislature, if the claim is well founded the 13th section of the act, so far as relates to two thirds of the revenues, is unconstitutional and void. The appropriation of this part of the excise tax revenues is, without doubt, for a local purpose within art. 3, § 20, of the Constitution. The fact that the purpose for which an appropriation is made is public does not withdraw it from the inhibition of the section if the purpose is also local. An act may be local, although public. Church, Ch. J., *Kerrigan* v. *Force*, 68 N. Y. 381; *People* v. *Allen*, 42 N. Y. 378. The crucial question, therefore, is whether the act of 1896 is, within the section, an appropriation of public moneys. This provision of the present Constitution was in the Constitution of 1821, and has ever since formed a part of the organic law of the state. Section 13 of the act of 1896, after fixing the rule of distribution of the excise taxes as between the state and the cities and towns, prescribes that the revenues received by the cities and towns shall be appropriated and expended for the purposes to which the excise moneys are applied under existing laws. The excise law of 1892, which was in force up to the passage of the act of 1896, under which all excise moneys were paid over to the several towns or cities in which licenses were granted and in which the license moneys were received, declared in substance that the moneys should be applied towards defraying the expenses of local government therein. Laws 1882, chap. 401, § 15.

Under the act of 1896, which in effect incorporates into the 13th section this provision of the act of 1892, the same application is to be made of the excise taxes received by the cities and towns, as was prescribed by the act of 1892 in respect to license fees collected under that act. Upon the point whether two thirds of the traffic taxes imposed by the act of 1896, and which the 13th section declares shall belong to the town or city where the traffic is carried on, are public moneys within art. 3, § 20, of the Constitution, it is important to notice that although this section has been since 1821 a part of the Constitution of the state, excise moneys collected during that whole period have been appropriated under a general law of the state exclusively to the localities where the licenses were granted to be applied to diminish local taxation or to some purpose of local charity. Indeed, this has been the uniform policy of the state in respect of the disposition of excise moneys derived from the traffic in liquors from the foundation of the state government. By the earliest excise law of the state (Laws 1779, chap. 17) the excise commissioners were directed to pay the excise moneys collected in each county to the county treasurer, to be applied towards defraying the contingent expenses of the county. The system of appointing commissioners of excise has not been uniform. Under the Colonial act (Laws 1775, chap. 54) they were designated by name in each of the localities. The act of 1779 designated certain officials to act as commissioners. Since that time county boards of excise have been created, as under the act of 1857, and subsequently town and city boards were substituted. Under the county system the excise moneys were paid to the counties, and under the system of town and city boards to the towns and cities in which the licenses were issued. But, notwithstanding many changes from time to time have been made in the details of the excise system, there has, for a century of the state government and up to the act of 1896, been one uniform policy recognized by the legislature, namely, that moneys received for licenses for the liquor traffic should be paid over to the localities of the state in which the licenses were granted, to be applied to some object of local government or interest.

Under the former license laws large sums have been collected annually in cities, villages, and towns. In a strict and accurate sense they were public moneys. No exaction can be lawfully made of a citizen by way of tax, impost, or excise, except under the authority of the legislature, and the product of such imposition is public money. But there is a well-settled distinction between the money of the state and money levied under corporate powers conferred upon cities, villages, and towns for local and corporate purposes. In the latter case the money levied and collected is not the money of the state. It is the money of the town, city, or village in which under the exercise of corporate powers it was levied and collected, and to it the state has no title. *People* v. *Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *Shepherd's Fold* v. *New York*, 96 N. Y. 138. In every city or village charter the power of local taxation for municipal purposes is conferred with authority to appropriate the money raised to purposes of local government. This, in a general sense, is an appropriation of public moneys to local purposes, but it has never been supposed that it was an appropriation within the meaning of art. 3, § 20, of the Constitution, so as to require a two-thirds vote to pass a bill granting a city or village charter. The former excise laws stood upon a different basis from the charter laws of cities and villages. They were general laws applicable to the whole state, establishing a system for the regulation of the traffic in liquors, varying in some respects in their application in cities and towns. The system was administered through boards of excise, sometimes, as we have seen, appointed directly by the legislature, but generally elected in towns, with jurisdiction to grant licenses in the town for which they were elected, and in cities, appointed by local authorities. The excise commissioners, although locally elected or appointed, were state agencies for administering the excise system, and, like assessors, collectors, and highway commissioners, were independent public officers, exercising public powers, and charged with public duties specially prescribed by law. *Lorillard* v. *Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *People, Van Keuren*, v. *Esopus Town Aud-*

itors, 74 N. Y. 310. In granting licenses they were not exercising a jurisdiction as agents of the corporation within which they acted, for the granting of licenses for the traffic in liquor was not a power vested in towns, villages, or cities. They exercised their functions under the authority of the state, which prescribed their powers and duties, and the mode of their appointment was a convenient method for designating the agencies through which the system should be administered.

We assent to the claim of the counsel for the appellant that the towns, cities, and villages never acquired any irrevocable right to receive the license fees collected. We do not doubt that it would have been competent for the legislature from the first to have required all license fees to be paid into the state treasury for general state purposes, or at any time to have changed the practice which was adopted. The reason for the legislative policy which has hitherto uniformly prevailed, to permit license fees to be applied to the uses of the locality where the traffic was licensed and carried on, is obvious, namely, to furnish some measure of indemnity against the public burdens thrown upon localities by the prosecution of a business therein under state authority, powerfully contributing to disorder, pauperism, and crime. Seventy-five years have elapsed since the constitutional provision now in question first became part of the organic law, and during that long period this practice, under statutes which concededly were enacted without a two thirds vote, has prevailed, and has never hitherto been challenged as a violation of the Constitution. Those statutes as distinctly appropriated public moneys to local purposes as does the statute of 1896, and were even more subject to the constitutional criticism made to the act of 1896, since they appropriated to the use of the cities and towns not a part only, but the whole of the excise moneys collected. This legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts and acquiesced in by all departments of the state government, is a practical construction of the constitutional provision now in question, that an appropriation of excise moneys to the use of towns and cities under acts passed by a majority vote, is not an infraction of the Constitution, and this construction ought not now to be disturbed.

We also assent to the proposition that the provisions of the former excise laws under which excise moneys were paid over to localities, constituted appropriations of public moneys. But the public moneys referred to in article 3, § 20, of the Constitution, are the public moneys of the state as contradistinguished from public revenues levied for local purposes by towns, cities, and villages under state authority, or moneys which by a long course of legislation, as in the case of excise moneys, have been treated as standing in the same situation.

The act of 1896, also, we think, appropriates to the towns and cities the two thirds of the excise taxes which may be collected under the act. But it is an appropriation which operates on the fund at the very moment of its collection. The two thirds so appropriated never reaches the treasury of the state and never bears the impress of state money. The statute declares in express terms that two thirds of the fund collected "shall belong to the town or city in which the traffic was carried on, from which the revenues were received." It was competent for the legislature so to declare by a majority bill, unless there is a distinction between excise money under former statutes and excise taxes under the act of 1896, which would justify such an appropriation in the one case but not in the other.

We think no such distinction exists. The claim that the act of 1896 is a tax law, having for its primary purpose the raising of revenue for the support of government, involves the theory that the legislature in enacting it intended to depart from the principle upon which all excise laws have hitherto been founded. That principle has been by exaction and restriction to limit a dangerous traffic in the interests of social order and the public welfare. It is probably competent for the legislature to tax occupations or business as a source of revenue, and it could tax the liquor traffic for this purpose. The selection of the subjects of taxation rests with the legislature, and the imposition of a license fee for revenue on a business or occupation is an exercise of the power of taxation. *License Tax Cases*, 72 U. S. 5 Wall. 462, 18 L. ed. 497; Cooley, Const. Lim. 201. But an exaction imposed as a condition of the right to carry on a business dangerous to public morals, or which may involve public burdens by way of discouragement or regulation, is not in any proper sense a tax. It does not proceed upon the principle upon which taxes are levied, and upon which taxation is justified, *viz.*, the protection afforded by the government to the taxpayer. The imposition is made in such cases generally for a double purpose, to discourage the business and to secure indemnity in part to the public from the losses and burdens which the business is likely to entail. The so-called excise tax is for the protection of the community and not for the protection of the person from whom it is exacted. It is said by Judge Cooley, in his work on Taxation, p. 397, that "custom has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation." There can be no doubt that a large revenue will result from excise taxes imposed by the act of 1896, nor that this was contemplated by the legislature. But this will be a consequence of the system, and was not the motive of its adoption. It was manifestly not the intention of the legislature to encourage the traffic, but to control, restrict, and regulate it, and by the local option provision it is rendered possible that it may be wholly prohibited in every town of the state, a provision quite inconsistent with a purpose to encourage the traffic or to make it an ordinary source of revenue. The fact that the exaction is in the act denominated a tax is not conclusive. All exactions imposed upon citizens by public authority are in a general sense taxes, whether imposed for regulation or revenue. The character of the act of 1896, whether a tax law in a proper sense, or a law enacted under the police power, must be determined from its whole scope and tenor, and there can be no reasonable doubt, we

think, that it is of the latter character. It is radically different in some respects from the excise laws which it supersedes. But the changes are in the administration of the excise system, and not in its essential character. The most noticeable changes are: (1) state supervision in place of supervision through boards of excise, and (2) the opening of the traffic to all citizens (with certain exceptions) who shall pay the license tax and give the bond required. The payment of the tax and the giving of the bond are conditions precedent to the right to engage in the business, and the imposition of conditions precedent is the distinguishing test of a license law. See Cooley, J., *Younyblood* v. *Sexton*, 32 Mich. 406, 20 Am. Rep. 654; Marshall, J., *Adler* v. *Whitbeck*, 44 Ohio St. 539. The analogy between the law of 1896 and the former excise laws is strongly marked. There is the same necessity of a public certification of a right to engage in the traffic; the same restrictions and regulations intended to guard the traffic and reasonably protect the public against its acknowledged evils; the same principle of local option; and the act incorporates the principle of the civil damage law. The new features of the system may prove to be efficient means of repression and regulation, such as the change in the administrative agencies, and the much larger tax upon the right to engage in the traffic.

We do not deem it important to consider how far the legislature may go in alienating the public revenues derived from the exercise of the ordinary power of taxation to local or private purposes, or in barring itself from a resort to the usual sources of taxation. Clearly it cannot appropriate the public moneys of the state for a local though public purpose, except by a two-thirds bill, and this whether the money is actually in the treasury of the state or in process of collection. But the legislative declaration in the act of 1896, that two thirds of the excise taxes shall belong to the towns and cities, is in accordance with an uninterrupted legislative understanding that the legislature may devote excise moneys to the uses of the towns and cities in which they are collected, by majority bill, and it is now too late to question this construction of the Constitution.

Second. We perceive no force in the objection based upon the departure in the act of 1896 from the classification of cities made by art. 12, § 2, of the Constitution. The section is new and its manifest purpose is to give some measure of protection to cities against the evils of special city legislation. It divides the cities of the state into three classes according to population, the first class embracing cities having a population of 250,000 or more; the second, those having a population of 50,000 and less than 250,000; and the third, all other cities. The section then proceeds: "Laws relating to the property, affairs, or government of cities and the several departments thereof are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city or to less than all the cities of a class." Then follow provisions for the transmission of a copy of every special city law after it has passed both branches of the legislature, to the mayor of the city for approval or rejection, before its final enactment and for subsequent action by the legislature in case of disapproval. The law of 1896 in fixing the excise taxes graduates them in cities according to population, but does not follow the classification in this section of the Constitution. More is exacted in New York than in Brooklyn or Buffalo, and more in Brooklyn than in Buffalo, although these cities are cities of the first class in the classification in art. 12, § 2.

The conclusive answer to the constitutional objection based on this section is that the act of 1896 is neither a general nor special city law, nor does it relate to the "property, affairs, or government" of cities. It is a general state excise law, with such special provisions and adaptations to localities as to the legislature seemed proper. Whether the law should be uniform in its application to the cities of the state, or whether a discrimination should be made in the excise tax as between New York and any other city, and the extent of the discrimination, was in the discretion of the legislature. In enacting a general law under the police power, the legislature is not hampered or restrained by the classification of cities in the Constitution. It may adjust details to meet varying conditions. In a health law, regulations which might be suitable and proper for the city of New York, a great seaport, exposed to peculiar dangers from infection and disease, might be unnecessary, burdensome, and oppressive if applied to an inland city like Buffalo. The constitutional limitation relates to city laws, either general or special, and not to general laws for the government of the state, including the cities therein. Nor is the law of 1896 a law relating to the "property, affairs, or government of cities." The granting of licenses for the liquor traffic has never been a corporate function or duty of a city, as such. It is a function which the state in its aggregate capacity has administered. It has made use of local machinery as has been shown, and it has permitted the cities to use excise moneys for local purposes. But excise laws do not relate to the affairs of cities, and still less to their property or government within the section of the Constitution now considered. Cities are affected by the act of 1896, as are all other localities in the state. But this is because, in the framing of general laws, all places are alike subject to the legislative power. The act in question is not special legislation under the disguise of a general law. It will be the duty, and, we have no doubt, the pleasure, of the court, on a proper occasion, to give full effect to this new provision of the Constitution, and to construe it with that liberal spirit which is especially required in the interpretation of a remedial provision of the fundamental law, so that, if possible, it shall be efficient to secure the purpose of its enactment.

Third. The objection that the law of 1896 was a special city law, which under art. 12, § 2, of the Constitution, ought to have been referred to the mayors of the cities affected, has been answered in the consideration of the other objection based on this section. It was not a special city law. It did not relate to the

"property, affairs, or government" of any city within the meaning of the section referred to.

We find no ground for questioning the constitutionality of the act of 1896, and *we therefore affirm the judgment below.*

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

OPINION OF THE JUSTICES.

(165 Mass. 599.)

The appointment of women to be notaries public cannot be authorized by the legislature under article 4 of the amendments to the Constitution, providing that they shall be appointed by the governor "in the same manner as judicial officers are appointed."

(April 25, 1896.)

THE House of Representatives submitted to the supreme judicial court the question whether or not the state legislature had power to authorize the governor and council to appoint women as notaries public.

To the Honorable House of Representatives of the Commonwealth of Massachusetts.

We, the undersigned, justices of the supreme judicial court, in reply to your order, a copy of which is annexed, respectfully submit the following opinion:

The question upon which our opinion is now required was suggested in the opinion given by the justices to the governor and council on March 18, 1890. *Opinion of the Justices*, 150 Mass. 586, 6 L. R. A. 842. The first paragraph of article 4 of the amendments to the Constitution is as follows: "Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor, with the consent of the council, upon the address of both Houses of the legislature." By the Constitution (chap. 2, art. 9, § 1), "all judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment." In the opinion given to the governor and council on March 18, 1890, the justices advised that, under the Constitution, a woman could not be appointed a notary public in the absence of any legislation authorizing such an appointment. We have carefully considered the question of the power of the legislature to authorize such an appointment, and are of opinion that, if the Constitution does not confer the power upon the governor and council, the legislature cannot confer it. The legislature in this respect cannot enlarge the power given to the governor and council by the Constitution unless the Constitution has authorized the legislature to do this, and we can find no such authority in the Constitution. The power of the general court, with reference to officers and offices, so far as it is expressly conferred by the Constitution, is found in chap. 1, art. 4, § 1, and it is full power and authority "to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and Constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this Constitution."

It is to be noticed that the power of the general court to set forth the several duties, powers, and limits of the several civil and military officers of the commonwealth is not limited to the officers whom the legislature is empowered to name and settle, but includes all civil and military officers of the commonwealth. But the power to name and settle civil officers, or to provide by fixed laws for naming and settling them, is confined to those the election and Constitution of whom are not provided for in the Constitution. The question is not whether the legislature cannot confer upon some officer whose office is created by statute some or all of the powers now exercised by notaries public in the commonwealth. If this were done, such an officer would not be a notary public in the sense in which the words are used in the Constitution. The Constitution did not create the office of notary public. It was an office known to the Roman law, and has existed in all, or nearly all, Christian countries for many centuries. The duties of the office in this commonwealth are in part prescribed by statute, and in part are such as, by usage, notaries public for a long time have been accustomed to perform, and the international character and relations of notaries public are important. The history of the office was briefly given in the opinion hereinbefore cited. The fact that the duties of notaries public in this commonwealth are not strictly judicial does not, in our

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NOTE.—The ineligibility of women to become notaries public in the absence of constitutional or statutory provisions making them so was decided in Women as Notaries Public (Mass.) 6 L. R. A. 842, and State, Peters, v. Davidson (Tenn.) 20 L. R. A. 311. The present case goes further by denying the power of the legislature to make them eligible.

For the competency of women as deputy clerks, see *note* to Jamesville & W. R. Co. v. Fisher (N. C.) 13 L. R. A. 721.

For women as officers, see also brief in *Re* Thomas (Colo.) 13 L. R. A. 538.

For women as grand jurors, see *note* to State v. Russell (Iowa) 28 L. R. A. on page 204.

For the right of women to vote, see *note* to Coffin v. Thompson (Mich.) 21 L. R. A. 662.

For the right of women to practice law, see *note* to *Re* Leach (Ind.) 21 L. R. A. 701.

See also 41 L. R. A. 727.

opinion, necessarily affect the question before us. The question in every case is of the meaning of the Constitution, and, in determining this, the history and nature of the particular office, and the usages of this and other states and countries with regard to the office at the time of the adoption of the Constitution, must be considered. At that time, as well as at the time of the adoption of the Fourth Amendment, so far as we are aware, the usage to appoint only men to be notaries public was as general as to appoint only men to judicial offices.

Where an office is created by statute, the tenure, the mode of appointment, the qualifications required, the duties of the office, and the compensation are wholly within the control of the legislature, unless there is some limitation put upon the legislature by the Constitution, and the statute creating the office may be altered or repealed by the legislature at any time. But, if the tenure of an office and the mode of appointment are prescribed by the Constitution, the legislature cannot change them, unless the Constitution gives the legislature authority to do so. If the qualifications for the office are prescribed by the Constitution, the legislature cannot change them. If the qualifications are not prescribed by the Constitution, although the tenure and mode of appointment are, there has been some question whether the legislature can prescribe the qualifications, but the solution of this question in any particular case depends upon the construction of the particular clauses of the Constitution involved, as well as of the whole frame and purport of the Constitution. But if, by the true construction of the Constitution, persons of a certain description cannot be appointed to an office, the legislature cannot authorize the appointment of such persons to that office. If, for example, the Constitution expressly had provided that only men or male persons should be appointed notaries public, the legislature could not authorize the governor and council to appoint women to that office. The construction which heretofore has been given to the 4th Amendment to the Constitution by the justices of this court is, in effect, that such is the meaning of that amendment. There is nothing in the Constitution which in terms prohibits women from being appointed to judicial offices, any more than from being appointed to military offices, or to executive civil offices, the tenure and mode of appointment of which are provided for in the Constitution. It was the nature of the office of justice of the peace, and the usage that always had prevailed in making appointments to that office, that led the justices to advise that it could not have been the intention of the Constitution that women should be appointed justices of the peace. *Opinion of Justices*, 107 Mass. 604. In our opinion, the same considerations apply to the office of notary public.

For these reasons, we are of opinion that the question proposed should be answered in the negative.

Walbridge A. Field.
Charles Allen.
Oliver Wendell Holmes.
Marcus P. Knowlton.
James M. Morton.
John Lathrop.
James M. Barker.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
v.
Edward McMULLEN.

(.....N. J.....)

***1. A servant assumes the ordinary risks** incident to the employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

2. The employer is bound to use reasonable care to protect the servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him.

*Headnotes by VAN SYCKEL, J.

NOTE.—*Liability of electric company to employee for injury caused by electric shock.*

The liability for negligence in respect to electric wires, so far as it relates to such wires in highways, is considered in a *note* to Denver Consol. Electric Co. v. Simpson (Colo.) 31 L. R. A. 566, and cases following. Police power as to electric lines is the subject of a *note* to State, Laclede Gaslight Co., v. Murphy (Mo.) 31 L. R. A. 798.

The present note includes merely the few decisions that have been rendered up to the present time respecting liability to employees of electric companies for injuries caused by electricity.

The ordinary principles of law governing the relation of master and servant are plainly applicable to this subject, but the application of these principles must be made with a recognition of the degree of danger to be guarded against in such employment.

Negligence of employer.

The defective stringing of electric-light wires, so that those of another circuit charged with electricity come in contact with dead wires along which an employee is trimming lamps, and because of worn insulation transmit a current to him, renders the electric company liable for the injury. Kraatz v. Brush Electric Light Co. 82 Mich. 457.

An arrangement of dynamo wires in an electric-light plant so that three dynamos are connected to the plug board by two wires part of which run along the floor of the building where they are unprotected and not properly insulated, and where an employee must stand astride of them to get at a dynamo box into which he must put tallow for lubrication, is a dangerous arrangement of the wires which constitutes negligence on the part of the electric company, which renders it liable to an employee who is injured without contributory

See also 33 L. R. A. 798; 37 L. R. A. 725; 41 L. R. A. 410.

(November 19, 1895.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. P. Douglass** and **Rush Taggart** for plaintiff in error.

Mr. **Samuel Kalisch** for defendant in error.

Van Syckel, J., delivered the opinion of the court:

In June, 1893, McMullen, who was plaintiff below, was in the employment of the Western Union Telegraph Company, engaged in helping to set poles, string wires, put up cross-arms, and connect wires. While in the performance of his duty, and as he was about to attach a new wire, he received such a strong current of electricity from the Western Union wire that he was knocked insensible, and received most painful injuries. The writ of error in this case is prosecuted to review the judgment recovered by McMullen below in compensation for the injuries received by him. The pole upon which McMullen was working at the time he was injured was the property of the telegraph company. It appeared in the case that, in the ordinary use of the telegraph wires, the current of electricity was not sufficient to do injury to the person handling the wires. It further appeared that in various parts of Jersey City, and not far from where McMullen was injured, there were poles of the telegraph company to which were attached electric-light wires, heavily and dangerously charged with electricity, and that such electric-light wires were in such close proximity to the wires of the telegraph company as to be dangerous, but no electric light wire was attached to the pole on which McMullen was injured. He had been in the employ of the company but one month and five days when he was injured, and had never worked in Jersey City before. It did not appear that the company gave any warning to McMullen of the danger in stringing its wires by reason of their close proximity to electric-

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negligence on his part. Mayhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172.

A recent case showing the degree of care required when the danger is great is McAdam v. Central Railway & E. Co., in the supreme court of Connecticut. In this case the following were the facts: The defendant, the Central Railway & Electric Company, maintained and operated an electrical plant comprising two separate and distinct branches; one for furnishing electric power to operate an electric street railway or trolley road, and the other for furnishing electric lights. The plaintiff was employed in the electric lighting branch of their works. Under the superintendent's order he undertook to remove from a pole opposite the power house of said defendant, a telephone wire which was used in the electric lighting branch or department. Said pole was about 24 feet high and carried wires of both high and low potential; high, such as electric light and railway wires; low, such as telephone and fire-alarm wires. In ascending said pole, and others of similar style, linemen were ordered to make use of ladders. Plaintiff did make use of a ladder about 18 feet long. A man of plaintiff's height could readily and easily remove any wire carried on said pole without leaving the ladder. As plaintiff neared the top of the ladder he laid hold of a projecting eye-bolt, after having first tested it with moistened finger to see if it was charged. As he reached out to touch a second eye-bolt, projecting from the opposite side of the pole, he received a shock of electricity which threw him to the ground, whereby he was injured. Both said eye-bolts were used for the purpose of fastening to said pole certain support and guy wires connected with the trolley; were understood to have no, or an extremely low, potential; were supposed and understood, together with the wires fastened to the same, to be dead, and would have been dead had the trolley wire been properly constructed and the wires properly insulated. Defendant knew that said trolley was improperly constructed and that said wires were not properly insulated, the attention of its superintendent having been called to sparks which were thrown off by said wires or others connected therewith. Of this, however, plaintiff had no knowledge. The court held that the defendant was liable. 67 Conn. 445.

A carpenter hired to assist in taking care of electric-light towers was sent by the superintendent to remove a lamp from an electric-light tower and connect the wires with the circuit. He was inexperienced in that work, which was outside of the scope of his duties, and was not instructed as to its performance or furnished with tools or implements for doing the work. He did not know of the use of a "jumper" to cut off the current between two points on a circuit, and used his hand in making the connection. The superintendent informed him that he would have time to do the work before the current would be turned on at the usual hour, which was about a quarter to five in the afternoon. While he was connecting the wires, after removing the lamp, the current was turned on, giving him a shock which caused him to fall. These facts were held to make a case for the jury and a verdict was rendered against the electric company. It was held on appeal that a motion for a nonsuit was properly overruled, but the judgment was reversed for the improper admission of evidence as to a subsequent warning by placards as to the hour of quitting work. Colorado Electric Co. v. Lubbers, 11 Colo. 505.

Duty to warn.

A master who carries on an imminently dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger and to notify the same to the servant, specially and unequivocally, so as to be clearly understood by him. Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172.

An employee who stands astride electric wires to get at a dynamo box, as he is obliged to do to put tallow into it in the performance of his duties, without knowing that the wires are dangerous, should be especially warned by his employer of the danger. *Ibid.*

Injury to an employee from a latent danger of which he should have been warned but was not when engaged in stringing and connecting telegraph wires will render the employer liable. See main case of WESTERN U. TELEG. CO. v. MCMULLEN.

An experienced lineman sent to make a connection of an electric plant with certain premises need not be cautioned in regard to the exposed condition of the ends of the wires which he is to connect, this being not only open and obvious, but something that it was his peculiar business to see and know. Junior v. Missouri Electric Light & P. Co. 127 Mo. 79.

light wires at other points. The trial court charged the jury that McMullen, when he entered the service of the company, assumed the ordinary risks incident to the employment, and he also assumed risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care. He left it to the jury to say whether the placing of electric-light wires upon some of the poles of the company, near to the telegraph wires, was a special feature of danger known to McMullen, or which should have been observed by one ordinarily skilled in the employment in which he was engaged. If the jury found in favor of McMullen upon these questions, then it was instructed to inquire whether the company had been guilty of actionable negligence. On this part of the case the jury were instructed that the duty imposed on the company by the contract of hiring was not to subject McMullen, without his knowledge or consent, to risks not assumed by him; that an employer contracts with his employee to use reasonable care to protect him from unnecessary risks, and is responsible to the employee for damages resulting to him by reason of the want of such care. The jury were directed to charge the company with negligence if it found that McMullen was injured through some latent danger, of which he should have been warned, and that the injury resulted from the fact that the electric-light wires placed on the poles of the company were the proximate cause of the injury. All these instructions are in accordance with the established rule in this state. *Foley* v. *Jersey City Electric Light Co.* 54 N. J. L. 411; *Newman* v. *Fowler*, 37 N. J. L. 89; *Ingebregtsen* v. *Nord Deutscher Lloyd S. S. Co.* (N. J.) 31 Atl. 630. Upon each and every of the controlling questions in the case there was sufficient evidence to go to the jury, and therefore there is no error in law in the trial below.

The judgment should be affirmed.

Assumption of risks.

The rule that the employee assumes all the obvious, incidental, and natural risks of his employment, applies to employees of electric companies as well as to all other employees. Junior v. Missouri Light & P. Co. 127 Mo. 79; Smart v. Louisiana Electric Light Co. 47 La. Ann. 869.

An employee engaged at an electric plant is not required to know latent, but only patent, defects. Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172.

Contributory negligence.

The rule as to contributory negligence also applies in actions by employees, and the employee cannot recover if his injury was caused by his own lack of reasonable care. Dixon v. Louisiana Electric Light & P. Co. 47 La. Ann. 1147.

Neglect to use rubber gloves provided for the very work of handling electric wires when a lineman is making connection of wires on a high pole, and is killed by touching their exposed ends, constitutes contributory negligence which prevents liability of the employer. Junior v. Missouri Electric Light & P. Co. 127 Mo. 79.

A lineman cannot recover of an electric-light company for injuries received from electric wires occurring by reason of defect in his gloves, which it was his own business to inspect and keep in good condition, and to exchange, when necessary, for new ones, although the gloves were thrown to him from a wagon with directions to put them on, by a foreman, if the latter had no special charge of the gloves and his direction was merely advisory. Smart v. Louisiana Electric Light Co. 47 La. Ann. 869.

Where an employee was sent to look for a break in the circuit while the current was on, and took with him a defective shunt cord which he himself selected from among others which were good, and after he found the break grasped the shunt cord at its defective end, and at the same time with his other hand grasped the naked end of the line wire, which was perfectly insulated a few inches from the end, and thereby received a deadly current which he would not have received by taking hold of the shunt cord if he had not taken hold of the line wire at the extreme end where it was not insulated, it was held that recovery could not be had against his employer. Piedmont Electric Illum. Co. v. Patteson, 84 Va. 747.

The claim that the wires should have been made dead before a lineman began to take them down from their position on one arm of a pole to place them on another, in doing which he was killed, is answered by the court, where the testimony is uncontradicted that the lineman could order the opening of the circuit in case of necessity, by saying the principle announced on this point is that an employee who has the opportunity to avoid the danger will have no recourse for the injury. Smart v. Louisiana Electric Light Co. *supra*.

Where the night inspector of an electric light and power company undertook to repair a lamp which was out of order because a cut-off screw was burnt out and was killed, it was held on a trial by the court without a jury that his contributory negligence would prevent any liability on the part of the company. In this case his dead body was found lying on the ground near the lamp, which had been lowered to within about 3 feet from the ground and the hood taken off, while the insulating board was on the opposite side of the lamp, showing that when he received the electric shock he must have been standing on the ground, and not on the insulating board. Dixon v. Louisiana Electric Light & P. Co. 47 La. Ann. 1147.

In cases where it is doubtful whether the special danger was so obvious that it should have been seen by the employee, or whether it was so latent that he should have been told of it, the question has been left to the jury. Thus, where the plaintiff was employed by a telegraph company in setting up its poles, affixing the crossarms, and stringing the wires, and in the course of this occupation received a severe shock which was probably caused by a current escaping from some electric-light wires which had been strung on the telegraph company's poles in neighboring localities by the permission of the telegraph company, it was held that the question whether the plaintiff should have been warned of the nearness of these electric-light wires, he never having worked in the same town before and having only worked for the company one month, might be left to the jury. See main case of WESTERN U. TELEG. CO. v. MCMULLEN.

So in the case of Colorado Electric Co. v. Lubbers, 11 Colo. 505, one of the questions for the jury was that of the employee's contributory negligence.

So in Voyer v. Dispatch Printing Co. (Minn.) 64 N. W. 1138, where an employee was injured by taking hold of a wire attached to an electric lamp while trying to hand the lamp, under a printing press to another employee.

B. A. R.

TENNESSEE SUPREME COURT.

W. D. HOPKINS, Admr., etc., of W. O. Hopkins, Deceased, *Appt.*,
v.
NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY.

(.....Tenn.....)

1. **Dismissing a suit on a demurrer to evidence** which, with all legitimate inferences therefrom, makes out no cause of action, is not a violation of the constitutional guaranty of the right to trial by jury, or of a provision that judges shall not charge juries with respect to matters of fact.

2. **The practice of demurring to evidence,** although cumbersome and antiquated, may be sustained when no liability is established against the defendant upon the facts or legitimate inferences therefrom.

(March 20, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Davidson County in favor of defendant in an action brought to recover for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. D. Covington, Nolen & Slemons,** and **J. W. Gaines,** for appellant:

In Alabama the courts cannot order a compulsory nonsuit.

Hunt v. *Stewart*, 7 Ala. 525; 2 Thomp. Trials, § 2228.

But demurrer to the evidence is recognized.

Pharr v. *Bachelor*, 3 Ala. 237; *Gluck* v. *Cox*, 90 Ala. 331.

The courts have the right to give instructions directing a verdict.

Thomasson v. *Groce*, 42 Ala. 431; *Montgomery* v. *Wright*, 72 Ala. 411, 47 Am. Rep. 422; 2 Elliott, Gen. Pr. § 888.

In Arkansas nonsuit cannot be ordered.

Ringo v. *Field*, 6 Ark. 44.

Where there is any evidence tending to prove the issue for plaintiff the court cannot instruct.

Little Rock & Ft. S. R. Co. v. *Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Overton* v. *Matthews*, 35 Ark. 147, 37 Am. Rep. 9.

If there is any evidence whatever, however slight, pertinent to issue, the case should not be taken from the jury even if the court would grant a new trial.

Little Rock & Ft. S. R. Co. v. *Perry*, 37 Ark. 193.

The only remedy is for the circuit courts to set aside the verdicts.

Little Rock & Ft. S. R. Co. v. *Henson*, 39 Ark. 419; *Little Rock & Ft. S. R. Co.* v. *Barker*, 39 Ark. 499; *Cotlett* v. *St. Louis I. M. & S. R. Co.* 57 Ark. 468.

In California nonsuit can be ordered.

Ringgold v. *Haven*, 1 Cal. 113; *De Ro* v. *Cordes*, 4 Cal. 117; *Warren* v. *McGill*, 103 Cal. 153; *Fox* v. *Southern Pac. Co.* 95 Cal. 234; *Warren* v. *Darrow*, 91 Cal. 310; *Butler* v. *Hyland*, 89 Cal. 581; *Higgins* v. *Ragsdale*, 83 Cal. 219; *Vanderford* v. *Foster*, 65 Cal. 49; *Wilson* v. *Southern P. R. Co.* 62 Cal. 164; 2 Thomp. Trials, § 2228.

In Connecticut compulsory nonsuit is allowed.

Naugatuck R. Co. v. *Waterbury Button Co.* 24 Conn. 468; 2 Thomp. Trials, § 2228; *O'Brien* v. *Miller*, 60 Conn. 214.

In Delaware the granting of a compulsory nonsuit is in the discretion of the court.

Croasdale v. *Bright*, 6 Houst. (Del.) 52; *Flanagan* v. *Wilmington*, 4 Houst. (Del.) 548.

In Florida demurrer to evidence is adopted.

Hanover F. Ins. Co. v. *Lewis*, 23 Fla. 193.

In Georgia the court can order a nonsuit.

Tison v. *Yawn*, 15 Ga. 491, 60 Am. Dec. 708; *Long* v. *Lewis*, 16 Ga. 154; 2 Thomp. Trials, § 2228.

The court cannot direct a verdict.

Hanson v. *Crawley*, 51 Ga. 533.

In Illinois demurrer to the evidence is allowed.

Joliet, A. & N. R. Co. v. *Velie*, 140 Ill. 60; *Crowe* v. *People*, 92 Ill. 231; 2 Elliott, Gen. Pr. § 855.

The court can instruct the jury to find a verdict for the defendant after the plaintiff has closed his evidence, which in effect is the same thing as sustaining a demurrer to the evidence.

Doane v. *Lockwood*, 115 Ill. 490; *People* v. *People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340; 2 Elliott, Gen. Pr. § 887.

In Indiana a nonsuit cannot be ordered.

Williams v. *Port*, 9 Ind. 551; 2 Thomp. Trials, § 2228.

Demurrer to the evidence may be allowed.

Pennsylvania Co. v. *Stegemeier*, 118 Ind. 306; *Ruff* v. *Ruff*, 85 Ind. 432; 2 Elliott, Gen. Pr. § 855.

The trial court may withdraw a case from the jury when there is no dispute as to the facts.

Purcell v. *English*, 86 Ind. 34, 44 Am. Rep. 255; *Carver* v. *Carver*, 97 Ind. 498; *Rush* v. *Coal Bluff Min. Co.* 131 Ind. 135.

In Iowa a judge can order a nonsuit.

Eddy v. *Wilson*, 1 G. Greene, 259; *Murphy* v. *Chicago, R. I. & P. R. Co.* 45 Iowa, 661.

The verdict may be directed.

Miller v. *House*, 63 Iowa, 82; *Poor* v. *Merrill*, 68 Iowa, 436.

Demurrer to the evidence is not allowed.

Jones v. *Ireland*, 4 Iowa, 69.

In Kansas the judge cannot direct a nonsuit.

Case v. *Hannahs*, 2 Kan. 490; 2 Thomp. Trials, § 2228.

The right to demur to the evidence is recognized.

Burlington Ins. Co. v. *Ross*, 48 Kan. 228.

It is error not to direct a verdict in proper cases.

Stiles v. *Steele*, 37 Kan. 552.

NOTE.—The above case examines and reviews with unusual fulness the authorities on the subject of demurrer to evidence. For illustration of the subject, see also Weber v. Kansas City Cable R. Co. (Mo.) 7 L. R. A. 819; Witting v. St. Louis & S. F. R. Co. (Mo.) 10 L. R. A. 602; and Gratiot v. Missouri P. R. Co. (Mo.) 16 . A. 189.

In Kentucky there may be demurrer to the evidence.

Ditto v. *Ditto*, 4 Dana, 503.

Nonsuit can be ordered.

Barrett v. *Meek*, Sneed (Ky.) 34; *Dodge* v. *Bank of Kentucky*, 2 A. K. Marsh. 612.

The court can direct the verdict.

Gallatin v. *Bradford*, 1 Bibb, 209; *Fightmaster* v. *Beasly*, 7 J. J. Marsh. 411; *Gregory* v. *Nesbit*, 5 Dana, 421.

In Maine the court has power to order a nonsuit.

Perley v. *Little*, 3 Me. 97; *Lyon* v. *Sibley*, 32 Me. 577; 2 Thomp. Trials, § 2228.

A demurrer to the evidence is an unusual and antiquated practice calculated to suppress truth and justice and is allowed by the court in the exercise of a sound discretion.

State v. *Soper*, 16 Me. 293, 33 Am. Dec. 665.

A verdict may be directed at the close of the entire case.

Cooper v. *Waldron*, 50 Me. 80; *Moore* v. *McKenney*, 83 Me. 80.

In Maryland a nonsuit cannot be ordered.

Kettlewell v. *Peters*, 23 Md. 312.

A verdict can be directed in proper cases.

Baltimore & O. R. Co. v. *Stricker*, 51 Md. 47, 34 Am. Rep. 291.

In Massachusetts a nonsuit may be granted.

Davis v. *Fall River*, 155 Mass. 96.

The court can direct a verdict at the close of the entire case.

Reed v. *Deerfield*, 8 Allen, 522; *Kingsford* v. *Hood*, 105 Mass. 495; 2 Elliott, Gen. Pr. § 888; *Denny* v. *Williams*, 5 Allen, 1; 2 Thomp. Trials, § 2250.

In Michigan the court cannot order a nonsuit.

Cahill v. *Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 125, 43 Am. Dec. 457; 2 Thomp. Trials, § 2228.

A verdict should be directed in a proper case.

Grand Trunk R. Co. v. *Nichol*, 18 Mich. 170; *Mynning* v. *Detroit, L. & N. R. Co.* 64 Mich. 93.

Demurrer to the evidence is permitted.

Mynning v. *Detroit, L. & N. R. Co. supra.*

In Minnesota nonsuit may be ordered.

Potter v. *Mellen*, 36 Minn. 122.

The court can direct a verdict at the close of the entire case.

Duluth Chamber of Commerce v. *Knowlton*, 42 Minn. 229.

In Mississippi a nonsuit cannot be ordered.

Winston v. *Miller*, 12 Smedes & M. 550.

A party against whom a demurrer has been filed may be compelled to join in the demurrer.

Western Assur. Co. v. *Mayer*, 64 Miss. 795.

A verdict may be directed.

Memphis & C. R. Co. v. *Chastine*, 54 Miss. 503.

In Missouri nonsuit cannot be ordered.

Martin v. *Henley*, 13 Mo. 312; *St. Louis Floating Dock Ins. Co.* v. *Boulard*, 8 Mo. 665; 2 Thomp. Trials, § 2227.

Demurrer to the evidence may be permitted.

Witting v. *St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L. R. A. 602; *Walton* v. *Wabash Western R. Co.* 32 Mo. App. 634.

A verdict can be directed.

Grube v. *Missouri P. R. Co.* 98 Mo. 330, 4 L. R. A. 776; *Carroll* v. *Interstate Rapid Transit Co.* 107 Mo. 653; *Morgan* v. *Durfee*, 69 Mo. 469, 33 Am. Rep. 508.

In Nebraska a nonsuit is proper when there is a total want of testimony to sustain a verdict.

Atchison & N. R. Co. v. *Loree*, 4 Neb. 450; *Missouri Valley Land Co.* v. *Bushnell*, 11 Neb. 192; *Manzy* v. *Hardy*, 13 Neb. 37.

It is error not to direct a verdict in a proper case.

Atchison & N. R Co. v. *Loree*, 4 Neb. 446; *Union Stock Yards Co.* v. *Conoyer*, 38 Neb. 488; *Hakanson* v. *Brodke*, 36 Neb. 42.

In Nevada a nonsuit can be granted.

Burns v. *Rodefer*, 15 Nev. 59; *Cooper* v. *Pacific Mut. L. Ins. Co.* 7 Nev. 121, 8 Am. Rep. 705.

In New Hampshire a nonsuit is admissible in proper cases.

Bailey v. *Kimball*, 26 N. H. 351; *Stickney* v. *Stickney*, 21 N. H. 61, 26 N. H. 351.

In New Jersey nonsuit can be ordered.

Aycrigg v. *New York & E R. Co.* 30 N. J. L. 460; *Central R. Co.* v. *Moore*, 24 N. J. L. 824.

A demurrer to the evidence is proper.

Williams v. *Sheppard*, 13 N. J. L. 76.

The court can direct a verdict.

Rochat v. *North Hudson County R. Co.* 49 N. J. L. 445; *Phillips* v. *Pullen*, 50 N. J. L. 439; *Baldwin* v. *Shannon*, 43 N. J. L. 596.

In New York nonsuit can be ordered in proper cases.

Pratt v. *Hull*, 13 Johns. 334; *Deyo* v. *New York C. R. Co.* 34 N. Y. 9, 88 Am. Dec. 418; *Wilds* v. *Hudson River R. Co.* 24 N. Y. 430; 2 Thomp. Trials, § 2228.

Demurrer to the evidence has long since gone out of use.

Colegrove v. *New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418.

The jury may be instructed to return a verdict.

Williams v. *Guile*, 117 N. Y. 343, 6 L. R. A. 366; *People* v. *Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Linkauf* v. *Lombard*, 137 N. Y. 417.

In North Carolina a nonsuit cannot be ordered.

Dickey v. *Johnson*, 13 Ired. L. J. 450; 2 Thomp. Trials, § 2228.

Demurrer to the evidence is the practice in this state.

Hopkins v. *Bowers*, 111 N. C. 175.

The court can direct a verdict.

Wittkowsky v. *Wasson*, 71 N. C. 451.

In Ohio a nonsuit can be ordered.

Ellis v. *Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610; 2 Thomp. Trials, § 2228.

Under the statute of 1853 the court can arrest the testimony from the jury and render a judgment for the defendant.

Stockstill v. *Dayton & M. R. Co.* 24 Ohio St. 83; *Dick* v. *Indianapolis, C. & L. R. Co.* 38 Ohio St. 389.

In Oregon nonsuit can be ordered.

Grant v. *Baker*, 12 Or. 329; *Herbert* v. *Dufur*, 23 Or. 462; *Anderson* v. *North Pac. Lumber Co.* 21 Or. 281.

Demurrer to the evidence is allowed.

Hawley v. *Dawson*, 16 Or. 344.

In Pennsylvania nonsuit can be ordered.

Munn v. *Pittsburgh*, 40 Pa. 364.

Demurrer to the evidence is recognized.

McKowen v. *McDonald*, 43 Pa. 441, 82 Am. Dec. 576.

Directing a verdict is proper.
Hyatt v. *Johnston*, 91 Pa. 196.
In Rhode Island nonsuit is proper.
Payton v. *Sherburne*, 15 R. I. 213.
The court can direct a verdict.
Wheeler v. *Schroeder*, 4 R. I. 383.
In South Carolina nonsuits can be ordered.
Turnbull v. *Rivers*, 3 McCord, L. 131, 15 Am. Dec. 622; 2 Thomp. Trials, § 2228.
But the practice is to be pursued with caution.
Rogers v. *Madden*, 2 Bail. L. 321; *Davis* v. *Columbia & G. R. Co.* 21 S. C. 93; *McCord* v. *Blackwell*, 31 S. C. 125; *Cheatham* v. *Morrison*, Id. 326; *Petrie* v. *Columbia & G. R. Co.* 29 S. C. 303; *Simms* v. *South Carolina R. Co.* 26 S. C. 490; *Carter* v. *Oliver Oil Co.* 34 S. C. 211; *Cobb* v. *Columbia & G. R. Co.* 37 S. C. 194; *Martin* v. *Bowie*, Id. 102; *Munroe* v. *Williams*, 35 S. C. 572; *Whitney Mfg. Co.* v. *Richmond & D. R. Co.* 38 S. C. 370.
A verdict can be directed.
Carter v. *Oliver Oil Co. supra.*
In Tennessee a nonsuit cannot be granted.
Scruggs v. *Brackin*, 4 Yerg. 528.
The verdict cannot be directed.
Robinson v. *Louisville & N. R. Co.* 2 Lea, 594; *R.* v. *Gates*, MS. Jackson, Tenn.
In Texas nonsuit is proper.
Foster v. *Wells*, 4 Tex. 101; *West* v. *Bagby*, 12 Tex. 34, 62 Am. Dec. 512.
Demurrer to the evidence is recognized.
Pitt v. *Texas Storage Co.* (Tex.) 18 S. W. 465; *Galveston, H. & S. A. R. Co.* v. *Templeton* (Tex.) 25 S. W. 135.
In Vermont nonsuit cannot be ordered.
French v. *Smith*, 4 Vt. 363, 24 Am. Dec. 616.
In Virginia demurrer to the evidence is recognized.
Trout v. *Virginia & T. R. Co.* 23 Gratt. 619; *Jones* v. *Old Dominion Cotton Mills*, 82 Va. 144.
In West Virginia demurrer to evidence is recognized.
Riddle v. *Core*, 21 W. Va. 530; *Williamson* v. *Newport News & M. Valley Co.* 34 W. Va. 657, 12 L. R. A. 297; *South West Imp. Co.* v. *Smith*, 85 Va. 306.
Directing the verdict is proper.
Poling v. *Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215; *Overby* v. *Chesapeake & O. R. Co.* 37 W. Va. 524; *Woolwine* v. *Chesapeake & O. R. Co.* 36 W. Va. 329. *Fitzgerald* v. *Hart* (Tex.) 17 S. W. 369.
In Wisconsin a nonsuit can be ordered.
Gardinier v. *Otis*, 13 Wis. 461; *Woodward* v. *McReynolds*, 1 Chand. (Wis.) 244.
A verdict should be directed in a proper case.
Dryden v. *Britton*, 19 Wis. 23; *Cutler* v. *Hurlbut*, 29 Wis. 152.
The Constitutions of Arkansas, California, Nevada, Tennessee, and South Carolina, since 1868, are exactly alike, and unlike the Constitutions of all the other states in this,—"judges shall not charge juries with respect to matters of fact but may state the testimony and declare the law."
The decisions of these five states only could be authority upon the question now before the court.
Nonsuit is a mode of taking the case from the jury.
2 Elliott, Gen. Pr. § 876.
Demurrer to the evidence is a mode of taking the case from the jury.
2 Elliott, Gen. Pr. §§ 855, 856.
Directing a verdict is another and the most common mode of taking the case from the jury.
2 Elliott, Gen. Pr. § 887; 2 Thomp. Trials, § 2227; *Doane* v. *Lockwood*, 115 Ill. 490; *People* v. *People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340; *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 264, 26 L. ed. 541.
The demurrer to evidence used in the ancient common-law practice seems to have passed, for the most part, out of use in American jurisdictions.
2 Thomp. Trials, § 2267.
A demurrer to the evidence, a motion for a nonsuit, or a peremptory direction for a verdict, admit precisely the same thing.
Colegrove v. *New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418.
In Tennessee a compulsory nonsuit cannot be ordered.
Bacon v. *Parker*, 2 Overt. (Tenn.) 56; *Scruggs* v. *Brackin*, 4 Yerg. 532.
The plaintiff is to judge whether his case is made out and if he sees proper to let a verdict go against him it is his oversight.
Hunter v. *Sevier*, 7 Yerg. 134; *Littlejohn* v. *Fowler*, 5 Coldw. 288.
A trial court cannot determine in the first instance questions of fact when the cause is being tried by a jury, and it is error for him to tell the jury to find a verdict for the defendant.
Robinson v. *Louisville & N. R. Co.* 2 Lea, 594; *Cantrell* v. *Knoxville, C. G. & L. R. Co.* 90 Tenn. 638.

Messrs. **E. H. East, C. D. Porter,** and **J. D. B. DeBow** for appellee:

McAlister, J., delivered the opinion of the court:

The only question presented for determination upon the record is whether the practice of demurring to the evidence is sanctioned by the Constitution and laws of this state. The suit was brought by W. D. Hopkins, administrator, to recover damages for the unlawful killing of his son, W. O. Hopkins. The plaintiff's intestate, at the time of his death, was employed by the railroad company in the capacity of fireman upon a locomotive. The gravamen of the action, as outlined in the declaration, is that the death of plaintiff's intestate was occasioned by the negligence of the engineer in charge of the train. The more specific allegations of the declaration are: That plaintiff's intestate was employed as a fireman, and as such fireman it was his duty to remain on the engine. That his intestate was a young man without any experience, having made but one trip on a freight train, and that he knew nothing of the duties of a brakeman. That, on the —— day of October, 1889, while one of defendant's freight trains was returning to Nashville, upon which the intestate was serving as brakeman, it was stopped at McEwen's station for the purpose of sidetracking a box car, and leaving it at said station. That, in accomplishing this object, it became necessary to uncouple some box cars in the rear of the car to be sidetracked, and

the conductor, not notifying the engineer or plaintiff's intestate that one of the box cars had to be placed on the side track, or that any of the rear cars had been uncoupled, gave orders for the engineer to move forward his train, which the engineer understood as an order to go on to the next station, which order he obeyed, and moved his train on towards Nashville, leaving the conductor and all the brakemen at said station, and having no one on board the train excepting a cub fireman, the engineer, and plaintiff's intestate. That the train was a long one, with many box cars. The engineer, ignorant of what the conductor wanted done, and in obedience to the order, continued to move his train on towards Nashville, and pulled his train 3 miles from said station, before he ascertained that he did not have all his train, and that he was without a conductor and brakemen. That the engineer then took charge and control of said train, and started back to hunt for the lost cars, conductor, and brakemen. That said engineer ordered plaintiff's intestate to brake on the rear car, to keep a lookout for the lost part of his train, and give the signal of danger. That, in order to do this, said engineer knew plaintiff's intestate had to walk upon the top of the box cars. That said engineer knew plaintiff's intestate had never ridden on top of freight trains, that he knew nothing of the duties of brakeman, that he had not been instructed in the duties of a brakeman, or told of the dangers attending such duties, or instructed in the way to give signals or the meaning thereof. And while said intestate was standing at the rear brake, on the rear car, as ordered by said engineer, exercising ordinary care and prudence, and keeping a lookout for the lost cars, and while the train was moving up said steep grade rapidly, a brakeman was seen coming after the train; and said brakeman, wishing to get aboard the train, gave a signal for the train to slow up, and said intestate repeated the signal, as best he could, without instructions, and when the engineer saw the signal, unmindful of the dangerous position occupied by said intestate, and knowing said intestate was without knowledge of the danger, negligently, carelessly, and suddenly reversed his engine, thus jerking the train with great force, whereby intestate was thrown with great violence to the ground and killed by said train passing over his body. The second count of the declaration states the cause of action in substantially the same way, averring that the engineer, without giving plaintiff's intestate any instructions in respect of the performance of his duties, ordered him to the rear brake on the rear car, to keep a lookout for the lost cars, and that the engineer, knowing the dangerous position of intestate, and his want of knowledge and experience as a brakeman, recklessly, carelessly, and with great force checked the speed of the train, thereby throwing intestate to the ground and causing his death. The third count avers that, in an emergency like that which confronted the engineer, it was required of him, by the rules of the company, that the train should not be moved back without sending out a flagman in the direction in which the train is to be backed; and that the train should then be moved back at a rate of speed not exceeding 4 miles an hour; that, in violation of this rule, the engineer did not send out any flagman, but ordered the deceased to take his position on the rear end of the rear car, well knowing the deceased had no experience, and while in this position, the train going at the rate of 15 miles per hour, he was thrown from the car and instantly killed. The fourth count is merely a repetition of the third count, excepting in one particular. It is averred, in the latter count, that the deceased undertook to give a signal to the engineer, and, not having been instructed in the use of signals, and not knowing their meaning, in obedience to said signal the engineer stopped the train suddenly, thereby throwing deceased to the ground and killing him. The defendant pleaded not guilty.

An analysis of the declaration will show that the death of plaintiff's intestate is alleged to have been caused by the negligence of the engineer. The engineer is charged to have been negligent in three particulars, *viz.:* First, in ordering the deceased to leave his place as fireman, and go to the rear brake of the rear car, to keep a lookout for the lost cars; second, in failing to give him warning, advice, and instructions in the use of signals; third, in violating the rules of the company in backing the train at a greater rate of speed than 4 miles per hour, and in failing to send out a flagman in the direction of the detached train. It has been held by this court that an engineer is a fellow servant, and not the superior, of a brakeman on his train, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the railroad company in such an emergency; the engineer not in fact assuming any control over the brakeman, though having the right to do so. *Louisville & N. R. Co.* v. *Martin*, 87 Tenn. 398, 3 L. R. A. 282; *Nashville, C. & St. L. R. Co.* v. *Wheless*, 10 Lea, 741, 43 Am. Rep. 317; *Nashville, C. & St. L. R. Co.* v. *Handman*, 13 Lea, 423; *East Tennessee & W. N. C. R. Co.* v. *Collins*, 85 Tenn. 227; *Louisville & N. R. Co.* v. *Lahr*, 86 Tenn. 335; *Fox* v. *Sandford*, 4 Sneed, 36, 67 Am. Dec. 587. Plaintiff, however, undertakes to remove this case from the general rule by the averment that the deceased had been ordered by the engineer to leave his place as fireman, and repair to the rear brake of the rear car, and keep a lookout for the detached cars. The plaintiff, in support of this charge, introduced the engineer. But this witness testified that deceased went to the rear car and took his position voluntarily and without orders from him; that deceased was performing the duties prescribed in such cases independently of the engineer, and without any orders or instructions from him whatever. This evidence is undisputed. The witness further testified that the deceased understood the signals, and, while the train was backing, gave the engineer a signal to stop immediately; that he accordingly shut off steam, and deceased fell over and was killed. The proof introduced by plaintiff shows that the engineer in charge was a thoroughly competent, careful, and prudent man, and that, in shutting off the steam, he was simply in the performance of his duty to stop the train in obedience to a danger signal from the deceased. There is no proof whatever that the deceased did not un-

derstand the signals. The only proof on the subject is that of the engineer, who testifies that he did understand them; and it will be remembered that the engineer is the plaintiff's witness. The engineer also contradicts the charge in the declaration that no notice was given him that a car was to be left at McEwen. He says he had such orders.

The only other ground of negligence averred is that the engineer, while in charge of this backing train, did not send out a flagman, as required by the rules of the company, and also exceeded the rate of speed allowed. The plaintiff offered in evidence rule 31, from the code of rules adopted by the company for the regulation of its employees. This rule provides that "if a train should part while in motion, trainmen must use great care to prevent the detached part from coming in collision. Engineers must give the signal as provided in signal rule 3, and keep the front of the train in motion until the detached portion may stop. The front portion will have the right to go back, regardless of all trains, to recover the detached portion, first sending out a flagman in the direction in which the train is to be backed, and running with great caution, not exceeding 4 miles per hour," etc. It is very obvious that this rule has no application to the facts of this case. This train did not part while in motion, nor was there any danger of the detached portions coming in collision. Hence, there was no occasion for sending out a flagman, or proceeding at a rate of speed not exceeding 4 miles per hour. The detached portion of the train had been left at McEwen, and remained stationary. It was not in motion on the track, following the fugitive train, and therefore presented no such emergency as called for the observance of this particular rule. But, if it be conceded that the rule did apply, and should have been observed on the occasion in question, it is not perceived that the violation of the rule was the proximate cause of the injury, or, indeed, that there was any causal connection between its infraction and the death of plaintiff's intestate. The record discloses that the deceased, in obedience to the rules of the company, had voluntarily taken his position at the rear brake of the rear car; that, with knowledge of the signals, he gave a danger signal to the engineer, and the latter in answer to said signal, immediately shut off steam, producing a jar in the train which threw the plaintiff from his position on the car, violently to the ground. This was the proximate cause of the accident, and the failure of the engineer to send out a flagman, or otherwise to observe rule 31, which was obviously designed to prevent a collision with the detached portion of the same train, had no causal connection whatever with the injury. So that, in any view of the case, upon the plaintiff's own showing, no liability was made out against the company.

It appears from the record that, at the conclusion of plaintiff's testimony before the jury, counsel for defendant company interposed a written demurrer to the evidence, as follows, to wit:

"The defendant comes and demurs to the evidence of plaintiff, and offers to admit of record that the following testimony and proof introduced by plaintiff [setting out all the testimony introduced by plaintiff] is true, and further admits as true all proper and legal deductions and inferences therefrom in law. The defendant offers to admit that the facts so stated are the facts in this case, and were proved entirely by plaintiff and his witnesses, and does now aver that the facts so stated present no ground for a recovery against it under the pleadings in this cause; and this it is ready to verify. Wherefore defendant prays the court to allow this demurrer, and direct plaintiff to join therein, and judgment of the court accordingly, and the plaintiff may be barred against having or maintaining his action against it, or further prosecuting the same.

"East & Fogg, C. D. Porter, J. D. B. De Bow, Attys."

It will be observed that the demurrer in this cause was in writing, and set out in full the plaintiff's evidence, which is in accordance with the established practice in such cases. Counsel for plaintiff moved to dismiss the demurrer, because unknown to the forms or practice of law, and because insufficient, which motion was by the court overruled. Thereupon plaintiff joined issue upon the demurrer. Upon argument of counsel and consideration by the court, the demurrer was sustained, and the suit dismissed. Plaintiff appealed, and has assigned errors.

The first assignment is that the trial judge erred in allowing defendant to file a demurrer to the evidence, sustaining the same, and dismissing the suit. It is insisted this action of the court violates art. 1, § 6, of the Constitution of the state, which provides that the right of trial by jury shall remain inviolate, etc., and also art. 6, § 9, which ordains: "Judges shall not charge juries with respect to matters of fact but may state the testimony and declare the law." It may be well to understand, at the threshold of this investigation, what is meant by the right of trial by jury, as guaranteed by the Constitution. The late Mr. Justice Miller, in his Lectures on Constitutional Law, quotes with approval the following from the Encyclopædia Britannica, in its article *Jury*, to wit: "The essential features of trial by jury, as practiced in England and countries influenced by English ideas, are the following: The jury are a body of laymen, selected by a lot, to ascertain, under the guidance of a judge, the truth in questions of fact arising either in a civil litigation or a criminal process. . . . Their province is strictly limited to questions of fact, and within that province they are still further restricted to the exclusive consideration of matters that have been proved by evidence in the course of the trial. They must submit to the direction of the judge as to any rule or principle of law that may be applicable to the case," etc. Again, Forsyth, in his History of Trial by Jury, published in 1852, says: "The distinctive characteristic of the system is this: That the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts. They are to decide upon the effect of the evidence, and thus to assist the court to pronounce a right judgment; but they have nothing to do with the judgment or sentence which follows the verdict. They are not, like the judges, mem-

bers of a class charged with the duty of judicial inquiry. They are taken from varied pursuits, to make a special inquiry, and return to their ordinary avocations when the labor is over." It will be observed that, in both of these definitions, the distinctive feature of the jury system is that it is a tribunal erected for the settlement of variant, contested, and disputed facts. If the facts upon which plaintiff relies are uncontroverted, and are expressly admitted by the defendant, together with all legal and reasonable inferences that may be deduced therefrom, it is difficult to perceive what function is to be performed by the jury in the settlement of such agreed facts. The province of the jury is to weigh the evidence; but when there is no disputed fact in the record, there is nothing to be weighed. It was upon this idea that the demurrer to the evidence became an established practice at common law. "It is defined by the best text writers to be a proceeding by which the court in which the action is depending is called upon to decide what the law is upon the facts shown in evidence, and it is regarded in general as analogous to a demurrer upon the facts alleged in the pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by consent of the court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the court, the application of the law to the facts, and thus the evidence is made a part of the record, and is considered by the court as in the case of a special verdict." *Suydam* v. *Williamson*, 61 U. S. 20 How. 427, 15 L. ed 978; *Van Stone* v. *Stillwell Mfg. Co.* 142 U. S. 134, 35 L. ed. 963. "Where the evidence in a cause is such that the counsel of the other party thinks it insufficient in law to maintain or overthrow the issue, he may demur to it. By so doing he admits the truth of all the facts alleged, withdraws the case from the jury, and submits the application of the law upon the facts to the court. As the province of the jury is to ascertain the truth of facts and the credibility of witnesses, the demurrer must, consequently, admit the truth of all facts which the jury might find in favor of the other party upon the evidence, of whatever kind, whether in writing or parol. Where the evidence is written, and where, though parol, it is certain, the party who offers it must join in the demurrer, or waive the testimony. If the plaintiff refuses to join, except in terms which the court disapproves, his evidence is considered as withdrawn, and the jury must find a verdict for the defendant. Where the evidence is uncertain or circumstantial, the party who offers it may specify the facts to be admitted before he joins in demurrer, and every fact must be admitted which the evidence conduces to prove. 5 Am. & Eng. Enc. Law, p. 563. The court will also, on the argument of the demurrer, make every inference of fact in favor of the party offering the evidence, which the evidence warrants, and which the jury, with the least degree of propriety, might have inferred; but they ought not to make forced inferences." 1 Troubat & H. Pr. p. 509; 2 Tidd, Pr. p. 865; Starkie, Ev. pt. 3, p. 435; 2 Elliott, Gen. Pr. §§ 855-858, and notes. "The demurrer not only admits the truth of all the evidence adduced by the party against whose evidence the demurrer is directed, but it also admits all the inferences that may be logically and reasonably drawn from the evidence. The probative force of the evidence is not confined to the direct effect of the evidence but extends to the results reasonably deducible from it by logical and legitimate inference. . . . It follows, therefore, that the facts which the evidence directly or indirectly tends to prove must be taken as admitted." Id. § 858. Again, the same author, at § 863, says: "The evidence must be incorporated in the demurrer. It should be addressed to the whole evidence, and not to part. It should assign for cause that the evidence is insufficient to entitle the party against whose evidence it is filed to a recovery, but, according to the precedents, this may be done in general terms." The party who prevails on the demurrer is entitled to final judgment in his favor. It is not necessary that the damages should be assessed by the jury originally called to try the case, although that jury may assess them, but another jury may be called to assess the damages. If there is a conditional assessment of damages, and the decision upon the demurrer is in favor of the plaintiff, he is entitled to a judgment for the amount conditionally assessed. Where the damages have not been provisionally assessed, then, as already suggested, a jury may be called to make the assessment, and judgment will be entered for the amount assessed by the jury. Id. §§ 869, 870; 2 Troubat & H. Pr. p. 866; Gould, Pl. p. 574, § 73.

We have seen, from the authorities, that the only province of the jury is to settle disputed questions of fact, while the office of the demurrer to the evidence is to admit the facts and invoke the application of the law by the court. Is this practice in any sense an invasion of the constitutional guaranty "that the right of trial by jury shall remain inviolate," or is it subversive of the other provision, "that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law?" We do not so understand it. It is not so understood in other states of the Union with similar constitutional provisions. Says Mr. Elliott: "In some jurisdictions [citing Maine], the courts refuse to recognize the practice of demurring to the evidence, but, as we think, without reason, for the practice is an ancient and well-established one, having a firm support in principle. It is recognized in most of the states, and also by the Federal and the English courts." 2 Elliott, Gen. Pr. § 855. "It is illogical," says the same author, "to assert that there is any encroachment upon the province of the jury where the evidence is conceded to be true and all legitimate and reasonable inferences that may be drawn from it are admitted, for, in such a case, there is no disputed question of fact for the jury to decide. Nor is there any injustice in entertaining a demurrer, for if the law is against the party to whose evidence the demurrer is addressed upon the evidence and the legitimate inferences that may be drawn from it, he can by no possibility be rightfully entitled to a recovery, and it is the duty of the court to so adjudge." Id. § 858.

The practice of demurring to the evidence

is in vogue in nearly every state of the Union, as is fully shown in the briefs of counsel, who have diligently and critically explored the whole subject, and who, by their research and intelligent presentation of the question, have greatly lightened the labor of the court. The Constitution of Alabama provides that "the right of trial by jury shall remain inviolate," yet the practice of demurring to the evidence is recognized and enforced. In 1835, the supreme court of that state in *Sawyer* v. *Fitts*, 2 Port. (Ala.) 9, held, *viz.*: "On demurrer to evidence, the party must admit the facts and conclusions which may be reasonably inferred therefrom, otherwise the adverse party is not bound to join in the demurrer." The practice is also recognized in *Gluck* v. *Cox*, 90 Ala. 331. The Constitution of Florida provides, *viz.*: "The right of trial by jury shall be secured to all, and remain inviolate forever." Yet this mode of practice is established. *Higgs* v. *Shehee*, 4 Fla. 382; *Hinote* v. *Simpson*, 17 Fla. 444. In the latter case the court said: "No demurrer to evidence should be allowed and no judgment thereon given unless the party demurring shall admit upon the record all the facts which the evidence conduces to prove." In Illinois the same constitutional provision is found, but the practice of demurring to the evidence is allowed. In the case of *Joliet, A. & N. R. Co.* v. *Velie*, 140 Ill. 61, 62, the supreme court of that state held: "Where the defendant demurs to the plaintiff's evidence, he must be held to admit not only all that the plaintiff's testimony proves, but all that it tends to prove. The demurrer not only admits the truth of the testimony demurred to, but all the conclusions of fact which a jury may fairly draw therefrom. The testimony is to be taken most strongly against the party demurring, and whatever inferences the jury would be entitled to draw the court ought to draw. The object of the demurrer is to refer to the court the law arising from facts. Nothing remains but that the court should apply the law to the admitted facts. The court cannot investigate the facts in dispute or weigh the force of testimony—that is the province of the jury." *Crowe* v. *People*, 92 Ill. 231. In the state of Indiana, with similar constitutional provision, the practice of allowing a demurrer to the evidence is well settled. *Pennsylvania Co.* v. *Stegemeier*, 118 Ind. 306; *Ruff* v. *Ruff*, 85 Ind. 432. In *Pennsylvania Co.* v. *Stegemeier* the court held: "The appellant demurred to the evidence. The rules upon the subject of demurrers to the evidence are well settled, and by them this case must be determined. By demurring to the evidence the appellant admitted the truth of all the evidence adduced by the appellee, and all inferences that might reasonably be drawn from it, and withdrew from consideration all favorable evidence, except upon points where there was no conflict." 118 Ind. 306; *Palmer* v. *Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Purcell* v. *English*, 86 Ind. 35, 44 Am. Rep. 255; *Hazzard* v. *Citizens' State Bank*, 72 Ind. 130; *Steinmetz* v. *Wingate*, 42 Ind. 574; *Willcuts* v. *Northwestern Mut. L. Ins. Co.* 81 Ind. 300; *Fritz* v. *Clark*, 80 Ind. 591. The Bill of Rights of Kansas (§ 5) also provides that "the right of trial shall be inviolate." In 1892 the case of *Burlington Ins. Co.* v. *Ross*, 48 Kan. 228, was tried under this Constitution, and the court held, *viz.*: "The plaintiff in error . . . demurred to the evidence because no cause of action was proved, and this demurrer was overruled, and judgment rendered for the amount of the loss. The overruling of the demurrer was error for which the cause must be reversed." Id. 234. The Kentucky Constitution (art. 13, § 8) provides, *viz.*: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by the Constitution." The former Constitution had ordained, also, that trial by jury shall be as heretofore, and the right thereof remain inviolate. Under both Constitutions the practice of demurring to the evidence prevailed. *Ditto* v. *Ditto*, 4 Dana, 503; *Shay* v. *Richmond & L. Turnp. Road Co.* 1 Bush, 108. The Constitution of Maryland provides that "the trial by jury in all issues of fact shall be inviolably preserved." Art. 15, § 6. The demurrer to the evidence is also practiced in that state. *Forbes* v. *Perrie*, 1 Harr. & J. 110. Massachusetts also recognized the practice under a similar constitutional provision. *Copeland* v. *New England Ins. Co.* 22 Pick. 138; *Forsyth* v. *Hooper*, 11 Allen, 421; *Golden* v. *Knowles*, 120 Mass. 336. Michigan, under a like provision in its Constitution, sustains the practice. See *Mynning* v. *Detroit, L. & N. R. Co.* 64 Mich. 97. This practice also prevails in the state of Mississippi, under similar conditions. In the case of *Mobile & O. R. Co.* v. *McArthur*, the supreme court of that state said, *viz.*: "A demurrer to evidence is a proceeding by which the judges, whose province it is to determine questions of law, are called upon to declare what the law is upon the facts in evidence," etc. If a party wishes to withdraw from the jury the application of the law to the facts, and the danger or risk of a misapplication, he demurs, in law, to the evidence. The effect is much the same as a special verdict, and perhaps would not be resorted to, if the jury would be compelled to find a special verdict. 43 Miss. 185. Again, the same court held that a party against whom a demurrer has been filed may be compelled to join in the demurrer. *Western Assur. Co.* v. *Mayer*, 64 Miss. 795. The practice is also recognized in Missouri under a like Constitution. *Witting* v. *St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L. R. A. 602; *Walton* v. *Wabash Western R. Co.* 32 Mo. App. 634. In New York the demurrer to the evidence is now superseded by a motion for a nonsuit at the close of plaintiff's evidence. This practice is even more radical than the demurrer to the evidence, in that such a motion is allowed where it appears that, by reason of the great preponderance of evidence against the plaintiff, no verdict in his favor would be permitted to stand. Gould, Pl. 5th ed. p. 446. See also *Colegrove* v. *New York & N. H. R. Co.* 20 N. Y. 492, 493, 75 Am. Dec. 418; *Haring* v. *New York & E. R. Co.* 13 Barb. 15; *Hartfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Suydam* v. *Grand Street & W. R. Co.* 41 Barb. 375-380. In New Jersey the practice prevails, although the Constitution preserves inviolate trial by jury. *Williams* v. *Sheppard*, 13 N. J. L. 76. The Constitution of North Carolina provides "that in

all controversies respecting property the ancient mode of trial by jury is one of the securities of the rights of the people and ought to remain sacred and inviolate." Art. 1, § 19. In the case of *Nelson* v. *Whitfield*, 82 N. C. 54, the court held, *viz.*: "A demurrer to evidence withdraws a case from the jury, and it is laid down in Tidd on Practice, 865, that when the evidence is in writing, or, if parol, is certain, the adverse party will be required to join in the demurrer, but where the parol evidence is loose and indeterminate, or is circumstantial, he will not be required to do so, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. This the plaintiff declines to do, and there was no waiver of the objection on the part of defendant. There was no error in the ruling of the court below upon the evidence." In the late case of *Hopkins* v. *Bowers*, 111 N. C. 178, the court held, *viz.*: "When the defendants demurred to the evidence, the ruling of his honor that thereby the defendants admitted the truth of the testimony, together with such inferences favorable to plaintiffs as could be reasonably drawn therefrom, was unquestionably correct." *Bond* v. *Wool*, 107 N. C. 139. In Oregon the practice prevails under a like constitutional provision. In *Hawley* v. *Dawson*, 16 Or. 346, the court held, *viz.*: "In such a case the rule is that the demurrer admits all that the testimony objected to has proved, and all that it tends to prove and hence, if there is testimony tending to prove the issues in favor of the plaintiff the judgment must be in his favor." In Pennsylvania the Constitution provides, *viz.*: That in all controversies respecting property and in suits between man and man the parties have a right to trial by jury which ought to be held sacred. The demurrer to the evidence is, however, recognized. See *McKowen* v. *McDonald*, 43 Pa. 443, 82 Am. Dec. 576. The practice is also recognized in Texas. *Hatch* v. *Garza*, 7 Tex. 60; *Galveston, H. & S. A. R. Co.* v. *Templeton*, 9 Tex. Civ. App. —; *Umscheid* v. *Scholz*, 84 Tex. 265. In the state of Virginia the practice also prevails. *Whittington* v. *Christian*, 2 Rand. (Va.) 357; *Jones* v. *Old Dominion Cotton Mills*, 82 Va. 140; *Trout* v. *Virginia & T. R. Co.* 23 Gratt. 619. In the case of *Jones* v. *Old Dominion Cotton Mills* the court said: "It is the settled rule that by demurring to the evidence the demurrer waives all evidence on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, and refers it to the court to deduce all fair inferences from the evidence." 82 Va. 140. In West Virginia the practice of demurring to the evidence is also recognized. *Miller* v. *Franklin Ins. Co.* 8 W. Va. 515; *Riddle* v. *Core*, 21 W. Va. 530; *Williamson* v. *Newport News & M. Valley Co.* 34 W. Va. 657, 12 L. R. A. 297; *South West Imp. Co.* v. *Smith*, 85 W. Va. 306.

It will thus be seen, from this review, that the demurrer to the evidence is still preserved in seventeen of the states. The practice has not been repudiated in the other states as obnoxious to their Constitutions; but it has been superseded by a less cumbersome and more radical procedure, to wit, ordering a nonsuit and directing a verdict. In the following states it has been adjudged lawful, under constitutional provisions guaranteeing trial by jury, for the courts to give instructions to the jury directing a verdict. Alabama: *Thomasson* v. *Groce*, 42 Ala. 431; *Montgomery* v. *Wright*, 72 Ala. 411, 47 Am. Rep. 422; 2 Elliott, Gen. Prac. § 888. Arkansas: In *Catlett* v. *St. Louis, I. M. & S. R. Co.* 57 Ark. 468, the court held: "Where the plaintiff has adduced evidence tending to prove all the facts obtainable to sustain his complaint and the undisputed evidence is so conclusive that this court would be compelled to reverse the judgment based upon a verdict in his favor, the court should withdraw the case from the jury, and direct a verdict for the defendant." It should be remarked that the Constitution of Arkansas provided that the right of trial by jury shall remain inviolate" (art. 2, § 7), and "judges shall not charge juries with regard to matters of fact, but shall declare the law" (art. 7, § 23). In Illinois it is held that the court can instruct the jury to find a verdict for the defendant after plaintiff has closed his evidence. *Doane* v. *Lockwood*, 115 Ill. 490; *People* v. *People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340; 2 Elliott, Gen. Prac. § 887. In Indiana it is held the trial court may withdraw a cause from the jury where there is no dispute as to the facts. *Purcell* v. *English*, 86 Ind. 34, 44 Am. Rep. 255; *Carver* v. *Carver*, 97 Ind. 497; *Rush* v. *Coal Bluff Min. Co.* 131 Ind. 135. In Iowa a verdict may be directed by the court. *Miller* v. *House*, 63 Iowa, 82; *Poor* v. *Merrill*, 68 Iowa, 436. In Kansas it was held that, if the testimony offered in behalf of the defendant has no tendency to establish or advance the propositions essential to the maintenance of the defense, it is the duty of the court to direct the jury to return a verdict for the plaintiff. *Stiles* v. *Steele*, 37 Kan. 552. In Kentucky the trial court may direct a verdict when there is no evidence. *Gallatin* v. *Bradford*, 1 Bibb, 209; *Fightmaster* v. *Beasly*, 7 J. J. Marsh. 411; *Gregory* v. *Nesbit*, 5 Dana, 421. In Maine the court may direct a verdict at close of entire case. *Cooper* v. *Waldron*, 50 Me. 80; *Moore* v. *McKenney*, 83 Me. 80. In respect of the demurrer to the evidence, the supreme court of Maine says it is an unusual and antiquated practice, calculated to suppress truth and justice, and is allowed by the court in the exercise of a sound discretion. *State* v. *Soper*, 16 Me. 293. This court held, however, in a later case, decided in 1862 (*Cooper* v. *Waldron*, 50 Me. 81), *viz.*: "When in any case it is clear that upon the evidence a verdict for the plaintiff cannot stand, and that in the end judgment must be rendered for the defendant, what good reason can be assigned for submitting the case to the jury? If their verdict is right, nothing is gained; and if it should happen to be wrong it must be set aside. To withhold a case from the jury is no greater interference than to set aside their verdict. To set aside their verdict impliedly impeaches either their intelligence or their integrity, and tends to lessen public confidence in the usefulness of the institution. . . . If the presiding judge is of the opinion that the facts admitted or clearly established

are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or direct the jury to find a verdict for the defendant. The better course is for the judge to nonsuit the plaintiff, for it is idle to submit to the jury a question that can be answered only in one way." The Constitution of Maine also guarantees right to trial by jury. In Maryland the court may direct a verdict when there is no evidence to support the issue. *Baltimore & O. R. Co.* v. *Stricker*, 51 Md. 47, 34 Am. Rep. 291. In Massachusetts the court may direct a verdict. In the case of *Reed* v. *Deerfield*, 8 Allen, 522, the court held: "Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as matter of law, that there is not sufficient evidence to warrant a verdict for the plaintiff." So in the case of *Denny* v. *Williams*, 5 Allen, 1, the court held: "If the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant." *Kingsford* v. *Hood*, 105 Mass. 495. In Michigan it is held that a verdict may be directed by the court in a proper case. *Grand Trunk R. Co.* v. *Nichol*, 18 Mich. 170; *Carver* v. *Detroit & S. Pl. Road Co.* 61 Mich. 592; *Mynning* v. *Detroit, L. & N. R. Co.* 64 Mich. 93. In Minnesota the court may direct a verdict at close of entire case. "If, when the evidence of both sides is closed, plaintiff is entitled, as a matter of law, to a verdict, the proper practice is to request the court to direct a verdict in his favor." *Duluth Chamber of Commerce* v. *Knowlton*, 42 Minn. 229. In Mississippi a verdict may be directed in a proper case. *Memphis & C. R. Co.* v. *Chastine*, 54 Miss. 503. In Missouri the practice of directing a verdict is allowable. *Grube* v. *Missouri P. R. Co.* 98 Mo. 330, 4 L. R. A. 776; *Carroll* v. *Inter-State Rapid Transit Co.* 107 Mo. 653; *Morgan* v. *Durfee*, 69 Mo. 469, 33 Am. Rep. 508. In Nebraska it is adjudged error for the court not to direct a verdict in a proper case. *Atchison & N. R. Co.* v. *Loree*, 4 Neb. 446; *Union Stock Yards Co.* v. *Conoyer*, 38 Neb. 488; *Hakanson* v. *Brodke*, 36 Neb. 42. In New York the jury may be instructed to return a verdict. *Williams* v. *Guile*, 117 N. Y. 343, 6 L. R. A. 366; *People* v. *Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Linkauf* v. *Lombard*, 137 N. Y. 417. In New Jersey the court may direct a verdict. *Rochat* v. *North Hudson County R. Co.* 49 N. J. L. 445; *Phillips* v. *Pullen*, 50 N. J. L. 439; *Baldwin* v. *Shannon*, 43 N. J. L. 596. It is also the practice in North Carolina for the trial court to direct a verdict. *Wittkowsky* v. *Wasson*, 71 N. C. 451. In Pennsylvania the trial court may direct a verdict. *Hyatt* v. *Johnston*, 91 Pa. 196. So in South Carolina the same practice obtains. *Carter* v. *Oliver Oil Co.* 34 S. C. 211. In Vermont a verdict may be directed under the practice prevailing in that state. *St. Johnsbury* v. *Thompson*, 59 Vt. 300, 59 Am. Rep. 731. In this latter case the court said, *viz.* "There being no conflict in the evidence nor any dispute as to the facts, there was nothing to be submitted to the jury. The only questions to be determined upon the evidence were questions of law which could be determined only by the court. With the case thus stated, it was proper and lawful for the court to direct the verdict." In West Virginia the practice of directing a verdict prevails. *Poling* v. *Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215; *Overby* v. *Chesapeake & O. R. Co.* 37 W. Va. 524; *Woolwine* v. *Chesapeake & O. R. Co.* 36 W. Va. 329. In Wisconsin it is held that a verdict should be directed in a proper case. *Dryden* v. *Britton*, 19 Wis. 23; *Cutler* v. *Hurlbut*, 29 Wis. 152.

It thus appears from a review of the cases that the practice of directing a verdict prevails in twenty-six states, with constitutional guaranties in respect of inviolability of trial by jury similar to our own. As pertinent to the present investigation, we also cite the different states in which the practice of ordering an involuntary nonsuit prevails, together with the reasons given by some of the courts why such a practice should be observed. In California, with constitutional provisions precisely similar to our own, a compulsory nonsuit may be ordered by the court. In the case of *Ringgold* v. *Haven*, 1 Cal. 115, the court said: "If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury. Nor, in adopting the practice of nonsuit, is there to be apprehended any danger of encroachment upon the rights of parties, or of abridgment of the prerogatives of juries. . . . We are of the opinion, therefore, that the power of compulsory nonsuit should be upheld." In *Butler* v. *Hyland*, 89 Cal. 575, the court said: "A motion for a nonsuit admits the truth of the testimony introduced, but challenges its sufficiency." *Fox* v. *Southern Pac. Co.* 95 Cal. 234; *Warner* v. *Durrow*, 91 Cal. 310; *Warren* v. *McGill*, 103 Cal. 153. In Connecticut compulsory nonsuits are allowed. In the case of *Naugatuck R. Co.* v. *Waterbury Button Co.* 24 Conn. 468, the court said, *viz.*: "The clause in the Constitution, which provides that the trial by jury shall remain inviolate, presents no obstacle to this legislation [authorizing nonsuits]. Its object is simply to preserve a jury trial in questions of fact, and it does not relate to questions of law with the court. The jury have nothing to do with the relevancy and materiality of evidence; or with inferences of law from facts fully established or not denied. If all the facts, claimed to be proved by the evidence of the plaintiff, cannot, if true, make a prima facie case for him, it would be worse than idle to proceed further with the trial. . . . Besides, this mode of trying a question of law had always been practiced at the common law, and was familiarly known to the men who framed our Constitution; and it is not to be believed that they meant, by this clause in the Constitution, to restrict the courts and the legislature itself, in relation to this ancient practice." 2 Thomp. Trials, § 2228. In Delaware the granting of an involuntary nonsuit is within the discretion of the court. *Croasdale* v. *Bright*, 6 Houst. (Del.) 52; *Flanagan* v.

Wilmington, 4 Houst. (Del.) 548. In Georgia a court can order a nonsuit. In the case of *Austin* v. *Raiford*, 68 Ga. 206, the court said: "We would not be understood as holding that, where even a prima facie case is made in behalf of the plaintiff, the court should award a nonsuit at law or dismiss a bill in equity. But if the evidence is such that, admitting all the facts proved and all reasonable deductions from them to be true, the plaintiff, on all the proof, ought not to recover, then the cause should be nonsuited or dismissed." In Iowa a nonsuit may be ordered by the trial court. *Eddy* v. *Wilson*, 1 G. Greene, 259; *Murphy* v. *Chicago, R. I. & P. R. Co.* 45 Iowa, 661. In Kentucky nonsuit may be ordered. *Shay* v. *Richmond & L. Turnp. Road Co.* 1 Bush, 108; *Barrett* v. *Meek*, Sneed (Ky.), 34. In Maine the court has power to order a nonsuit. *Perley* v. *Little*, 3 Me. 97; *Lyon* v. *Sibley*, 32 Me. 577; *Cooper* v. *Waldron*, 50 Me. 80. In Massachusetts an involuntary nonsuit may be ordered by the trial court. *Davis* v. *Fall River*, 155 Mass. 96; *Atherton* v. *Brown*, 14 Mass. 153. In Michigan the same practice prevails. In *Carver* v. *Detroit & S. Pl. Road Co.* 61 Mich. 592, the court said: "'There is, in every case, a preliminary question, which is one of law, *viz.*: whether there is any evidence on which the jury could properly find a verdict for the party on whom the *onus* of proof lies. If there is not the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant.' The rule above stated may be considered as that now established in the English courts." In Minnesota a nonsuit may be ordered. *Potter* v. *Mellen*, 36 Minn. 122. In Nebraska nonsuit may be ordered. *Atchison & N. R. Co.* v. *Loree*, 4 Neb. 450; *Missouri Valley Land Co.* v. *Bushnell*, 11 Neb. 192; *Manzy* v. *Hardy*, 13 Neb. 37. So, also, in Nevada the same practice is allowed. *Burns* v. *Rodefer*, 15 Nev. 59; *Cooper* v. *Pacific Mut. L. Ins. Co.* 7 Nev. 121. A nonsuit may be ordered in New Hampshire. *Bailey* v. *Kimball*, 26 N. H. 351; *Stickney* v. *Stickney*, 21 N. H. 61. In New York a compulsory nonsuit may be ordered by the court. In the case of *Haring* v. *New York & E. R. Co.* 13 Barb. 15, the court said: "But when upon the plaintiff's own showing, he has no cause of action, or has defeated his claim by his own misconduct, there can be no propriety in requiring the jury to pass upon the evidence. For if the jury should find a verdict against the law, the court would be bound to set it aside. . . . We cannot shut our eyes to the fact that in certain controversies between the weak and the strong—between an humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly, and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There is, therefore, a manifest propriety in withdrawing from the consideration of the jury those cases in which the plaintiff fails to show a right of recovery." See also *Pratt* v. *Hull*, 32 L. R. A. 13 Johns. 334; *Deyo* v. *New York C. R. Co.* 34 N. Y. 9; *Wilds* v. *Hudson River R. Co.* 24 N. Y. 430. In New Jersey the court is permitted to order an involuntary nonsuit. *Aycrigg* v. *New York & E. R. Co.* 30 N. J. L. 460; *Central R. Co.* v. *Moore*, 24 N. J. L. 824. So, also, in the state of Ohio, the same practice prevails. *Ellis* v. *Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610. In this case the court held, *viz.*: "The law of every case, in whatever form presented, belongs to the court; and it is not only the right of the judge, but a solemn duty, to decide and apply it. He must determine the legal requisites to the right of action, and the admissibility of the evidence offered to sustain it. When all the evidence offered by the plaintiff has been given, and a motion for a nonsuit is interposed, a question of law is presented, whether the evidence before the jury tends to prove all the facts involved in the right of action, and put in issue by the pleadings. . . . All that the evidence in any degree tends to prove must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, must be taken as fully established. . . . But where he has given no evidence to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court that the fact constitutes an essential element in the right of action necessarily ends the case." Id. 645, 646. In Oregon a nonsuit may be ordered. *Grant* v. *Baker*, 12 Or. 329; *Herbert* v. *Dufur*, 23 Or. 462. In the case of *Anderson* v. *North Pac. Lumber Co.* it was held that, where there is no evidence to support the plaintiff's case, a nonsuit may be properly ordered. 21 Or. 281. In Pennsylvania a nonsuit may be ordered. The court held in the case of *Munn* v. *Pittsburgh*, 40 Pa. 371, *viz.*: "The court then was right in holding that there was no evidence sufficient in law to maintain the action, and in directing a nonsuit. The complaint that the constitutional right of trial by jury has been violated is made without due consideration. The province of a jury has always been to determine facts. What is the law applicable to those facts has always been a question for the court. In ordering the nonsuit, the court conceded all the facts which the jury could have found, and simply declared that under the law as applicable to them there was no liability on the part of the defendants." The practice in Rhode Island permits a nonsuit. *Payton* v. *Sherburne*, 15 R. I. 213. In South Carolina it is held that, whenever there is a total failure of testimony or evidence offered to a jury in support of an action, it is "the duty of the judge to order a nonsuit, because it would be a nugatory act to send such an unsupported cause to a jury. But wherever there was testimony, although of a doubtful nature, or a train of facts which were contradictory in themselves, or which admitted of different interpretations, in all such cases the court ought to send it to the jury." *Brown* v. *Frost*, 2 Bay, 131, 132, 1 Am. Dec. 633; *Turnbull* v. *Rivers*, 3 McCord, L. 131, 15 Am. Dec. 622; *Davis* v. *Columbia & G. R. Co.* 21 S. C. 101. In the last case it was said: "In fine, the rule is, where there is any competent, pertinent, and relevant testimony

offered to the facts in dispute, the case passes into the hands of the jury and beyond the judge; but where no such testimony is offered, it is the province and duty of the judge to nonsuit." In Texas the same practice prevails. *Foster* v. *Wells*, 4 Tex. 101; *West* v. *Bagby*, 12 Tex. 34, 62 Am. Dec. 512. So in Wisconsin a nonsuit may be ordered. *Gardinier* v. *Otis*, 13 Wis. 461; *Woodward* v. *McReynolds*, 1 Chand. (Wis.) 244.

It thus appears from the foregoing examination that in twenty-two states the compulsory nonsuit is practiced by the courts under constitutions which provide that the right of trial by jury shall remain inviolate. It will be perceived, moreover, that in every state in the Union the judge is allowed to withdraw a case from the jury whenever there is a destitution of any competent, relevant, and material evidence to support the issue; and this authority is exercised either by directing a verdict, sustaining a demurrer to the evidence, or enforcing a compulsory nonsuit, as the practice may prevail in the particular state. This fact is incontestable, and is abundantly shown in the overflow of cases already cited.

But it is argued by counsel for plaintiff in error that, whatever may be the practice in other states of the Union, the adjudications of this court are against either form of practice, and necessarily so, since the Constitution of Tennessee not only secures the right of trial by jury, but further declares that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." As already seen the first clause in respect of the right of trial by jury is found in the constitutions of all the states in one form or another, but the latter clause is found in the organic law of only five states. We do not think the latter clause adds anything to the prohibition contained in the first clause. The right of trial by jury *ex vi termini* means that judges shall not charge juries with respect to matters of fact, but the settlement of all disputed facts shall be left exclusively to their province. This court, in the case of *Ivey* v. *Hodges*, 4 Humph. 155, stated that the object of this provision of our Constitution was "to put a stop to the practice of summing up as it was and is yet practiced in the courts of Great Britain," etc., "which consists in telling the jury not what was deposed to, but what was proved." In other words, the court held that, where there is a conflict in the testimony, the judge may state the testimony, but is prohibited from declaring what facts are proved. In the case of *Catlett* v. *St. Louis, I. M. & S. R. Co.* 57 Ark. 461, a similar provision of the Constitution of Arkansas was drawn in question as late as 1893. The court said: "This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province, before this provision was ordained, to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The Constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge Battle expressed it in *Sharp* v. *State*, 51 Ark. 151: 'The manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of the judges.' If there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so. 'The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in legal idea. The first lies within the province of the court, the last within the province of the jury.' *Wheeler* v. *Schroeder*, 4 R. I. 383."

It will be found that the practice in the five states whose constitutions embody this additional clause sanctions either the compulsory nonsuit or the right of the judge to direct a verdict; in either case confessedly a more radical procedure than the demurrer to the evidence. Thus far we have not noticed the practice in our own state, but now proceed to examine the authorities on the subject. And, in the first place, it may be conceded that the involuntary nonsuit has no foothold in our practice. The question arose in the case of *Bacon* v. *Parker*, decided by this court in 1809, and reported in 2 Overt. (Tenn.) 55. Judge Overton, speaking for the court, said: "The practice in England and this country differs on this ground. Here, as well as in North Carolina, in common cases, the court never compels a nonsuit or gives judgment to that effect, but with the consent of the party nonsuited. In England, the practice is understood to be, that the court will order a judgment of nonsuit to be entered, whenever it clearly perceives, the plaintiff fails in proving his case, supposing his evidence to be true; or where no evidence is given on his part. . . . Which is the better method is immaterial, since our practice seems to be settled." The next reported case is that of *Scruggs* v. *Brackin*, decided in 1833, and reported in 4 Yerg. 528. In that case it appeared the trial court had ordered a nonsuit. Peck, J., in delivering the opinion of the court, said: "This is erroneous. The court had a right to judge of the admissibility of the evidence offered, and to reject it if inadmissible. But no case is recollected where our courts have tolerated the practice of ordering a nonsuit. This is sufficient to reverse the judgment." The next reported case is that of *Hunter* v. *Sevier*, 7 Yerg. 134, in which Catron, Ch. J., said: "But in this state the courts have at all times been holden not to have the power to order a nonsuit for want of proof. The plaintiff is to judge whether his case is made out, and if he sees proper to let a verdict go against him it is his oversight." So in the case of *Littlejohn* v. *Fowler*, 5 Coldw. 288, it was held that under our Constitution the plaintiff has the right to have his evidence, whether slight or full, passed upon by the jury, and that the courts have no power to order a nonsuit. These cases do not decide the question we are now investigating. For the same reason the Tennessee cases cited by counsel for plaintiff in error in respect of the right of the trial court to direct a verdict are not controlling in this case. Those cases presented controverted questions of fact material to the settlement of the issue, which belonged exclusively to the jury. Such

were the cases of *Kirtland* v. *Montgomery*, 1 Swan, 452; *Ayres* v. *Moulton*, 5 Coldw. 154; *Robinson* v. *Louisville & N. R. Co.* 2 Lea, 594; *Gregory* v. *Underhill*, 6 Lea, 207; *Jones* v. *Cherokee Iron Co.* 14 Lea, 157; *Cantrell* v. *Knoxville, C. G. & L. R. Co.* 90 Tenn. 638. As stated by the United States Supreme Court, the difference between compulsory nonsuit and directing a verdict "is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended." *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 264, 26 L. ed. 541. But, whatever the points of similarity or divergence, it is indisputable that neither form of practice prevails in this state. While this is true, we have at least one precedent where the practice of demurring to the evidence was recognized. It is found in the case of *Bedford* v. *Ingram*, 5 Hayw. (Tenn.) 155, and decided in 1818. That was an action by Ingram against John R. Bedford, administrator of Thomas Bedford, deceased, for work and labor done and materials furnished. The first seven counts in the declaration were upon an assumpsit by the intestate. The eighth count alleged that the plaintiff and the defendant administrator, after the death of Thomas Bedford, accounted together concerning divers sums of money due and owing to the plaintiff by said Thomas Bedford in his lifetime; and on the account stated, the defendant, as administrator, was found in arrears to the plaintiff, Ingram, in the sum of $1,100, and, being so indebted, he promised to pay. Nonassumpsit was pleaded to said eighth count. This court said: "In the progress of the cause, the defendant's counsel demurred to the evidence (which demurrer contains the whole of the evidence given on the part of the plaintiff), and offered to admit of record that the whole of the evidence, together with every legal and just inference thereupon, were facts in this cause, and thereupon prayed the court to allow the demurrer, and direct the adverse party to join therein; which the court refused unless the demurrant would expressly admit of record that an account had been stated between the parties. To this opinion of the court defendant excepted. The jury found that Thomas Bedford [the intestate] did assume as the plaintiff hath alleged in the first seven counts in the declaration, . . . and further say that the defendant [administrator] did assume as the plaintiff hath alleged in the eighth count [which was upon the account stated]. As to the demurrer to evidence, where either party, for instance, the defendant below, cannot prevail by showing the testimony inadmissible to have it rejected, but says that the evidence itself, though competent to be received, and though it maintain the fact which it is offered to prove, does not still in law maintain the case of the plaintiff, but is afraid the jury will misapply the law if they determine both the law and fact, and at the same time fears that they will not give a special verdict, leaving the law for the court to apply; then, by demurrer to evidence, he may cause the fact to appear as satisfactorily as if stated in a special verdict. If, therefore, the evidence demurred to be parol and circumstantial, upon which the jury may infer the fact it is offered to establish, then the demurrant must admit the fact in the same way as a special verdict would state it. Upon a special verdict the court cannot make any inference from evidence, however plain and irresistible that inference may be. So, likewise, the court cannot do so upon evidence stated in a demurrer. It will not do for the demurrant to say, 'I agree the court may infer all that the jury legally might,' for the judges cannot respond to a question of fact. . . . The demurrer to evidence being in place of a special verdict, must have the same certainty in all respects, and not leave it to the court to make inferences, which they have no more right to do in this case than in that of the special verdict, which in short they have no right to do in any case. . . . This can only be avoided by requiring the demurrant to admit the facts, the same that a jury might find, and then the court will have nothing to do but apply the law. . . . As in the present instance, the demurrant did not offer to admit any fact whatever, but only to leave it to the court to make inferences, therefore the plaintiff below ought not to have been compelled to join in the demurrer. Whether the evidence offered be conducive to the fact, in other words, whether it be competent to be received towards the establishment of the fact, the judge determines. . . . But if the evidence be received, then how far it conduces to the proof is for the jury to determine; and he that demurs must admit the fact it conduces to prove, and which a jury might infer from it; otherwise, you take from the party producing the evidence the benefit of the conclusion which the jury might make in his favor, if the cause were not taken from them. . . . Therefore the demurrant ought distinctly and unequivocally to admit in his demurrer to such circumstantial evidence that the defendant did account with the plaintiff, and promise to pay as stated in the declaration, or ought to withdraw his demurrer, and leave it to a jury to say whether the facts were so or not. The circu t court did not err in refusing to compel the plaintiff below to join, and in leaving to the jury to decide upon the evidence. We concur with the doctrine laid down in 2 H. Bl. 187." It is obvious that in this case the practice of demurring to the evidence is distinctly recognized and there is no suggestion that, when properly understood, it violates any provision of the Constitution. The real point at issue was whether there had been an account stated (*insimul computassent*) between the plaintiff and the administrator of Thomas Bedford, deceased, and the plaintiff relied on circumstantial evidence to establish the affirmative of that proposition. The court held that the plaintiff could not be compelled to join in the demurrer unless the demurrant would expressly admit of record that an account had been stated between the parties, since there were circumstances in proof from which the jury might fairly deduce that inference. The court expressly approved the rule laid down in the leading case of *Gibson* v. *Hunter*, 2 H. Bl. 187, namely: On a demurrer to circumstantial evidence the party offering the evidence is not obliged to join in the demurrer unless the party demurring will distinctly admit upon the rec-

ord every fact and every conclusion which the evidence offered conduces to prove. The Lord Chief Justice Eyre, among other things, made this sententious statement of the law, namely: "My lords, in the nature of the thing, the question of law to arise out of the fact cannot arise till the fact is ascertained. It is the province of a jury to ascertain the fact under the direction and assistance of the judge," etc. "The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury," etc. That case was an action by the holder against the acceptors of a bill of exchange, payable to a fictitious payee or order, and which, after the acceptance, had been indorsed by the drawers in the name of the fictitious payee for valuable consideration to the plaintiff. The latter exhibited evidence of a long course of dealing in similar bills between the drawers and acceptors for the purpose of raising a presumption from those circumstantial facts that the defendants at the time of accepting the bill knew the paper to be fictitious, and of then urging as matter of law that, if this presumption was established, the defendants were bound by their acceptance. To this evidence the defendants demurred, without admitting upon the record their knowledge, at the time of accepting the bill, that the payee was fictitious, and the plaintiff joined in demurrer. But it was resolved in the House of Lords, Chief Justice Eyre delivering the unanimous opinion of the judges, that, because the defendant's knowledge of the payee being a fictitious person was not expressly admitted on the record, the point of law intended to be raised by the demurrer could not arise upon the record, and, consequently, that no judgment could be given upon the demurrer. Gould, Pl. § 65.

The case at bar is not to be assimilated to the case of *Gibson* v. *Hunter* nor to the case of *Bedford* v. *Ingram*, 5 Hayw. (Tenn.) 155, for the reason that it does not present a case of circumstantial evidence tending to prove any particular fact fixing liability upon the company, and which must be expressly admitted upon the record. But, conceding all the facts proved by plaintiff to be true, and admitting all proper and legal inferences which may be deduced therefrom, there is no foundation whatever for any liability against the company. Both cases, however, distinctly recognized the demurrer to the evidence as an established practice of the common law. In this state the practice fell into disuse, and, so far as any reported case would indicate, remained in desuetude since *Bedford* v. *Ingram*. In the meantime the practice has been ingrafted upon the jurisprudence of other states, while the judiciary as well as the bar of this state have frequently observed the necessity of such a practice to prevent injustice in the misapplication of law by juries. As stated by Judge McKinney in *Whirley* v. *Whiteman*, 1 Head, 616: "In trials by jury the court is to decide questions of law; and the jury, questions of fact. . . . The truth of the facts and circumstances offered in evidence, in support of the allegations on the record, must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings. And this must be done in one of two modes, either the court must inform the jury, hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations; or, the jury must find the facts specially, and then the court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties. . . . The principles of law by which the jury must be governed in finding a verdict cannot be left to their arbitrary determination. The rights of parties must be decided according to the established law of the land, as declared by the legislature, or expounded by the courts, and not according to what the jury, in their own opinion, may suppose the law is, or ought to be. Otherwise, the law would be as fluctuating and uncertain as the diverse views and opinions of different juries in regard to it." No clearer definition of the distinct provinces of court and jury is to be found in our books than in this masterpiece of Judge McKinney. In that opinion we find an express recognition of the practice of requiring a special verdict upon the facts in order that the court may make an application of the law. When it appears there is no conflict in the evidence, but the facts are all admitted, we fail to perceive what is to be submitted to the jury. And if the court may apply the law upon a special verdict settling controverted facts, why may not the court make application of the law upon facts which are undisputed, and are all admitted by the demurrer of the defendant? The Supreme Court of the United States, in *Louisville & N. R. Co.* v. *Woodson*, 134 U. S. 614, 33 L. ed. 1032, a case appealed from the supreme court of Tennessee, had occasion to examine the act of 1801, which provides that "not more than two new trials shall be granted to any party in any action at law, or upon the trial by a jury of an issue of fact in equity." Chief Justice Fuller, after reviewing the decisions of this court construing the statute, and also several cases defining the province of the jury in the settlement of disputed facts, said, *viz.*: "From these decisions it is clear that in Tennessee, as elsewhere, although the jury are the judges of the facts, yet the judge has power to set aside the verdict when, in his judgment, it is against the weight of the evidence, but that that supervisory power cannot be exercised under the statute when the triers of the facts have three times determined them the same way. This manifestly refers to a state of case where, in the opinion of the judge, the verdict should have been otherwise than as rendered, because of the insufficiency of the evidence to sustain it, but not to a case where there is no evidence at all, . . . while, on the other hand, the case should be left to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. . . . In such case the practice of a demurrer to the evidence can be resorted to, or a motion to exclude the evidence from the jury, or to instruct them that the plaintiff cannot recover, which motions are in the nature of

demurrers to evidence, though less technical, and have in many of the states superseded the ancient practice of a demurrer to evidence. . . . Such a motion, like the demurrer to evidence, admits not only what the testimony proves, but what it tends to prove. The ultimate facts, in other words, are admitted. In *Bacon* v. *Parker*, 2 Overt. (Tenn.) 57, it was decided that an involuntary nonsuit could not be entered, but a demurrer to evidence was allowed in *Bedford* v. *Ingram*, 5 Hayw. (Tenn.), 155, and it must be that, as the duty devolves upon the judge to declare the law, he may be requested, in some form, to advise the jury that the plaintiff cannot recover when that is the conclusion of law arising upon the record, and should do so though not specifically directed. It is true that it was held in *Kirtland* v. *Montgomery*, 1 Swan, 452, that it was error for the trial judge to assume to answer both the questions of law and the questions of fact involved in that case, which was one, however, in which there was evidence raising questions of fact to be determined; and in *Ayres* v. *Moulton*, 5 Coldw. 154, it was held error in the circuit judge to charge the jury that from the facts as proved the plaintiffs were 'entitled to recover of the defendant the sum sued for,' because 'the facts to be deduced from the evidence must be left exclusively to the jury.' But that also was a case where it evidently did not follow from the ultimate facts that the plaintiffs were entitled as matter of law to recover as stated. To the same effect is *Case* v. *Williams*, 2 Coldw. 239, where it was ruled that, if the charge of the trial judge be equivalent to a determination of the facts involved, a new trial would be granted.' This is and must be so, whenever there are deductions of fact to be drawn by the jury, but where that is not the case, although a direct instruction to return a verdict for the defendant may not be in accordance with the practice in Tennessee, yet the decision showed that the question whether a recovery can be had at all, or not, can be presented in some appropriate form in that state." See also *East Tennessee, V. & G. R. Co.* v. *Mahoney*, 89 Tenn. 332.

We hold that an appropriate form for determining whether, as a matter of law, any recovery can be had or liability fixed against the defendant upon facts which are not disputed, is by demurring to the evidence. This form of practice is expressly sanctioned by an adjudication of this court which has never been overruled, though it may be conceded that the practice is cumbersome and antiquated. In the nature of things, it can seldom be successfully invoked, for the reason that if, upon any rational or legitimate view of the evidence, a prima facie case is made out, "or if the testimony be doubtful, or the trend of facts contradictory in themselves, or admit of different interpretations by fair-minded men," the case must be submitted to the jury. Moreover, the practice is attended with the danger that, if unsuccessful, the prevailing party is entitled to final judgment, and an immediate assessment of his damages. 2 Elliott, Gen. Pr. §§ 865–870. In the present record we are confronted with a perfectly plain case, in which no liability is established against the defendant upon the facts, or upon any reasonable or legitimate inference that may be made upon such facts. The law of every case, in whatever form presented, belongs to the court. It is not only the prerogative of the judge, but a solemn duty to declare it. The defendant in this case is entitled to the judgment of the law upon the undisputed facts found in the record. Our duty is imperative, and, being of opinion that in no view of the facts shown in evidence is any liability made out against the defendant company, *we affirm the judgment of the Circuit Court.*

NEW YORK COURT OF APPEALS.

Sarah KNISLEY, *Respt.*,
v.
Pascal P. PRATT *et al.*, *Appts.*

(148 N. Y. 372.)

1. **The assumption of the obvious risks of unguarded cog-wheels** by an employee, who thus waives the protection of a statute requiring them to be guarded, is not in contravention of public policy.

2. **Disregard of the statutory duty properly to guard the cog-wheels** of a machine, which is imposed by Laws 1890, chap. 395, p. 756, § 12, does not render an employer liable to an employee whose hand was caught in such wheels where the risk was obvious and was assumed by engaging in the work.

(February 18, 1896.)

NOTE.—As to the effect of a disregard of statutory duty upon the doctrine of contributory negligence, see also *note* to Sowles v. Moore (Vt.) 21 L. R. A. 723.

APPEAL by defendants from an order of the General Term of the Supreme Court, Fifth Department, granting a new trial after the entry of a nonsuit at the Erie County Circuit in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **John G. Milburn,** for appellant:

The risk in cleaning the machine with the cog-wheels unguarded, as they were during the entire period of her service, was obvious and known to the plaintiff, and was therefore assumed by her.

Wright v. *New York C. R. Co.* 25 N. Y. 566; *Gibson* v. *Erie R. Co.* 63 N. Y. 452, 20 Am. Rep. 552; *De Forest* v. *Jewett*, 88 N. Y. 264; *Powers* v. *New York, L. E. & W. R. Co.* 98 N. Y. 274; *Marsh* v. *Chickering*, 101 N. Y. 396; *Sweeney* v. *Berlin & J. Envelope Co.* Id. 520; *Shaw* v. *Sheldon*, 103 N. Y. 667; *Hickey* v. *Taaffe*, 105 N. Y. 26; *Appel* v. *Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550; *Buckley* v. *Gutta Percha & R. Mfg. Co.* 113 N. Y. 540; *Williams*

v. *Delaware, L. & W. R. Co.* 116 N. Y. 628; *Crown* v. *Orr*, 140 N. Y. 450.

As this act merely provides that cog-wheels shall be guarded, it does not, in the absence of provisions having that effect, abrogate the rule that if the employee knows they are unguarded and appreciates the risk he cannot call upon his employer for personal indemnity in case of resulting injury.

Willy v. *Mulleady*, 78 N. Y 310, 34 Am. Rep. 536; *Freeman* v. *Glens Falls Paper Mill Co.* 70 Hun, 530, Affirmed 142 N. Y. 639; *White* v. *Wittemann Lithographic Co.* 131 N. Y. 631; *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135; *Goodridge* v. *Washington Mills Co.* 160 Mass. 234; *Britton* v. *Great Western Cotton Co.* L. R. 7 Exch. 130; *Caswell* v. *Worth*, 5 El. & Bl. 855; *McRickard* v. *Flint*, 114 N. Y. 222.

Mr. **H. C. Day,** for respondent:

A master is bound to use all reasonable care, diligence, and caution in providing for the safety of those in his employ, and to furnish for their use in his work, safe, sound, and suitable tools, implements, appliances, and machinery in the prosecution thereof, and keep the same in repair.

Benzing v. *Steinway & Sons*, 101 N. Y. 547; *McGovern* v. *Central Vermont R. Co.* 123 N. Y. 280; *Ford* v. *Lake Shore & M. S. R. Co.* 124 N. Y. 493, 12 L. R. A. 454.

A master employing a servant owes to him a duty while in such employ to "use reasonable care, diligence, and caution in providing for his safety, and furnish for his use, in his work, safe, sound, and suitable tools, implements, appliances, and machinery in the prosecution thereof, and keep the same in repair."

The servant, upon entering the master's employ, assumes and consents to assume only the ordinary risks incident to the service.

Employers or masters cannot avail themselves of this assent, unless they take reasonable precaution to insure the servant's safety while in the performance of his duties.

The master can claim no exemption from liability for injuries sustained by a servant, when such injuries are traced to the employers' failure to take such precautions for the servant's safety as are enumerated in the first above principle.

The master can gain no exemptions for liability to his servant by reason of his long delay and neglect in performing a positive legal duty resting upon him.

Ford v. *Lake Shore & M. S. R. Co. supra.*

The failure to perform a duty imposed by statute, when, as the consequence, an injury results to another, is evidence upon the question of negligence of the party charged with such failure.

McRickard v. *Flint*, 114 N. Y. 222; *McLaughlin* v. *Armfield*, 58 Hun, 376; *Koster* v. *Noonan*, 8 Daly, 233; *Pauley* v. *Steam Gauge & L. Co.* 131 N. Y. 90, 15 L. R. A. 194; *White* v. *Wittemann Lithographic Co.* 131 N. Y. 631.

A servant cannot contract to relieve the master from liability for an injury inflicted by his own negligence.

Clarke v. *Holmes*, 7 Hurlst. & N. 937; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Lake Shore & M. S. R. Co.* v. *Spangler*, 44 Ohio St. 471; *Runt* v. *Herring*, 2 Misc. 105.

Bartlett, J., delivered the opinion of the court:

The plaintiff seeks to recover damages for loss of her left arm, caused by the alleged negligence of the defendants, who were the proprietors of a hardware factory, where plaintiff was employed at the time of the accident in operating what is known as a "punching machine." A person using this machine is seated at a bench, the top of which is about 32 inches from the floor and covered with plank about 5 inches in thickness. The machine is about 22 inches wide and 4 feet high, with an iron bed plate bolted to the bench. Two iron posts 4 feet high, connected at the top by an iron crosspiece, make a substantial frame for the machine. Near the top is a shaft, passing through the posts, on one end of which is a drum and belt connecting with shafting; on the other end are a small cogwheel, about 7 inches in diameter, running close to the frame, and outside of it, and a large fly wheel. Immediately under this shaft is another shaft, having a cogwheel about 2 feet in diameter, which is operated from the cogwheel on the upper shaft. In the center of the lower shaft is an iron rod, to which is attached a punch, arranged on an eccentric so that the revolution of the shaft causes the punch to lift and lower sixty times per minute. There was no shifter to throw off the belt so as to stop the machine, and the cogwheels were unguarded. The plaintiff, the machine being in motion, was engaged in cleaning it, which consisted in rubbing the dirt and oil off the punch and uprights with a piece of waste, held in her left hand; and in some way her hand was caught between the cogwheels, causing such injuries to it and the arm as to necessitate amputation of the latter near the shoulder. Plaintiff, being of full age, entered the employ of defendants in May or June, 1890, and the accident happened September 24, 1891. She testified that she worked, off and on, about three months on these punching machines prior to the accident, sometimes an hour, sometimes half a day, at a time, as required; that up to the time of the accident she had worked twelve different times, on different days, upon one of the punching machines, and had cleaned it about seven or eight times. It is insisted, on behalf of the plaintiff that, even if, under the admitted facts, she would by the rules of the common law be deemed to have assumed, not only the ordinary, but the obvious, risks of the business, yet the provisions of the statute commonly known as the "factory act" would enable her to recover. Laws 1890, p. 753, chap. 398, amending Laws 1886, chap. 409, entitled, "An Act to Regulate the Employment of Women and Children in Manufacturing Establishments and to Provide for Inspectors to Enforce the Same." The complaint makes no reference to the statute, but charges the defendants in the usual way with neglect to provide safe and suitable machinery and a safe and proper place in which to work. The statute was referred to at the trial in the general term, and on the argument before this court. We shall therefore

consider this case as presenting the question whether the plaintiff is entitled to recover by reason of this statute, even if, under the principles of the common law, as applied to the facts, she had assumed the obvious risks of the employment.

The statute (Laws 1890, p. 756, chap. 398, § 12) provides that it shall be the duty of the owner of any manufacturing establishment to furnish, in the discretion of the factory inspector, belt shifters, for the purpose of throwing on or off belts or pulleys. It also provides absolutely that cogs shall be properly guarded. The belt shifter is out of this case, as no effort was made to prove that the inspector had ordered it to be placed on the machine which injured the plaintiff, and that the owner had failed to obey. It is admitted that the cogwheels were unguarded on this machine. The plaintiff was injured by reason of that condition of the cogwheels, and it appears that a piece of sheet iron, put in between the upright and the gear wheels, would have protected the hand of the operative while cleaning the machine when in motion. It was not unlawful to permit plaintiff to clean the machine when in motion, as the statute provides that "no female, under the age of twenty-one years, . . . shall be allowed to clean machinery when in motion." Laws 1890, p. 756, chap. 398, § 12. The plaintiff was over twenty-one years of age. The defendants are chargeable, therefore, with one omission only under the statute, *viz.*, a failure to properly guard the cogwheels of the punching machine. In order to sustain the judgment in favor of plaintiff, it is necessary to hold that, where the statute imposes a duty upon the employer the performance of which will afford greater protection to the employee it is not possible for the latter to waive the protection of the statute, under the common-law doctrine of obvious risks. We regard this as a new and startling doctrine, calculated to establish a measure of liability unknown to the common law, and which is contrary to the decisions of Massachusetts and England under similar statutes. It should be remarked at the outset that the factory act in this state does not, in terms, give a cause of action to one suffering an injury by reason of the failure of the employer to discharge his duty thereunder. An action for such injury is the ordinary common-law action for negligence, and subject to the rules of the common law. *Caswell* v. *Worth*, 5 El. & Bl. 855. The principle contended for seems to rest, if it can be maintained at all, upon a question of public policy. The factory act, it is said, is passed to regulate the employment of women and children, and imposes upon the employer certain duties, and subjects him to specified penalties in case of default; that a sound public policy requires the rigid enforcement of this act, and it would contravene that policy to permit an employee, by implied contract or promise, to waive the protection of the statute. We think this proposition is essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action,—whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. It is possible that the statute imposes upon the employer duties under which he did not rest at common law.

It may be asked, if the doctrine of obvious risks is applied to the statute, under what circumstances could the employee sue? It is well settled that the risks of the service a servant assumes in entering the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him. *Benzing* v. *Steinway & Sons*, 101 N. Y. 552; *McGovern* v. *Central Vermont R. Co.* 123 N. Y. 280. The rule as to the risks of the service, or ordinary risks, is entirely distinct from the rule of obvious risks, and if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. This court has frequently recognized the general rule that, whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of this duty, causing damage, gives a cause of action. In *Willy* v. *Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536, a recovery was permitted against a landlord who had failed to provide proper fire escapes, as required by the charter of the city of Brooklyn. In *Pauley* v. *Steam Gauge & L. Co.* 131 N. Y. 95, 15 L. R. A. 194, it was suggested, for a failure of duty on the part of an employer under the factory act, that, in addition to the public remedy for the enforcement of penalties, the injured employee had his action for damages. We come, then, to the rule of the assumption of obvious risks, and it may well be doubted whether it can be said to rest wholly upon the implied agreement of the employee. The supreme judicial court of Massachusetts, in *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, uses this language: "The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*. One who, knowing and appreciating a danger voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case, there

is no actionable negligence on the part of him who is primarily responsible for the danger."

Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver, evidenced by his entering the employment with a full knowledge of all the facts. This distinction is not, however, of great importance, in the view we take of the statute, and its effect upon the rights of the parties. We are of opinion that there is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs. In Massachusetts they have a statute called the "Employers' Liability Act" (Stat. 1887, chap. 270). It provides for a civil remedy at the suit of the injured party, in express terms. In the case of *O'Maley* v. *South Boston Gaslight Co. supra*, which was brought under this statute to recover damages for injuries received by the plaintiff, who, while wheeling coal in a barrow on a run in one of defendant's coal sheds, fell off and was injured, it was held that it was a defense to the action to show that plaintiff, when he entered upon the employment, knew and fully appreciated the danger to which he was to be exposed. A few extracts from the opinion will show how the statute has been construed in Massachusetts. The learned judge says: "If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened; . . . but it is contended that, under the statute referred to, the rule is different. . . . The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. . . . It would be unreasonable to attempt to require every one hiring laborers to have the safest place and the best machinery possible for carrying on his business. It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. Nothing but the plainest expression of intention on the part of the legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery, as well since the enactment of this statute as before." *Goodridge* v. *Washington Mills Co.* 160 Mass. 234, was another case under the same statute, and involved, as does the case at bar, uncovered or unguarded gears. It was held plaintiff could not recover. The case of *Britton* v. *Great Western Cotton Co.* L. R. 7 Exch. 130, involved the construction of the English act, 7 Vict. chap. 15, which imposed on the defendant the unqualified duty to fence the fly wheel connected with the steam engine or other motive power. This duty it failed to perform, and plaintiff's intestate, on the sixth morning of his employment, undertook to grease the bearings between the fly and spur wheels, was caught by the fly wheel, and killed. The plaintiff recovered, on the ground that the dangerous character of the employment was not so obvious that deceased must necessarily have been taken to have known it. It is clear, from the language of the court, that the doctrine of obvious risks would have been applied had the facts warranted it. Bramwell, B., said (page 138): "They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed." Pigott, B., said: "I do not think we can safely say that he must have known the risk he was running The place was, no doubt, a dangerous place, but he may very well have been ignorant of the real nature of the risk."

The facts in the case at bar, whether it be considered as an action for negligence at common law or under the statute, show conclusively that the plaintiff assumed the obvious risk of working on the machine in operating which she was injured. It is impossible not to feel great sympathy for this unfortunate plaintiff, who has been maimed for life, but her recovery is barred by legal principles that are salutary and proper in the general administration of justice.

The order of the General Term should be reversed, and judgment ordered for defendants against plaintiff, on nonsuit, with costs.

All concur, except **Haight**, J., not sitting, and **Vann**, J., dissenting.

Nicholas WILHELM *et al.*, *Respts.*,
v.
Charles WILKEN, *Appt.*

(149 N. Y. 447.)

A recorded quitclaim deed "of certain real property and appurtenances and all the grantor's estate, right, title, and interest therein" is a "conveyance" within the meaning of the recording laws, under which the grantee may be protected as a subsequent purchaser in good faith and for a valuable consideration against a prior unrecorded deed.

(May 26, 1896.)

NOTE.—For *note* as to the effect of a quitclaim deed in an otherwise perfect record title, see Parker v. Randolph (S. D.) 29 L. R. A. 33.

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, in favor of plaintiffs in a controversy submitted without action to determine the right to the specific performance of a contract to purchase real estate. *Affirmed.*

Statement by **Gray**, J.:

This was a submission of a controversy on an agreed statement of facts, pursuant to § 1279 of the Code of Civil Procedure. The plaintiffs had agreed to sell and convey to the defendant certain premises in Westchester county, and the defendant refused to complete the contract for the purchase on his part upon the ground that the plaintiffs had not a good title. The premises were originally owned by Cornelius H. Tallman, who acquired them in 1864 and whose title is conceded to have been good. Later in the same year Tallman conveyed them to Page, by a warranty deed with full covenants, but which was not recorded until in February, 1893. In 1889 Tallman conveyed the same premises to Louisa A. Penfield, by quitclaim deed, which was recorded a few days after its date. A few days later, in the same year, Louisa A. Penfield conveyed the premises to these plaintiffs by warranty deed with full covenants, for the consideration of $1,000. At the time of the conveyance to the plaintiffs they had no notice that Tallman had conveyed the premises to Page, as above mentioned. The consideration expressed in the quitclaim deed from Tallman to Penfield was $125, and the conveyance was made subject to unpaid taxes and sales for the same. The language of the quitclaim deed was as follows: "Have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim, unto the said party of the second part, and to her heirs and assigns forever"—(then follows a full description of the property)—"together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances under the said party of the second part, her heirs and assigns forever." The general term held the title of the plaintiffs to be valid and required the defendant to complete his purchase.

The question about which the parties are in dispute is whether Louisa A. Penfield, as a purchaser of the premises by a quitclaim deed, is to be deemed a bona fide purchaser for value without notice, and, as such, to be within the protection accorded by that portion of the Revised Statutes of this state which is commonly known as the recording act. 1 Rev. Stat. 756, § 1.

Mr. **Frank A. Bennett,** for appellant:

A purchaser under a simple deed of quitclaim is not to be regarded as a bona fide purchaser in good faith for a valuable consideration.

Villa v. *Rodriguez*, 79 U. S. 12 Wall. 323, 20 L. ed. 406; *United States* v. *Sliney*, 21 Fed. Rep. 894; *May* v. *LeClaire*, 78 U. S. 11 Wall. 232, 20 L. ed. 53; *Marshall* v. *Roberts*, 18 Minn. 405, 10 Am. Rep. 201; *Springer* v. *Bartle*, 46 Iowa, 688; *Ridgeway* v. *Holliday*, 59 Mo. 444; *Thorn* v. *Newsom*, 64 Tex. 161, 53 Am. Rep. 747.

An unrecorded deed as between parties is valid and a grantee under a quitclaim deed has no better right to the possession of the property than his grantor had.

Ridgeway v. *Holliday*, *supra*.

A quitclaim deed only purports to release and quitclaim whatever interest the grantor may then have in the premises. If he had none *in esse* at its delivery, nothing passes and the recording act will not give an instrument greater force or larger meaning than that expressed by the words of the recorded instrument.

Sparrow v. *Kingman*, 1 N. Y. 242; *Thorn* v. *Newsom*, *supra*; *Taylor* v. *Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Rodgers* v. *Burchard*, 34 Tex. 441, 7 Am. Rep. 283.

The effect of a quitclaim deed is to pass such estate as the grantor can lawfully convey, and as he may not lawfully convey land which he has already conveyed to another nothing passes by such deed.

Marshall v. *Roberts*, *supra*; *Tram Lumber Co.* v. *Hancock*, 70 Tex. 312.

Mr. **Harry V. Morgan,** for respondents:

A purchaser under a quitclaim deed, for a valuable consideration, without notice, is a "purchaser in good faith."

Devlin, Deeds, § 672; *Brown* v. *Banner Coal & Coal Oil Co.* 97 Ill. 214, 37 Am. Rep. 105; *Cutler* v. *James*, 64 Wis. 173, 54 Am. Rep. 603; *Bradbury* v. *Davis*, 5 Colo. 265; *Shotwell* v. *Harrison*, 22 Mich. 410; *Chapman* v. *Sims*, 53 Miss. 154; *Graff* v. *Middleton*, 43 Cal. 341; *Willingham* v. *Hardin*, 75 Mo. 429; *Fox* v. *Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Rowe* v. *Beckett*, 30 Ind. 154, 95 Am. Dec. 676; *Pettingill* v. *Devin*, 35 Iowa, 344.

A quitclaim deed is a conveyance within the meaning of 1 Rev. Stat. 762, § 38.

Lynch v. *Livingston*, 6 N. Y. 422.

A quitclaim deed is as good for all purposes as deeds of bargain and sale.

Beddoe v. *Wadsworth*, 21 Wend. 121; *Jackson, Salisbury*, v. *Fish*, 10 Johns. 456.

A purchaser under a quitclaim deed is in the same position as a purchaser at a sheriff's sale under an execution, in some respects.

Fox v. *Hall*, *supra*.

And a purchaser at a sheriff's sale under an execution is protected by the New York recording act.

Hetzel v. *Barber*, 69 N. Y. 1.

Gray, J., delivered the opinion of the court:

I think there can be no doubt as to the correctness of the general term judgment. While there seems to have been no decision by this court upon precisely such a case as is here presented, nevertheless, there are decisions to the effect that deeds which "remise, release, and quitclaim" are operative as a

conveyance of land by way of bargain and sale. Such are, for instance, the cases of *Lynch* v. *Livingston*, 6 N. Y. 434, and *Striker* v. *Mott*, 28 N. Y. 92, which rested upon the authority of the early case of *Jackson, Salisbury*, v. *Fish*, 10 Johns. 456. This latter case did away with the strictness in which a release or quitclaim had been sometimes regarded. In *Sparrow* v. *Kingman*, 1 N. Y. 242, it was assumed in the opinion that an ordinary quitclaim deed might be used to pass the fee to an estate; so that whatever the interest or estate of the grantor whether that of tenant for life or years or a fee, it would pass by such a conveyance. But the provisions of the Revised Statutes should make the matter perfectly clear. "Deeds of bargain and sale and of lease and release may continue to be used and shall be deemed grants; and, as such, shall be subject to all the provisions of this chapter concerning grants." 1 Rev. Stat. 739, § 142. The requirement of the recording act (1 Rev. Stat. 756, § 1) is that every conveyance of real estate shall be recorded in the office of the clerk of the county where it is situated, and if not so recorded it shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. Section 38 of the chapter prescribes that "the term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any estate, or interest in real estate, is created, aliened, mortgaged, or assigned; or by which the title to any real estate may be affected in law or in equity." The elasticity of the term "conveyance" thus appears to be quite sufficient to comprehend a grant by way of quitclaim, or of bargain and sale.

The argument for the defendant is that the unrecorded deed from Tallman to Page was a valid conveyance, and that Penfield, as grantee under Tallman's quitclaim deed, has no better right to the possession of the property than her grantor had, and as he had none at the time of the delivery of the quitclaim deed there was nothing for it to grant. I fail to see the relevancy or importance of the argument, when considering the purpose and scope of the recording statute, which is designed, obviously, to afford protection to purchasers, in good faith and without notice, from those having an apparent title to land. In the cases in the United States Supreme Court, of *May* v. *Le Claire*, 78 U. S. 11 Wall. 217, 232, 20 L. ed. 50, 53, and *Villa* v. *Rodriguez*, 79 U. S. 12 Wall. 323, 338, 20 L. ed. 406, 410, it was, indeed, suggested that one who acquires his title by quitclaim deed cannot be regarded as a bona fide purchaser without notice, and that, as the conveyance by such a deed would pass the title as the grantor held it, the grantee would take only what the grantor could lawfully convey. The expression of such an opinion in those cases was unnecessary for their decision, and nothing was, in fact, decided against the competency of quitclaim deeds to convey interests in lands. They were based on the case of *Oliver* v. *Piatt*, 44 U. S. 3 How. 333, 11 L. ed. 622, but that case did not go to any further extent with reference to the question of the validity of a quitclaim deed as a conveyance than to point it out, in connection with other facts in the case, tending to show notice, as a significant circumstance. Mr. Rawle, in his work on Covenants, 4th ed. p. 35, justly criticises *Oliver* v. *Piatt*, and observes, in answer to the suggestion in the decision, that a deed with general warranty might as well be regarded as a "significant circumstance;" for, unless there had been something wrong about the title, the purchaser would not have demanded a general covenant, and he must have intended to rely upon it for his protection. These cases, and others in the state courts, to which the appellant refers, and which I have examined, not because they can be authoritative, but for the purpose of investigation, do not go quite so far as the appellant would have us believe, except in the one case of *Marshall* v. *Roberts*, 18 Minn. 405, where a contrary view of the question seems to have been taken The supreme court of Iowa, while holding that a quitclaim deed would not protect a purchaser from one whose title was tainted by fraud, seems to have held, under the recording statutes in that state, that a purchaser acquiring title by quitclaim takes precedence of one holding under a prior but unrecorded deed, of which he had no notice. *Springer* v. *Bartle*, 46 Iowa, 688; *Pettingill* v. *Devin*, 35 Iowa, 344. In the Texas case of *Thorn* v. *Newsom*, 64 Tex. 161, 53 Am. Rep. 747, the question appears to have been raised, but it was left undetermined. The distinction, however, was made there between a contract calling for the sale of the vendor's interest in the land, or, as it is termed, "chance of title," and one calling for a conveyance of the land as distinguished from a release of the vendor's rights. The intimation from the decision is that if there was a conveyance intended the bona fide purchaser would be protected. In the Missouri case of *Ridgeway* v. *Holliday*, 59 Mo. 444, the title of the holder by quitclaim deed from the holder of the record title was actually affected, because of his having notice of facts respecting the title of the true owner of the land.

On the other hand, there are many decisions by the state courts to the effect that the holder of the quitclaim deed is entitled to be regarded as a bona fide purchaser and to be protected against a prior, but subsequently recorded, deed. *Brown* v. *Banner Coal & Coal Oil Co.* 97 Ill. 214, 37 Am. Rep. 105; *Chapman* v. *Sims*, 53 Miss. 154; *Cutler* v. *James*, 64 Wis. 173, 54 Am. Rep. 603; *Shotwell* v. *Harrison*, 22 Mich. 410; *Graff* v. *Middleton*, 43 Cal. 341; *Willingham* v. *Hardin*, 75 Mo. 429. The recording statutes in these different states are very similar to, if not substantially the same as, the New York statute; and the effect of the decisions is to make a deed of real estate by quitclaim as operative to transfer title as would be a deed of bargain and sale, and to hold that the prior recording of such a deed would give it a preference over one previously executed and delivered, but which was subsequently recorded.

The practice of transferring title to real

estate through quitclaim deeds has not been uncommon in this state, and, in the absence of any facts creating a suspicion as to the transaction of transfer, there is nothing especially significant in the use of such a mode of conveyance. The point is, What is effected by the deed? and where, as in the present case, the subject of the release and quitclaim is a certain particularly described property with all the appurtenances and all the estate, right, title, and interest of the grantor, with the "habendum" to the grantee, her heirs and assigns forever, a conveyance of the real estate within the meaning of the act, is evident. The terms of such a deed imply that Tallman professed to have an interest in the premises, which he could convey, and it is the duty of the court to so construe a deed, purporting to convey land for a valuable consideration, as to give effect to the intentions of the parties, and to hold it to be a conveyance of the land.

I think *the judgment of the General Term should be affirmed*, with costs.

All concur.

John CUNNINGHAM, *Appt.*,
v.
William B. DAVENPORT, Public Admr., etc., *Respt.*

(147 N. Y. 43.)

A trust by a deposit in a savings bank of one's own money to his own credit, merely naming himself as trustee for another, is not established when the depositor states that he never intended to create a trust, and has always retained possession of the bank book, without making any disclosure or publication of the trust, or informing the proposed beneficiary of the transaction.

(October 8, 1895.)

APPEAL by plaintiff from an order and judgment of the General Term of the Supreme Court, Second Department, affirming a portion of a judgment of a special term for Kings County establishing the right of defendant as administrator of Patrick Cunningham, deceased, to a sum of money which plaintiff had deposited in a savings bank in trust for decedent. *Reversed.*

The facts are stated in the opinion.

Mr. **J. Stewart Ross,** for appellant:

The judgment clearly cannot be sustained upon the theory of a gift, for all the elements of a perfected gift are wanting.

Young v. *Young*, 80 N. Y. 430, 36 Am. Rep. 634; *Beaver* v. *Beaver*, 117 N. Y. 421, 6 L. R. A. 403.

Nor can the judgment be sustained upon the theory of a trust.

Beaver v. *Beaver*, *supra*; *Hamer* v. *Sidway*, 124 N. Y. 550, 12 L. R. A. 463.

The judgment is in face of an affirmative finding of no such intent. Such judgment cannot be sustained.

Conselyea v. *Blanchard*, 103 N. Y. 231; *Weber* v. *Weber*, 9 Daly, 211, 58 How. Pr. 256; *Clark* v. *Clark*, 108 Mass. 522; *Alger* v. *North End*

NOTE.—*Effect of depositing money in bank in trust for third person.*

The circumstances attending the deposit may be such as to effect a perfected trust in favor of the third person. In such case there can be no question that the title to the funds will pass to him. In case the depositor's acts are equivocal the rule seems to be to seek his intention and let the intention govern. Upon the question as to what is sufficient to show a completed trust there is some conflict among the authorities. Some courts hold that there can be no completed trust without communicating knowledge of it to the beneficiary, while others hold communication unnecessary. But even in cases which might, in the absence of proof of intention, be held to be completed trusts the intention may control, as is shown by CUNNINGHAM v. DAVENPORT.

What sufficient to show trust generally.

There is one line of cases which holds that to perfect the trust knowledge of the deposit must be communicated to the beneficiary. And that the mere deposit without more is without effect.

Money deposited in trust for a third person will not pass to him if he has no knowledge of the deposit until after the death of the depositor where the by-laws of the bank provided that the money should not be withdrawn without presentation of the pass book. Stone v. Bishop, 4 Cliff. 593.

If the beneficiary does not know of the trust it will not be enforceable. Jewett v. Shattuck, 124 Mass. 590.

If the beneficiary never has possession of the pass book and a by-law of the bank provides that no one should receive a deposit without producing the pass book, there is no completed transfer of the money. Clark v. Clark, 108 Mass. 522.

A mere deposit by a husband of money in the bank as trustee for his wife is not sufficient to pass the title to her. Walker v. Welch (Mass.) 4 New Eng. Rep. 354.

A fund deposited in a savings bank in the name of the depositor in trust for another who is neither party nor privy to the transfer, the depositor retaining the title and control of the fund, is held by an executory trust which is not enforceable. Bartlett v. Remington, 59 N. H. 364.

But under that rule communication of knowledge of the deposit to the beneficiary may be sufficient to perfect the trust.

If the deposit is made and notice of it is given to the beneficiary it cannot be subsequently revoked by the depositor withdrawing the money from the bank. Minor v. Rogers, 40 Conn. 512.

Where the depositor took one of her nieces to the bank and had three accounts opened, one for each of her three nieces, and had them sign the book, adding her name as trustee, with the restriction that during her lifetime she alone could draw the money, and then took and kept the books until her death, it was held that there was a valid gift to the nieces, they having accepted the benefit during her life. Miller v. Clark, 60 Conn. 148, note, 40 Fed. Rep. 15.

A deposit of money as trustee for a third person, followed by a declaration to him that the money has been deposited for his benefit and that the trustee intends only to retain the interest for his own use during life, may be sufficient to perfect the trust. Gerrish v. New Bedford Inst. for Sav. 128 Mass. 159, 35 Am. Rep. 365.

If there is evidence of a perfected gift before the death of the depositor, the trust will be carried out. Alger v. North End Sav. Bank, 146 Mass. 418.

A deposit of money in a bank in the name of another person with the depositor's name as trustee

See also 32 L. R. A. 377; 33 L. R. A. 700; 39 L. R. A. 84; 44 L. R. A. 205.

Sav. Bank, 146 Mass. 418; *Nutt* v. *Morse*, 142 Mass. 1.

Mr. **James J. Rogers,** with *Mr.* **Charles H. Otis,** for respondent:

The court, on appeal, will not go into an examination to see whether the findings of the court at special term are sustained by the testimony, but will assume that the findings are true and in accordance with the evidence.

Lamb v. *Grover*, 47 Barb. 317; *Howard* v. *Hayes*, 15 Jones & S. 89; *Morehouse* v. *Yeager*, 9 Jones & S. 135; *Perrine* v. *Hotchkiss*, 2 Thomp. & C. 370; *Perkins* v. *Hill*, 56 N. Y. 87; *Gardiner* v. *Schwab*, 110 N. Y. 650; *Kellogg* v. *Thompson*, 66 N. Y. 88; *Murray* v. *Marshall*, 94 N. Y. 617; *Schwarz* v. *Weber*, 103 N. Y. 658; *Travis* v. *Travis*, 122 N. Y. 449; *Hinds* v. *Kellogg*, 37 N. Y. S. R. 356; *St. John* v. *Potter*, 46 N. Y. S. R. 883.

The account No. 523,181 of Bowery Savings Bank in the name of "John Cunningham in trust for Patrick Cunningham his brother," must be presumed to have been the sole property of Patrick Cunningham, deceased.

Millspaugh v. *Putnam*, 16 Abb. Pr. 380; *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Willis* v. *Smyth* (1883) 91 N. Y. 297; *Anderson* v. *Thomson* (1885) 38 Hun, 394; *Mabie* v. *Bailey* (1884) 95 N. Y. 207; *Scott* v. *Harbeck* (1888) 49 Hun, 292.

Where the pass book is in the name of "Michael Smith for Mary Smith," the deposit belongs to Mary Smith, and upon her death goes to her administrator.

Smith's Estate, 17 Abb. N. C. 78; *Gaffney* v. *Public Administrator*, 4 Dem. 223; *Barker* v. *Harbeck*, 17 N. Y. S. R. 678.

The trust once established and no power of revocation having been reserved, it was within the authorities irrevocable.

Minor v. *Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Martin* v. *Funk*, 75 N. Y. 141, 31 Am. Rep. 446; *Mabie* v. *Bailey*, 95 N. Y. 211.

Bartlett, J., delivered the opinion of the court:

The plaintiff appealed from the judgment of the general term, second department, which affirmed that part of the judgment of the special term adjudging that William B. Davenport, public administrator, as administrator of the goods, etc., of Patrick Cunningham, deceased, recover of the plaintiff a judgment for $2,830.15.

This case presented questions between other parties that were determined by the judgment of the special term in plaintiff's favor, and as to which no appeal is taken. In order to properly understand that portion of the special term judgment appealed from it is only necessary to examine a few of the facts as found.

It appears that the plaintiff, on the 2d day of July, 1869, opened an account in the Bowery Savings Bank in the city of New York by a deposit of his own money, and made other like deposits down to about the year 1881, when the account was transferred, at plaintiff's request, to a new account entered on the books of the bank to the credit of "John Cunningham, in trust for Patrick Cunningham, his brother," and so remained until the 17th day of April, 1890, when plaintiff surrendered to the bank his deposit book and had the account transferred to his own credit, and on the 6th or 7th of June,

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following it, and a statement to the other that he has made the deposit which will belong to the other after the death of the depositor, constitute a deposit in trust although the depositor retained the deposit book until his death. *Re* Atkinson, 16 R. I. 413, 3 L. R. A. 392.

If the book is given to the *cestui que trust* after the money is deposited the trust will be complete although it is returned to the depositor and retained by him until his death. Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447.

Another line of cases holds the deposit to be sufficient of itself to vest the title in the beneficiary.

The deposit of money as trustee for a third person will pass the title to him although he is not notified of the fact. Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446, citing the unreported case of Kelly v. Manhattan Inst. for Sav.; *Re* Collyer's Account, 4 Dem. 24; Willis v. Smyth, 91 N. Y. 297; Mabie v. Bailey, 95 N. Y. 207; *Re* Walker's Will, 45 N. Y. S. R. 21; Connecticut River Sav. Bank v. Albee, 64 Vt. 571.

A trust is complete and irrevocable where a person makes a deposit of money in a bank to the credit of himself as trustee for certain children named, and nothing remains in him but the mere naked legal title. Sayre v. Weil, 94 Ala. 466, 15 L. R. A. 544.

Where, by a direction of a depositor, a sum was carried to an account in the joint names of herself as trustee for a third person and such third person, there was a complete trust in favor of the third person which he could enforce against the executor of the depositor. Wheatley v. Purr, 1 Keen, 551.

The trust is valid although the beneficiary did not know of it until after the death of the trustee. Macy v. Williams, 83 Hun, 243.

A savings bank book showing a deposit in account with one person for another after the death of both gives the representative of the latter a right to the money. Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L. R. A. 145

A deposit in trust for a third person will raise the presumption that the money was that of the third person. Millspaugh v. Putnam, 16 Abb. Pr. 380.

If a person deposits money to the credit of himself as trustee for another, and the account so remains until his death, prima facie the money belongs to the beneficiary although he has not obtained possession of the pass book. *Re* Gaffney's Estate, 146 Pa. 49.

Effect of making third person trustee.

In case the owner of money places it in bank in the name of another person in trust for a third the latter will have a right to it as against the trustee. Petty v. Petty, 17 Jur. 646, 22 L. J. Ch. 1065.

Where deposit is made for a purpose other than to pass title.

Where the statute forbids the receiving of an account above a specified amount, and a person whose account has reached that amount makes a further deposit as trustee for another, if it appears that the intention was to evade the act and not to create a trust there will be no interest in the *cestui que trust*. Field v. Lonsdale, 13 Beav. 78, 19 L. J. Ch. N. S. 560, 14 Jur. 995.

If the money is deposited in trust because the depositor has reached the limit of his possible deposit in his own name evidence of that fact may be given for the purpose of defeating the claim of the beneficiaries, although the by-laws of the bank provide that the depositor may at the time of making the deposit designate for whose benefit it was made.

1890, withdrew all of the money, amounting to $2,322.54.

It further appears that the plaintiff always retained possession of the bank books representing these accounts; that there is no evidence that plaintiff ever informed Patrick Cunningham of the transfer of the account to the credit of plaintiff in trust for him; that there is no evidence that plaintiff ever received any moneys from Patrick Cunningham, and plaintiff claims never to have intended to give the money contained in the account to Patrick Cunningham, or to have ever intended it for his benefit.

It also appears that Patrick Cunningham, the alleged beneficiary, died April 14, 1890, three days before the account in the Bowery Savings Bank was changed back into the name of plaintiff individually.

The question now presented is whether, under the facts as stated, the plaintiff created a trust in favor of his brother, Patrick Cunningham, when he opened the alleged trust account in 1881, which he could not afterwards revoke.

It is insisted by the learned counsel for the respondent that this is no longer an open question in this court, and that plaintiff's action in 1881 created an irrevocable trust in favor of Patrick Cunningham, and that the administrator of the latter can recover of plaintiff the money he withdrew from the Bowery Savings Bank, with interest and costs.

We are of the opinion that this case is distinguishable from the cases in this court to which we have been referred, and that the recovery against plaintiff by the administrator of Patrick Cunningham's estate cannot be sustained.

The first case is *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446. The account was here opened: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard."

The depositor opened this account in 1866 and retained possession of the bank book until her death in 1875.

A like account was opened at the same time in trust for Kate Willard, a sister of the other beneficiary.

Neither beneficiary was informed of the account.

The court held that such a transaction unexplained and followed by the death of the depositor with the accounts still existing, created a valid trust.

The case of *Willis* v. *Smyth*, 91 N. Y. 297, was quite similar in its facts to *Martin* v. *Funk*, and the latter case was held to be a controlling authority.

In the case of *Mabie* v. *Bailey*, 95 N. Y. 206, the deposit was the same in form as in *Martin* v. *Funk*, but the intention of the depositor was not left to inference, it being shown that the pass book had been exhibited to plaintiff's mother and was matter of conversation on several subsequent occasions.

Judge Andrews, after calling attention to this proof, also pointed out that *Martin* v. *Funk* left undecided the point whether, in respect to such a transaction, surrounding circumstances may not be shown to vary or explain the apparent character of the acts and the intent with which they were done, and he then adds: "If it was now necessary to decide that point, I should incline to the opinion that the character of such a transaction, as creating a trust, is not con-

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Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222.

The mere fact of the deposit of money as trustee for another is not of itself sufficient to establish the trust, and evidence is admissible to show that the depositor had reached the limit of his possible deposit, for the purpose of explaining the form of the deposit. Parkman v. Suffolk Sav. Bank, 151 Mass. 218.

Money transferred to the name of trustees for beneficiaries of the depositor under his direction for the purpose of evading the legacy duty will not pass the title to the beneficiaries, especially where the trustees are not notified of the trust and the depositor continues to exercise control of the funds during his life. Gaskell v. Gaskell, 2 Younge & J. 502.

If the depositor does not intend that the title shall pass until after his death, and adopts the device of the trust to evade the statute of wills, the trust cannot be executed. Nutt v. Morse, 142 Mass. 1.

If the transaction is intended as a testamentary disposition of the property it will not be valid. Markey v. Markey, 38 N. Y. S. R. 173.

But the deposit may constitute a valid trust although the fund is to go to the beneficiary only upon the death of the *cestui que trust*, the depositor retaining control of the deposit in the meantime. Grafing v. Heilmann, 1 App. Div. 260.

If the depositor retains control over the fund and the beneficiary understands that he is to have no benefit of it until after the death of the depositor, he has no such interest as will enable him to prevent the depositor or her guardian in case she becomes insane, from drawing out the funds. Smith v. Speer, 34 N. J. Eq. 336.

If the fund is deposited in trust for the purpose of securing advantageous terms as to interest with no intention of transferring the title, it will not pass. Weber v. Weber (N. Y.) 9 Rep. 632.

Effect of subsequent acts of depositor.

The inference of the creation of an irrevocable trust arising from the deposit of money and opening an account by the depositor in trust for another cannot be refuted by subsequent acts or declarations not connected with the deposit so as to constitute *res gestæ*. Hyde v. Kitchen, 69 Hun, 280.

If after having created a perfect trust the depositor withdraws the funds and leaves nothing on deposit at the time of his death, it will be the duty of the executor to carry out the trust in favor of the beneficiary. Witzel v. Chapin, 3 Bradf. 386.

No act of the person making the deposit in subsequently withdrawing the money can affect the title of the *cestui que trust*. Scott v. Harbeck, 49 Hun, 292.

And in case the trustee draws the money his executor may be held for the amount to the *cestui que trust*. Macy v. Williams, 55 Hun, 489.

Rights and liabilities of representative of deceased depositor.

The administrator of the trustee has a right to draw the fund in continuation of the trust in the absence of notice by the beneficiary forbidding such action. Boone v. Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498, Reversing 21 Hun, 235; Terry v. Bale, 1 Dem. 452; Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 5 L. R. A. 541.

In case the money has been deposited by one as trustee for a third person the beneficiary may recover the amount from the executor of the trustee in case he has withdrawn the money from the bank. Anderson v. Thomson, 38 Hun, 394. H. P. F.

clusively established by the mere fact of the deposit, so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to devest himself of the beneficial ownership of the fund."

In the case of *Beaver* v. *Beaver*, 117 N.Y. 421, 6 L. R. A. 403, the matter of deposit in savings bank by father in name of his son was under consideration. Owing to the peculiar circumstances of that case it was held that the plaintiff's title to the fund depended upon the question of gift rather than trust.

Judge Andrews uses this language in a general discussion of the subject:

"It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit." Judge Andrews pointing out various motives that impel depositors to open accounts to the credit of third parties or fictitious persons, with no intention of devesting themselves of ownership, continues as follows:

"We are inclined to think that to infer a gift from the form of a deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case."

We think the reasoning of this opinion is equally applicable to a case presenting the question whether a trust is created by opening an account in the name of, or in trust for, a third party.

The doctrine laid down by this court in the previous cases amounts to this, that the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank book and failing to notify the beneficiary, creates a trust if the depositor dies before the beneficiary, leaving the trust account open and unexplained.

If the intent can be strengthened by acts and declarations of the depositor in his lifetime amounting to publication of his intent a more satisfactory case is made out, but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing.

In the case at the bar we have a state of facts in every way distinguishable from the cases heretofore passed upon by this court. John Cunningham, the depositor, is alive, denying the trust and seeking in his old age to hold his own money as against the administrator of his deceased brother, the beneficiary under this alleged trust.

This case was tried at special term; the record does not contain the evidence, and the findings of fact are conclusive.

The findings show, as already stated, that this was a transaction between John Cunningham and the Bowery Savings Bank; that the depositor first opened the account in his own name, then changed it to his own name in trust for his brother, then changed it back to his own name three days after the death of the alleged beneficiary; that the depositor at all times retained possession of the bank books representing these accounts until delivered up to the bank; that Patrick Cunningham, the brother, was not informed of the account; that John never received any money from Patrick; that John claims never to have intended to give the money represented by the account to Patrick, nor to have intended it for his benefit.

Surely this is a full and complete explanation by the living depositor of his intentions in this matter.

The learned trial judge uses this language in his opinion, *viz.*: "An intention not to give it to his brother is inconsistent with his act and the form of his deposit, and his evidence is insufficient, to my mind, of what would otherwise be the legal effect without some explanations of the reasons for making the deposit in the form he did."

We think it was quite sufficient for the depositor to state, as he did, that he did not intend to create a trust and never intended to give his brother the money; he was not called upon to disclose his reasons for opening the account in trust for his brother.

We have presented here the case of a man who takes his own money and deposits it to his own credit in trust for another, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, and then survives the proposed beneficiary.

We are of opinion that such a transaction does not create a trust.

There are no sufficient circumstances or declarations from which a court of equity can spell out a trust even under the liberal rule as to the creation of trusts in personal property which holds no formal or written agreement or particular form of words necessary.

The death of the beneficiary three days before the trust account was closed is urged as a reason why this alleged trust should be sustained.

It is a circumstance of no moment, for the opening of the account, as now explained, did not create a trust.

The order and judgment appealed from are reversed, with costs to plaintiff in all the courts.

All concur.

MAINE SUPREME JUDICIAL COURT.

BATH SAVINGS INSTITUTION
v.
Barzillai W. HATHORN, Admr., etc., of Henry Walker, Deceased,
and
Alice B. FILES.

(88 Me. 122.)

1. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

2. The words "in trust for" in the entry of a savings bank deposit, with the same form used on the depositor's book, is sufficient to create a prima facie trust which will be a completed trust or gift in favor of the donee as against the estate of the donor, where all his declarations, acts, and conduct are consistent with the presumption arising from the entry itself.

(June 7, 1895.)

REPORT by the Supreme Judicial Court for Sagadahoc County of an interpleader proceeding to determine the right to a deposit in the complainant institution. *Decree in favor of Alice B. Files.*

After the bill was filed each defendant filed an answer, and then by agreement a decree of interpleader was entered and it was stipulated that the answers should be taken as the pleadings and the cause set down for rehearing on bill of answers and proof, Miss Files being regarded as plaintiff.

The facts are stated in the opinion.

Messrs. **Baker, Baker, & Cornish,** for Miss Files:

There are three ways in which a person holding property, real or personal, may make a voluntary distribution thereof for the benefit of another:

1. He can make a simple conveyance or assignment of it directly to the donee so as to vest in the latter whatever interest and title the donor has without intervention of any trust.

2. He may make a transfer of it to a third person upon trusts in favor of the donee.

3. He may retain the title and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate.

2 Pom. Eq. Jur. § 997.

The elements necessary to constitute an equitable gift such as we claim here are two.

First, an unequivocal intention on the part of the donor to declare a trust in himself.

Second, an unequivocal declaration on the part of the donor, either orally or in writing, that he holds it *in præsenti* for another.

2 Pom. Eq. Jur. § 997; *Ray* v. *Simmons*, 11 R. I. 266, 23 Am. Rep. 447.

The form of deposit itself is evidence of Mr. Walker's intention to make himself a trustee.

Northrop v. *Hale*, 72 Me. 275; *Augusta Sav. Bank* v. *Fogg*, 83 Me. 374.

The surrounding circumstances here point most clearly in favor of our claim.

There is no evidence that this deposit was made in this way to evade any by-law of the bank, or statute of limitation.

Brabrook v. *Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Parkman* v. *Suffolk Sav. Bank*, 151 Mass. 218.

Mr. Walker made a complete declaration of trust.

Gerrish v. *New Bedford Inst. for Sav.* 128 Mass. 159, 35 Am. Rep. 365; *Alger* v. *North End Sav. Bank*, 146 Mass. 418; *Ray* v. *Simmons*, *supra*; *Minor* v. *Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Robinson* v. *Ring*, 72 Me. 140, 39 Am. Rep. 308; *Blasdel* v. *Locke*, 52 N. H. 238; *Barker* v. *Frye*, 75 Me. 29; *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446.

Where we claim an equitable gift the retention of the book by the trustee is evidence in favor of the trust, instead of against it.

2 Pom. Eq. Jur. § 997; *Ray* v. *Simmons*, *Minor* v. *Rogers*, and *Barker* v. *Frye*, *supra*.

Mr. **Charles W. Larrabee** for B. W. Hathorn.

Haskell, J., delivered the opinion of the court:

Henry Walker, of Woolwich, died, solvent and intestate, October 2, 1891, leaving brothers and sisters and nephews and nieces, but neither wife nor children. His wife died January 1, 1886. She was a cousin to the father of the plaintiff, Alice B. Files, of Winslow, who knew the old people as uncle and aunt, and seems to have been always welcome at their house and a favorite with them.

On July 1, 1882, Mr. Walker deposited in the Bath Savings Institution $700 "in trust for Alice B. Files," saying, in substance, that he wished it to go to her at his decease. That deposit remained intact during Mr. Walker's life, and at his death amounted to something over $1,000. He always retained the book, and it was found among his papers by his administrator, the defendant, who now claims the deposit as a part of his estate. The evidence shows that Mr. Walker intended the deposit for Alice at his decease, but never communicated his intention to her.

The authorities all say that a gift *inter vivos* must be complete. The donor must devest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee. *Northrop* v. *Hale*, 73 Me. 66; *Dole* v. *Lincoln*, 31 Me. 422; *Robinson* v. *Ring*, 72 Me. 140, 39 Am. Rep. 308; *Augusta Sav. Bank* v. *Fogg*, 82 Me. 538.

A voluntary trust is an equitable gift, and, like a legal gift *inter vivos*, must be complete. A declaration of trust as effectually passes the equitable title of the fund to the *cestui* as a gift *inter vivos* passes the legal title to the donee. The distinction between them is of a technical nature. In a trust, the real title vests in the donee, but the legal title, perhaps, carrying control of the property, may be placed elsewhere; while in a gift both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should devest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the *cestui;* for then he creates an estate really no longer his own. He may re-

NOTE.—See note to preceding case.

32 L. R. A.

See also 39 L. R. A. 84; 44 L. R. A. 205.

tain the legal title, giving him the control, but for the benefit of the *cestui*, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity. They spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more.

An express trust of lands can only be created by some writing signed by the party or his attorney (Rev. Stat. chap. 73, § 11), but a trust of personal property may be created or declared by parol. It is necessary, however, to clearly establish the terms of it, and show an executed gift, so that the equitable title shall have passed to the donee as effectually as a gift *inter vivos*. *Gerrish* v. *New Bedford Inst. for Sav.* 128 Mass. 159, 35 Am. Rep. 365; *Dresser* v. *Dresser*, 46 Me. 48.

Says Lord Cranworth: If a man chooses to give away anything which passes by delivery, he may do so, and there is no doubt that, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel, that of course passes by delivery; and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed, and this court will enforce it, in the absence of fraud, even in favor of a volunteer. . . . The authorities all turn upon the question whether what took place was a declaration of trust or merely an imperfect attempt to make a legal transfer of the property. In the latter case the court will afford no assistance to volunteers; but when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it whether with or without consideration. *Jones* v. *Lock*, L. R. 1 Ch. 25.

In this case, the deposit is in the name of the donor, "in trust for the donee." Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust,—that is, a trust without limitation or condition, that may be terminated at the will of the *cestui;* but extrinsic evidence is competent to control its effect. *Brabrook* v. *Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Clark* v. *Clark*, 108 Mass. 522; *Powers* v. *Provident Inst. for Sav.* 124 Mass. 377; *Stone* v. *Bishop*, 4 Cliff. 593, Fed. Cas. No. 13,482; *Northrop* v. *Hale*, 72 Me. 275.

The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort nor did any act to apprise her of it, or of his intention concerning it. The deposit on his part was both voluntary and secret. Information of it may have been communicated to her by others, but never at his request or with his knowledge. What evidence, then, operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in his own breast. He could have withdrawn the money at any time, and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery; a trust, by declaration.

In *Augusta Sav. Bank* v. *Fogg*, 82 Me. 538, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition.

In *Parcher* v. *Saco & B. Sav. Inst.* 78 Me. 470, a depositor caused to be entered upon the bank ledger words, in substance, "Payable also to Mrs. Leavitt in case of my death," and it was held no gift.

In *Curtis* v. *Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750, the entry of "Subject also to" the donee was held to constitute no gift, but that a subsequent delivery of the bank book completed the gift.

In *Barker* v. *Frye*, 75 Me. 29, a deposit in the name of the donee, subject to the donor during life, afterwards changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says "was an acceptance of the gift," it was held that the gift was complete.

The same doctrine is held in *Northrop* v. *Hale*, 73 Me. 66; *Robinson* v. *Ring*, 72 Me. 140, 39 Am. Rep. 308; *Drew* v. *Hagerty*, 81 Me. 231, 3 L. R. A. 230; *Parkham* v. *Suffolk Sav. Bank*, 151 Mass. 218.

All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust cannot change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

In *Dresser* v. *Dresser*, *supra*, a writing specifying the terms of a voluntary trust, and a delivery of the trust property so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort.

In *Alger* v. *North End Sav. Bank*, 146 Mass. 418, the donor made a deposit similar to the one under consideration. It was in his own name, as trustee for the donee, his housekeeper, who claimed the deposit as a payment for her services. It was shown that, shortly before his death, he told her, "I put it in for you;" "that money is yours;" and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so.

Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever-varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case, the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the *cestui*. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declarations of the donor show the same intent. The gift cannot be upheld as an absolute gift *inter vivos*, nor as a gift *causa mortis*, for these gifts require a delivery of the *res*, a complete transfer of title. They differ from a gift in trust in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but in either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches (*Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Lister* v. *Hodgson*, L. R. 4 Eq. 30; *Sharp* v. *Leach*, 31 Beav. 491; *Anderson* v. *Elsworth*, 3 Giff. 154; *Toker* v. *Toker*, 31 Beav. 629; *Phillips* v. *Mullings*, L. R. 7 Ch. 247; *Smith* v. *Iliffe*, L. R. 20 Eq. 666; *Welman* v. *Welman*, L. R. 15 Ch. Div. 570, 578, 579; *Prideaux* v. *Lonsdale*, 1 De G. J. & S. 433), it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains, or can be shown, does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced. So, a secret trust may be valid when it can be proved; but if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part, that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The *cestui's* rights are the same although his remedy may have been destroyed.

In the case of *Re Smith's Estate*, 144 Pa. 428, a lad of three years went to live with his uncle. When the lad was twelve the uncle placed $13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew.

In *Connecticut River Sav. Bank* v. *Albee*, 64 Vt. 571, the court says: "A completed trust, although voluntary, is valid and may be enforced in equity. It is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it. The owner and donor of personal property may create a perfect or complete trust, by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself, or another person, the trustee."

In that case a father deposited money in a savings bank in the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the court, that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass book is not inconsistent with such a purpose; he must have retained it as trustee.

Ray v. *Simmons*, 11 R. I. 266, 23 Am. Rep. 447, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a stepdaughter. He did not tell her what he had done, nor show her the pass book. He kept that himself. After his death, the court held that the stepdaughter was entitled to the money,—that the transaction constituted a trust in her favor.

So is *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446. Susan Boone deposited $500 in a savings bank "in trust for Lillie Willard." Susan kept the pass book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie, and the retention of the pass book by Susan, were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor* v. *Rogers*, 40 Conn. 512, 16 Am. Rep. 69. A widow deposited $250 in her own name, "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass book; and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is *Re Gaffney's Estate*, 146 Pa. 49. It appeared that Hugh Gaffney deposited $560 in his own name, as trustee for Polly Kim, and the court held the entry itself prima facie evidence of the trust, and, unexplained, sufficient to uphold it.

In *Gerrish* v. *New Bedford Inst. for Sav.* *supra*, the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear; but when ambiguous, or susceptible of different interpretations, it removes the

doubt, and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when considered in the light of this case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but, when shown, has controlling effect.

In this case, the entry "in trust for" is of clear and unmistakable import, and sufficient to create a prima facie trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction, and creates a completed trust in favor of the donee.

Decree accordingly, with costs against the estate.

WISCONSIN SUPREME COURT.

C. BITTENHAUS, *Appt.*,
v.
C. W. JOHNSTON *et al.*, *Respts.*

(.....Wis.....)

1. **A statute as to fisheries** making different regulations for different localities or waters is not void as class legislation in the absence of a constitutional provision against it.
2. **A statute discriminating between different kinds of fish** and between different localities and waters, in regulating fisheries, does not deny to any person the equal protection of the laws.
3. **Seizure and destruction of nets** by officers, in obedience to a statute, in abating a nuisance caused by their voluntary use by the owner in violation of the fishery laws, does not deprive the owner of his property without due process of law, or of "a certain remedy in the laws for all injuries" to his property, or make an unconstitutional "distinction" as to the possession, enjoyment, or descent of property.

(March 27, 1896.)

APPEAL by plaintiff from a judgment of the Winnebago County Court in favor of defendants in an action brought to recover certain nets alleged to have been illegally taken from plaintiff by defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. W. Waterhouse** and **H. J. Gerphide** for appellant.

Messrs. **Thompson, Hershaw, & Thompson,** with *Mr.* **C. E. Whelan,** for respondents:

The statute in question does not constitute class legislation.

Soon Hing v. *Crowley*, 113 U. S. 702, 28 L. ed. 1145; *Blount* v. *Walker*, 134 U. S. 607, 33 L. ed. 1036; *Farmers' Loan & T. Co.* v. *Chicago, P. & S. R. Co.* 39 Fed. Rep. 155; *Minnesota* v. *Barber*, 136 U. S. 320, 34 L. ed. 458, 3 Inters. Com. Rep. 185; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 354, 35 L. ed. 1040; *Electric Imp. Co.* v. *San Francisco*, 45 Fed. Rep. 595, 13 L. R. A. 131; *McKean* v. *Archer*, 52 Fed. Rep. 795; *Smith* v. *United States*, 151 U. S. 55, 38 L. ed. 69.

The law is not *ex post facto* in its nature.

The law is not unconstitutional as depriving persons of property without due process of law.

Mugler v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Magner* v. *People*, 97 Ill. 320; *People* v. *Brooks*, 101 Mich. 98; *People* v. *Collison*, 85 Mich. 105.

There was no prescriptive right obtained nor could there be by which these fishermen would be perpetually permitted to use nets in these waters.

8 Am. & Eng. Enc. Law, p. 35; *Parker* v. *People*, 111 Ill. 581.

A statute for the protection of fish and game is a public advantage to which private interests must conform.

Phelps v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State* v. *Randolph*, 1 Mo. App. 15.

Their constitutionality has been expressly affirmed in—

Burnham v. *Webster*, 5 Mass. 266; *Nickerson* v. *Brackett*, 10 Mass. 212; *Gentile* v. *State*, 29 Ind. 409; *State* v. *Norton*, 45 Vt. 258; *Magner* v. *People*, *supra*.

Due process of law is not a judicial process necessarily, but is that process which the law prescribes.

San Mateo County v. *Southern P. R. Co.* 13 Fed. Rep. 145.

The nets were declared by the statutes to be public nuisances. The courts have repeatedly held that the legislature may enlarge into a nuisance that which at common law was not a nuisance, or may declare that not to be a nuisance which the common law invests with that term.

Coe v. *Schultz*, 47 Barb. 65; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Reg.* v. *Crawshaw*, Bell, C. C. 303; *McLaughlin* v. *State*, 45 Ind. 338; *Monroe* v. *Gerspach*, 33 La. Ann. 1011; *State* v. *Towler*, 13 R. I. 661; *Miller* v. *New York*, 109 U. S. 385, 27 L. ed, 971; *Leigh* v. *Westervelt*, 2 Duer, 618; *Harris* v. *Thompson*, 9 Barb. 350; *Griffith* v. *McCullum*, 46 Barb. 561; *Babcock* v. *Buffalo*, 56 N. Y. 268; *Hart* v. *Albany*, 3 Paige, 213; *Harrower* v. *Ritson*, 37 Barb. 301; *Kellogg* v. *Thompson*, 66 N. Y. 88; *Rockwell* v. *Nearing*, 35 N. Y. 302; Wood, Nuisances, 1; *State*, *Weller*, v. *Snover*, 42 N. J. L. 341; *Williams* v. *Blackwall*, 2 Hurlst. & C. 33.

The state possesses ample authority to rid the fisheries of such devices as are destructive of them, without judicial proceedings against the offending owners who have constructed or

NOTE.—As to the right to compensation for property destroyed in abating a public nuisance, see Orlando v. Pragg (Fla.) 19 L. R. A. 196.

32 L. R. A.

placed such devices in the fisheries in violation of the law protecting them.

Lawton v. *Steele*, 119 N. Y. 226, 7 L. R. A. 134; *Phelps* v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State, Weller*, v. *Snover*, 42 N. J. L. 345; *Magner* v. *People*, 97 Ill. 332; *Williams* v. *Blackwall, supra; Smith* v. *Lavinus*, 8 N. Y. 472.

If the law can be made operative and upheld without the provision which is found void the court will not render void the entire statute by the failure of one sentence or one word therein.

State, Weller, v. *Snover, supra; Shivers* v. *Newton*, 45 N. J. L. 474; *Newark & S. O. Horse Car R. Co.* v. *Hunt*, 50 N. J. L. 313; *Parker* v. *People*, 111 Ill. 581; *Weld* v. *Hornby*, 7 East, 195; *American Print Works* v. *Lawrence*, 21 N. J. L. 248; *Hale* v. *Lawrence*, Id. 714; *American Print Works* v. *Lawrence*, 23 N. J. L. 590, 57 Am. Dec. 420; *Haney* v. *Compton*, 36 N. J. L. 507.

The law is a valid and proper exercise of the police power of the state.

4 Bl. Com. 174; *Burnham* v. *Webster*, 5 Mass. 266; *Nickerson* v. *Brackett*, 10 Mass. 212; *Gentile* v. *State*, 29 Ind. 409; *State* v. *Norton*, 45 Vt. 358; *Magner* v. *People*, 97 Ill. 320; Tiedeman, Pol. Powers, § 2; Cooley, Const. Lim. 4th ed. 168.

The legislature has the right to declare that a public nuisance which was not at common law a public nuisance.

Smith v. *Com.* 6 B. Mon. 21; *State* v. *Bailey*, 21 N. H. 343; *McClean* v. *State*, 49 N. J. L. 471; *Meyer* v. *State*, 42 N. J. L. 145; *Com.* v. *McDonough*, 13 Allen, 581.

All private property in the state is held subject to the laws of the state as to its use, and must not be so used as to injure the public in its rights and privileges, the private citizen in his property, or the state in the property which it holds in trust for the whole people.

State, Shivers, v. *Newton*, 45 N. J. L. 469; *Newark & S. O. Horse Car R. Co.* v. *Hunt*, 50 N. J. L. 308; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229; Cooley, Const. Lim. *584.

The state has the right to enact laws for the preservation of fish and game and to prohibit the use of tools and implements tending to the destruction of the same.

People v. *Bridges*, 142 Ill. 30, 16 L. R. A. 684; *Lawton* v. *Steele*, 119 N. Y. 226, 7 L. R. A. 134, 152 U. S. 133, 38 L. ed. 385; *Com.* v. *Perley*, 130 Mass. 469; *Smith* v. *Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269.

Property voluntarily placed in a situation which the law declares shall subject it to summary destruction cannot be recovered either in its value or itself when destroyed pursuant to such law by persons whom the law vests with the authority to destroy.

Newark & S. O. Horse Car R. Co. v. *Hunt, supra;* Cooley, Const. Lim. chap. 16; Mills, Em. Dom. § 6; *Com.* v. *Kelly*, 163 Mass. 169; *Campbell* v. *Evans*, 45 N. Y. 356; *Cook* v. *Gregg*, 46 N. Y. 439.

Cassoday, Ch. J., delivered the opinion of the court:

This is an action of replevin, commenced August 9, 1895, before a justice of the peace in Oshkosh, to recover twelve gill nets, of the value of $60, alleged to have been unjustly taken and detained by the defendants. The defendants answered by way of denials, and justified the seizure and destruction of the nets as fish and game wardens of the state, under chapter 221, Laws 1895. On the trial before the justice the plaintiff proved the ownership and value of the nets, and admitted that he had placed the nets in the waters of Lake Winnebago for the purpose of fishing, and that the defendants were such fish and game wardens. The defendants admitted that they, as such fish and game wardens, took the nets from such waters and destroyed them. A trial by jury having resulted in a verdict in favor of the defendants, judgment was entered thereon accordingly, from which the plaintiff appealed to the county court. Upon the trial in that court it was stipulated that the case be decided by the court upon the record certified by the justice; and it was thereupon decided, accordingly, by that court, in favor of the defendants. From the judgment entered therein, in favor of the defendants, and upon the certificate of the trial judge as required by chapter 215, Laws 1895, the plaintiff brings this appeal. Chapter 221, Laws 1895, appears first on pages 367–396, inclusive, and again on pages 397–426, inclusive. There are some discrepancies between the chapter as thus first presented and as thus subsequently presented; but they both purport to have been approved and published on the same day, and they both have the same title, and are numbered the same, and are the same throughout, except in certain particulars, not material on this appeal since the portions of the act there involved, are the same in both publications. Counsel contend that the act in question is unconstitutional and void upon several grounds.

1. It is claimed that certain clauses of the act are repugnant to the constitutional provisions which declare that "no . . . *ex post facto* law . . . shall ever be passed." Wis. Const. art. 1, § 12. "No state shall . . . pass any . . . *ex post facto* law." U. S. Const. art. 1, § 9. "By an *ex post facto* law," said Field, J., "is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri*, 71 U. S. 4 Wall. 325, 326, 18 L. ed. 363, 364. See also *Re Medley*, 134 U. S. 160, 33 L. ed. 835; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485. This rule is uniformly recognized in all well-considered adjudications upon the subject. It is equally well settled that a general law for the punishment of offenses, which endeavors by retroactive operation to reach acts before committed, and also provides a like punishment for the same acts in future, is void only so far as it is retrospective, and valid as to future cases within the legislative control. *Jaehne* v. *New York*, 128 U. S. 189, 32 L. ed. 398. In the case at bar the act complained of was committed nearly four months after the passage and

publication of the law in question, and hence that chapter cannot be regarded as an *ex post facto* law, as to that act. This being so, we are not called upon to determine whether any provision of the chapter was thus retroactive, and hence, to that extent, an *ex post facto* law.

2. Counsel contend that the law in question is class legislation, and therefore void. This seems to be put on the ground that the act makes certain "regulations for the outlying waters of the state" (§§ 12–15), and certain other "regulations for the inland waters" of the state (§ 16), and certain "provisions applying to certain localities or waters only" (§§ 33–38*a*), and particularly because "the waters of Rush lake" are thereby "exempted from the provisions" of the "act relating to regulations upon the methods or times of taking, catching, or killing fish" (§ 36). We are referred to no clause of our state Constitution which condemns such legislation as class legislation, and we have found none. It certainly does not belong to any of the nine classes of cases in regard to which "the legislature is prohibited from enacting any special or private laws." Const. art. 4, § 31. The constitutions of some of the states expressly prohibit every kind of local or special legislation. As indicated, such prohibition in this state is only partial. As often said, and always conceded, our state Constitution is not so much a grant as a limitation of powers; and hence the state legislature has authority to exercise any and all legislative powers not delegated to the Federal government, nor expressly or by necessary implication prohibited by the national or state Constitution. *State, Graef*, v. *Forest County*, 74 Wis. 615; *State, Lamb*, v. *Cunningham*, 83 Wis. 146, 17 L. R. A. 145. The law in question is entitled "An Act to Revise, Amend, and Consolidate the Laws of the State Relating to Game and Its Preservation, Fish and the Preservation and Propagation thereof." To legislate intelligently upon such a subject, there must be a legislative discretion as to the different kinds of fish, and as to the different waters in which they are or may be found. The exercise of such legislative discretion in the instant case does not seem to be condemned, as class legislation, by any clause of our state Constitution.

3. But it is claimed to be class legislation within the meaning of the clause of the Federal Constitution, which declares that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. art. 14, § 1. This clause was clearly intended to prevent hostile discrimination against any individual, or class of individuals, by the statutes of any state. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Pembina Consol. Silver Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 U. S. 32, 28 L. ed. 925. In speaking of that constitutional provision, it was said by Mr. Justice Field that it "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri*, 120 U. S. 71, 30 L. ed. 580. There is no pretense that the act in question contains any hostile discrimination against any person or any class of persons. True, it makes certain things unlawful, and prescribes certain penalties, forfeitures, and punishments for violations of the law, but they are alike applicable to any and all persons who violate the law. Under the authorities cited, it is very clear that the mere fact that the statute in question is applicable to certain localities and waters, and discriminates between different kinds of fish, does not make it class legislation, within the meaning of the clause of the Federal Constitution quoted.

4. Among other things, the statute in question provides that "the powers and duties of such fish and game wardens shall be . . . to seize, remove, and forthwith destroy any net, pound, or other device found in the inland waters of this state or in the possession of any person or persons intending to use the same for fishing, or having removed or being in the act of removing the same from any of the waters where the fishing with nets or devices or the setting of the same is prohibited or illegal under this act, or any law of the state, and which are declared to be public nuisances." Section 9, subd. 4. "No person shall be allowed to set, place, or use any gill, fyke, pound, seine, dip, or other net or snare, or trap, in any of the inland waters of the state of Wisconsin for the purpose of catching fish of any variety," except as therein otherwise provided, and which is not material here. Section 16. "Any net of any kind prohibited by law, while set or found in any waters when such net is prohibited by law from being set or used," is therein "declared to be a public nuisance." Section 19, subd. 1. The illegal use of such net contrary to the provisions of the act forfeits the same to the state. Id. subd. 10. It is thereby made the duty of such wardens to destroy the same forthwith, as a public nuisance, "when found or taken in the unlawful use . . . and no liability shall be incurred to the owner or to any other person for such destruction." Section 20. It is conceded that the plaintiff's nets were seized by the defendants, as such wardens, while they were in such unlawful use, and thereupon forthwith destroyed by them. Counsel for the plaintiff frankly admits that "the only issue involved is the constitutionality of said law." But, in addition to the grounds stated, they contend that the statute in question is repugnant to that clause of the Federal Constitution which declares "nor shall any

state deprive any person of life, liberty, or property without due process of law." Amend. art. 14, § 1. "Due process of law," said Waite, Ch. J., "is process due according to the law of the land. This process in the states is regulated by the law of the state." *Walker* v. *Sauvinet*, 92 U. S. 93, 23 L. ed. 679. In other words, in matters of state jurisprudence the law of the state is the law of the land. "Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case." *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623. "Due process of law, and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225. But neither that provision nor any other provision of the Constitution of the United States "was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier* v. *Connolly*, 113 U. S. 31, 28 L. ed. 924; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524; *State* v. *Heinemann*, 80 Wis. 253. "The police power of a state is as broad and plenary as the taxing power." *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232. In the recent case of *Lawton* v. *Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, Affirming 119 N. Y. 226, 7 L. R. A. 134, Mr. Justice Brown, speaking for the court, has enumerated a great variety of cases which have been sustained under the police power, and adds: "Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." The decision in that case sustained the validity of a statute substantially like the one in question, and it was there held that such seizure and destruction of the nets was a lawful exercise of the police power of the state, and did not deprive the citizen of his property without due process of law; and such decision was put upon the ground that "it is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish." The plaintiff, having voluntarily put the nets to an unlawful use, which made them public nuisances under the statute is in no position to recover damages from the defendants for having as public officials obeyed the law, in abating the nuisances by seizing and destroying the nets. Of course the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law.

5. The reasons given for holding that the statute in question is not repugnant to the Federal Constitution in the particulars mentioned, make it sufficiently clear that it is not repugnant to that clause of our state Constitution which declares that "every person is entitled to a certain remedy in the laws, for all injuries" to his property; nor that other clause, cited by counsel, which declares that "no distinction shall ever be made by law, between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property." Const. art. 1, §§ 9, 15.

It will be observed that we have confined our opinion to the validity of so much of the chapter in question as is applicable to the particular facts here present, and have carefully refrained from expressing any opinion as to the validity of the act in other respects.

The judgment of the County Court for Winnebago County is affirmed.

L. A. SHAKMAN, *Respt.*,
v.
UNITED STATES CREDIT SYSTEM COMPANY, *Appt.*

(92 Wis. 366.)

1. **A contract to indemnify a merchant** against loss by insolvency of customers is a contract of insurance.
2. **An agent of an insurer against loss by insolvency of customers,** having power to solicit insurance, transmit applications, collect premiums, and receive pay therefor, may, under Rev. Stat. § 1977, bind his principal by an agreement to include customers rated by a mercantile agency not recognized in the regular policies of the company.
3. **Mere failure to reply to a letter** containing a slip to be pasted to a policy of insurance, and which deals with a matter already embraced in the contract, will not make the slip binding on the insured in the absence of anything to show that the insurer was injured by the silence.
4. **An agreement attached to a policy insuring against loss by insolvency** of customers, which policy embraces a period of several months prior to the date of its issuance, which agreement accepts customers rated by a mercantile agency not recognized in the policy, will cover the same period as the policy.
5. **An exclusion of liability for losses**

NOTE.—The above case begins another branch of insurance law. It is believed to be the first decision, at least by any court of last resort, upon the kind of insurance therein considered.

For insurance of an employee's fidelity, see Fidelity & C. Co. v. Eickhoff (Minn.) 30 L. R. A. 586.

For insurance against employer's liability, see Anoka Lumber Co. v. Fidelity & C. Co. (Minn.) 30 L. R. A. 689.

See also 33 L. R. A. 511.

for credit given "exceeding a credit of 30 per cent on the lowest capital rating" in a policy insuring against loss by insolvency of customers excludes merely the excess above that amount, and not the entire loss in case credit is given above that amount.

6. **An agreement attached to a policy insuring a merchant against loss by insolvency** of customers, that in case a customer is not rated "within the system" of the insurer by the mercantile agency designated by the policy, and he is rated by another specified agency within such system, losses suffered on his account shall be covered by the policy, will, in case the system requires a rating as to both capital and credit, include a customer rated by the agency designated by the policy only as to credit, but by the other agency as to both capital and credit.

7. **The dissolution of a corporation defendant** after the submission and taking under advisement by the court of an action on contract will not abate the action, but the court will date the findings and enter the judgment as of the time when the action was submitted.

(February 18, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action upon a contract guaranteeing plaintiff against loss by insolvency of customers to whom he sold goods. *Affirmed.*

Statement by **Winslow, J.**:

This is an action upon a written contract issued by defendant to plaintiff, and called a "certificate of guaranty." The plaintiff is a manufacturer of clothing, doing business in Milwaukee, and was such in 1889. The defendant was, at that time, a corporation, incorporated under the laws of the state of New Jersey. It appeared that, about the 23d day of October, 1889, the defendant's agent at Chicago, one Langsdorf, called on the plaintiff, and the plaintiff then made a written application to the defendant company for a certificate of guaranty. This application, so far as necessary to be stated, is as follows:

"L. A. Shakman & Co. hereby apply for a guaranty of $5,000 of the debts of the persons to whom we may sell goods, according to the system of said company, during the period of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890, and for that purpose we hereby make application to purchase of said company a certificate of guaranty, according to its system of credits, under the copyright of said company, for said term, and desire to enter series A of said company, which series is made up of not more than six hundred and fifty certificates, averaging a guaranty of $5,000 for each certificate. This application is made with the understanding that the said company limits its liability to pay excess losses in any one series in accordance with the following table, less the deduction allowed, to be made by said company, as the value of the bad debts sustained by the applicant, which is hereby agreed to be 12½ per cent of the total amount of losses incurred by reason of bad debts remaining unpaid at the time of proving applicant's losses against said company." Langsdorf forwarded this application to the company, by whom it was accepted and a "Certificate of Guaranty" returned to Langsdorf, who delivered it to Shakman on the 8th day of November, 1889. This certificate reads as follows:

No. 3452. Incorporated 1888. $5,000.

United States Credit System Company, of the City of Newark, N. J.

For and in consideration of the terms and conditions herein named, and of the sum of $145, paid by L. A. Shakman & Co., hereby grants, bargains, and sells to the said L. A. Shakman & Co. this certificate, issued under its copy-righted system of credits, in series A, class B, for the term of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890. And for said consideration the said United States Credit System Company guarantees, covenants, and agrees that if the said L. A. Shakman & Co. should, by reason of the insolvency of any debtor or debtors, who owe such debtor debts for merchandise sold and delivered during said period, under the credit system of said company as hereinafter mentioned, or by reason of any uncollectible judgment or judgments that he or they may have obtained, for the sum or sums of money due for merchandise sold and delivered as aforesaid, have losses in excess of 1¼ per cent on their total sales made during the above limited period, to pay such excess loss, not exceeding $5,000, less the deductions, and subject to the terms and conditions hereinafter named. It is, however, expressly agreed and understood that this certificate forms a part of series A, and the company's liability to pay excess losses in any series is limited to the fund or funds provided for said series, as appears more specifically in the application signed by said L. A. Shakman & Co., which application forms a part of this certificate.

Terms and Conditions.

(1) That no credit which may have been given to any party or parties shall be included in the calculation of losses, unless he or they were rated in R. G. Dun & Co.'s Mercantile Agency in the latest books or reports issued by it at the time of shipping the goods, and that no special or other report was received by said L. A. Shakman & Co. changing the same. And in case any change has occurred, such sale and shipment shall be considered to have been made in accordance with such change. (2) That, in calculating the losses, no credit that may have been given shall be included therein exceeding credit of 30 per cent on the lowest capital rating such party or parties were rated in said Mercantile Agency's books or reports. (3) That, in the calculation of losses, no account against any debtor shall be included therein for more than $10,000. (4) That no credit that may have been given shall be included in the calculation of losses, unless the rating of the party to whom such

credit is given was at least two thousand dollars ($2,000) at the time of shipping the goods, and that the credit rating was the best or next to the best for the capital. (5) All losses shall remain the property of said L. A. Shakman & Co., and in consideration thereof it is agreed that 12½ per cent of the said 1¼ per cent of the yearly sales, and 12½ per cent of the losses incurred in excess thereof, not exceeding the amount of this guaranty, shall be deducted from both said sums, and the balance, after the deduction of the amount of said 1¼ per cent on the said yearly sales, shall be the sum for which said company is liable. (6) That it shall be the duty of the said L. A. Shakman & Co. to notify said company of the insolvency of any of his or their debtors coming within the calculation of losses under this certificate, within ten days after receiving information of the same. Such notice shall state the name of the debtor, the place of business, date of shipment, amount thereof, and amount still due. Upon failure to give such notice, such claim shall not be taken into the calculation of losses. (7) That, in presenting proofs of losses to said company, such proofs shall specifically show the facts upon which the guarantor bases the belief that the claims are a loss, a statement of the amount of the gross sales between and including date of beginning and expiration of this certificate, the names of the person or persons to whom the goods were sold, itemized account of the same, date of shipment, amounts paid on account, the discounts the debtor or debtors were entitled to receive; and said proofs of loss must be duly verified. (8) That all proofs of loss must be presented within six months after the expiration of the term mentioned and set forth in this certificate, or else the said claims shall be forever barred, even though the loss occurs on an account falling due after the expiration of said six months: provided, however, where any claim is in litigation, and notice thereof is given to the company, then, in that case, the loss, if any, shall be presented within ten days after the termination of said litigation. (9) It is expressly understood that this certificate is issued under class B of this company, whereby the amount of the yearly sales of said L. A. Shakman & Co. are fixed between the sum of $100,000 and $200,000; but, should such sales be of a greater or less sum than above fixed, then any loss sustained by the said L. A. Shakman & Co. would be settled by this company under the terms and conditions of the class to which it belongs, according to the classification system of this company. (10) That this company shall only be liable to the said L. A. Shakman & Co. for goods, wares, and merchandise by him or them owned, shipped, and sold in the usual course of his or their business and trade, and not for goods kept by him or them on consignment, and for which he or they have incurred no liability to pay for; nor shall said company be liable for claims arising from other sources. (11) The company shall pay all losses within sixty days after the proof of loss shall have been made. (12) There shall be no liability on the part of the company unless the said L. A. Shakman & Co. shall have continued his or their said business for the full period of the term herein mentioned and set forth, and should he or they not so continue, fifty (50) per cent of the guaranty fee received shall be returned in full satisfaction of all claims against this company.

Special: In condition No. 2, 20 per cent is changed to 30 per cent. Condition No. 4 is changed so as to include sales to parties whose rating is K 3½ in Dun's Agency Book.

At the time of the delivery of this certificate, and before payment of the consideration or premium, Shakman objected that the policy did not allow the use of Bradstreet's reports of ratings as well as Dun's. There is a conflict in the evidence as to what followed this objection. Shakman's evidence tends to prove that Langsdorf said he would concede this, and that he had authority to do so, and that Langsdorf thereupon wrote, and delivered with the policy, the following slip:

Milwaukee, Nov. 8, 1889.

Indorsement to certificate No. 3,452, in favor of L. A. Shakman & Co., to wit: Should any party to whom above-named firm may sell goods not be rated within the system of this company at Dun's Mercantile Agency, and Bradstreet's Agency does rate such party within the system of this company, then, in such cases, the latter shall be binding upon this company.

A. Langsdorf, Genl. Supt.

Langsdorf, on the other hand, while admitting that Shakman objected to the policy because it did not allow the use of Bradstreet's ratings as well as Dun's, denies that he gave the indorsement to Shakman as a contract, but says that he told him he would submit the matter to the company for their decision, and that he wrote out the indorsement simply to show Shakman how it would read in case the company approved it. At the same time, and after the delivery of the slip, Shakman paid to Langsdorf the premium of $155. It appeared that one Fishell was the partner of Langsdorf, and that their office was at Chicago, and that they styled it the "Western Department" of the United States Credit Company; Langsdorf calling himself general superintendent, and Fishell general manager. Langsdorf testifies that they assumed these titles without authority of the company, and really only had authority to solicit business and collect premiums. On or about November 26, 1889, the plaintiff received a letter from Fishell as follows:

Inclosed find indorsement slip, as requested, which please attach to the certificate, to take the place of the agreement left with you signed by our Mr. Langsdorf.

Very respectfully,
Albert Fishell, Mgr.

The slip inclosed reads as follows:

Should Dun's Mercantile Agency not rate a party, and Bradstreet's Agency should give such party a rating or report, and such rating

or report is sufficient to be covered by the system of this company, then and in that case the said L. A. Shakman & Co. may use Bradstreet's Mercantile Agency as a basis for such party. This special permission to take effect November 13, 1889.

[Signed] Fred M. Wheeler, Secretary.

The plaintiff read the letter, but not the slip, and paid no attention to it, and did not return it. The action was tried by the court, jury being waived, and the court made findings of fact substantially as above stated. As to the disputed questions with regard to the Langsdorf indorsement, of date November 8, the court found favorably to the plaintiff's contention, and that it became a part of the contract on that day. The court further found that the plaintiff, during the period covered by the contract, suffered losses within its terms, amounting, in the aggregate, to $6,502.47, and that after deducting therefrom 12½ per cent of such total, and 1¼ per cent of the plaintiff's total sales, the net losses covered by the contract were $2,856.75. Due notice and proof of loss were also found, and the court found, as matter of law, that the defendant is an insurance corporation, and that the contract in question is a contract of insurance. Judgment for the plaintiff for $2,856.75, with interest and costs, was rendered, and the defendant appealed.

Messrs. **Winkler, Flanders, Smith, Bottum, & Vilas,** for appellant:

The defendant is not an insurance company. *Com.* v. *Wetherbee*, 105 Mass. 160.

The contract between plaintiff and defendant being one of guaranty, Langsdorf, the alleged agent of defendant, had no power to change or modify the contract except by authority from defendant, and no such authority can be implied from the facts in this case.

1 Beach, Corp. § 187; *DeBost* v. *Albert Palmer Co.* 35 Hun, 386; *Alexander* v. *Cauldwell*, 83 N. Y. 480; *Rice* v. *Peninsular Club*, 52 Mich. 90.

Even assuming that the Langsdorf indorsement at the time took effect subject to the subsequent approval or rejection of the company, the respondent is nevertheless concluded by the subsequent indorsement sent him in the letter of November 26, 1889, and by him received and retained.

Wade, Notice, § 11; *Sanger* v. *Dun*, 47 Wis. 615, 32 Am. Rep. 789; *Fuller* v. *Madison Mut. Ins. Co.* 36 Wis. 603; *Hill* v. *Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Grace* v. *Adams*, 100 Mass. 507, 1 Am. Rep. 131; *McMillan* v. *Michigan S. & N. I. R. Co.* 16 Mich. 113, 93 Am. Dec. 208.

Messrs. **Bloodgood, Bloodgood, & Kemper,** for respondent:

The contract is one of insurance.

Our statute has changed the rule of law requiring a person dealing with the agent of an insurance company to inform himself, at his peril, of the power of such agent.

Rev. Stat. § 1977; *Schoner* v. *Hekla F. Ins. Co.* 50 Wis. 575; *Knox* v. *Lycoming F. Ins. Co.* Id. 671; *Renier* v. *Dwelling House Ins. Co.* 74 Wis. 89; *Knudson* v. *Hekla F. Ins. Co.* 75 Wis. 198.

The business done by this defendant, as shown in the contract itself, is an insurance business within the definitions given in the books.

11 Am. & Eng. Enc. Law, p. 280; May, Ins. p. 1; *Lucena* v. *Craufurd*, 2 Bos. & P. N. R. p. 300; *State, Atty. Gen.*, v. *Farmers' & M. Mut. Ben. Asso.* 18 Neb. 276; *United States Credit System Co.* v. *Robertson* (N. J.) 23 Ins. L. J. 717.

Where a party has brought his case to trial and proceeded to present it on the merits and submit the decision, and before any judgment is rendered one of the parties dies, the court, in order that the time consumed by it in deliberation without laches of the party who was successful in the suit may not operate to his disadvantage, will not allow the action to abate, but instead will enter judgment *nunc pro tunc* as of the submission.

1 Black. Judgm. § 127; *Mitchell* v. *Overman*, 103 U. S. 62, 26 L. ed. 369.

Winslow, J., delivered the opinion of the court:

We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (*sub silentio*) construed as a policy of insurance by the supreme court of New Jersey. *United States Credit System Co.* v. *Robertson* (N. J.) 23 Ins. L. J. 717. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of Rev. Stat. §§ 1977 and 1978, Langsdorf was its agent for the purpose of soliciting insurance, transmitting applications, and collecting premiums, and received pay therefor. He was, consequently, under § 1977, *supra*, its agent for all intents and purposes, and had power to make the additional agreement contained in the indorsement dated November 8. *Renier* v. *Dwelling House Ins. Co.* 74 Wis. 89. The court has found, on ample evidence, that he did make that agreement, and the fact is therefore settled. It is, then, a fact in the case that a complete contract of insurance was made, on or about November 8, by the terms of which the plaintiff was to have the right to use the Bradstreet's ratings in case a given customer was given no rating by Dun.

But it is said that the memorandum sent to the plaintiff November 26, which permitted the use of Bradstreet's reports only after November 13, 1889, became effective and binding by reason of the plaintiff's receiving it and failing to object thereto. We

are unable to agree with this contention. The agreement of November 8, being perfect, the letter and inclosed memorandum of November 26 could, at the most, amount to nothing more than a proposal to change the terms of the existing contract. This the plaintiff could do or not, as he chose; but it cannot be said that he did so unless he expressly agreed to the change, or unless his silence was legally equivalent to an express consent to the proposed change. There was no express agreement to make the change, nor do we think that the simple failure to answer the proposal should be construed as such an agreement, in the absence of all evidence showing that the defendant was influenced in its conduct by plaintiff's silence. An agreement inferred from silence must, in such case, rest on the principle of estoppel; and one essential element of estoppel is lacking here, namely, a change of position on the part of the defendant, relying on the plaintiff's silence, which would result in substantial injury to the defendant were it not permitted to rely on the estoppel. The conclusion necessarily is that the contract which became perfected, November 8, with the Langsdorf indorsement, became the contract governing the rights of the parties.

Another question now arises upon the construction to be given to the Langsdorf indorsement. It will be noticed that the policy, though dated October 23, 1889, in terms covers the period of one year commencing on the 1st of July, 1889, and that it insures against losses accruing for merchandise sold and delivered during that period. Thus, the contract covers several months' business transactions previous to its date. It appears in evidence that a considerable number of the losses for which the plaintiff has recovered judgment were suffered between July 1, 1889, and the delivery of the contract, and that these losses arose from credits given to parties who had no credit rating in Dun's reports, but did have such rating in Bradstreet's reports. It is now contended that the Langsdorf indorsement is purely prospective in its operation, and only insures losses occurring after November 8; so that, for the losses occurring before that date, covered by Bradstreet's reports only, there can be no recovery. The indorsement reads:

"Should any party to whom above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency," etc.

The argument cannot prevail. This indorsement is part of the whole contract. It must be read in connection with all the other provisions of the contract, and as though it were incorporated in the contract at the proper place. So read, there can be no doubt that the contract refers to all goods sold and credits given between July, 1889, and July, 1890, and that the right to use the Bradstreet ratings in the proper cases was intended to be as broad in its terms as to time as the right to use the Dun ratings.

Subdivision 2 of the terms and conditions of the policy provides that, in calculating "losses, no credit that may have been given shall be included therein, exceeding a credit of 30 per cent on the lowest capital rating such party or parties were rated at in said mercantile agency's books or reports." In a number of instances of losses the plaintiff had given the insolvent debtors a larger credit than 30 per cent of their lowest capital rating. The court allowed, in such cases, 30 per cent of such rating, and disallowed the excess. It is claimed by appellant that the clause means that the entire credit is to be excluded, and not simply the excess above 30 per cent of the rating. This is purely a matter of construction of language, and our construction agrees with that of the trial court, namely, that it is only that part of the credit exceeding 30 per cent of the rating which is to be excluded.

It is claimed that a loss of $300 suffered by the failure of one Simansky was improperly allowed. It appears that Simansky's name appears in Dun's reports with the notation "Blank 3;" that is, no capital rating, and credit "fair." In Bradstreet's reports, however, he appears rated "X D," which means $1,000 to $2,000 capital, credit fair. It seems to us that this loss was properly allowed. Simansky had no capital rating in Dun's reports. The system of the defendant required both a capital and a credit rating. This was therefore a case clearly within the Langsdorf indorsement, where the party was not "rated within the system of the company" at Dun's Agency, and was so rated in Bradstreet's Agency.

This case was tried and submitted to the court February 20, 1894, and taken under advisement by the court, and held under advisement until October of the same year. The original findings were signed and filed October 2, and, on motion of defendant, were amended in some particulars on the 27th day of October, on which day the appellant's attorneys made proof to the court that, on the 2d day of October, the court of chancery of New Jersey had by decree declared that the defendant had ceased to be a corporation, and had forfeited franchises and rights under the laws of New Jersey, and appellant's attorneys objected to the entry of judgment for that reason. Thereupon the court ordered the findings to be dated and filed as of March 3, so as to bring them within the term at which the case was tried, and also rendered judgment *nunc pro tunc* as of that day. This was right. The action was upon contract. Where such an action has been fully tried and submitted, and taken under advisement by the court, and, pending the decision, a party dies, the court will not allow the action to abate, but will enter judgment as of the time when the action was submitted. The judgment forfeiting the franchises of the corporation could amount to nothing more than the death of an individual. 1 Black, Judgm. § 127; *Mitchell* v. *Overman*, 103 U. S. 62, 26 L. ed. 369.

Judgment affirmed.

Ole O. HOVEN, *Respt.*,
v.
WEST SUPERIOR IRON & STEEL COMPANY (Employers' Liability Assurance Corporation, Garnishee, *Appt*).

(.....Wis.....)

1. **Payment of a claim for injuries to an employee** is not a condition precedent to a right of action against the insurer on a policy to indemnify an employer for sums for which he "shall become liable" to employees.

2. **Injury to a workman in iron and steel works,** caused by the fall of a girder which was being raised by an independent crew building an addition to the works, is within a policy of indemnity against claims for compensation for injuries in "all operations connected with the business of iron and steel works."

3. **Entry of judgment against the principal defendant** before proceedings to garnish a claim have commenced, makes the indebtedness absolute, within the meaning of Rev. Stat. § 2769, providing that no judgment shall be rendered upon a liability owing from him to the defendant unless it is due absolutely before judgment against the defendant.

(May 1, 1896.)

APPEAL by the garnishee from a judgment of the Superior Court for Douglas County in favor of plaintiff in an action brought to enforce an employer's liability for personal injuries to his servant against which he held a policy of insurance with the garnishee. *Affirmed.*

Statement by **Marshall, J.**:

On the 3d day of March, 1892, the appellant issued to the West Superior Iron & Steel Company its policy of insurance, the essential parts of which are as follows:

"Whereas, the West Superior Iron & Steel Company of West Superior, Wisconsin, hereinafter called the 'employer,' by application dated the 1st of March, 1892, the statements in which the employer warrants to be true and agrees shall be incorporated herein, has applied to the Employers' Liability Assurance Corporation . . . for indemnity against claims for compensation for personal injuries caused to employees while in its service, at the place and places mentioned in the schedule hereto attached, and has paid to the corporation the sum of $1,044 as premium for such indemnity for twelve months from the 1st day of March, 1892, at noon, which premium is based on the estimated yearly pay roll of the employer, amounting to $400,000: Now, it is agreed as follows: That the corporation, in so far as regards injuries caused during the period covered by the premium now paid, or by any renewal, will pay to the employer . . . such sums for which the employer shall become liable to its employees by virtue of the common law or of any statute, subject to the following limitations: . . . In the event of an accident which shall be the cause of the death of or injury to an employee the corporation shall not be liable for more than $1,500 The sums paid to the employer shall be for personal injury within the meaning of this policy caused to any employee in its service while engaged in the employer's work in any of the occupations or at any of the places mentioned in the schedule hereto, such payment to be made within one week after the receipt by the corporation of satisfactory proofs of the claim: provided, always, that this policy is subject to conditions indorsed hereon."

The conditions indorsed provided, among other things, that in case of an accident causing personal injury to an employee and an anticipated claim for damages, the assured should give immediate notice thereof to the company, and furnish such additional information as it might require, and that it should have the right to settle such claim or defend the same in the name of the employer. The schedule referred to is as follows: Under the heading "Description of the Occupation of Employee" occurs the following: "All operations connected with the business of iron and steel works." Under the heading "Wages Paid to Employees in the Occupation" occurs the following: "Four hundred thousand dollars." Under the heading "Places at Which Employees to Whom Wages are Paid are Employed" occurs the following: "West Superior and elsewhere in Wisconsin in the service of the employer." The plaintiff, during the life of the policy, was one of the regular employees of the assured at said iron and steel works, and, during such time, and on the 24th day of August, 1892, he received a personal injury. Notice, according to the terms of the policy, was given to the appellant. Plaintiff commenced suit against the employer to recover compensation for his injuries. Notice thereof was given to the appellant. It refused to take any action in the matter, upon the ground that, "the operations being carried on at the time complained of, and by which plaintiff was injured, were not covered by the contract of insurance," namely, the erection of a building. Such proceedings were had in the action that plaintiff recovered judgment against the employer for $1,400 damages and $51.95 costs. Thereafter such proceedings were had that appellant was summoned as garnishee of the judgment debtor by reason of its liability on the policy. Issue was joined in the garnishee action, and was tried, with the result that findings of fact were filed in accordance with the foregoing statement, and to the effect that at the time plaintiff was injured he was engaged in the manufacturing department; that the employer was building an addition to its works; that a crew other than the one plaintiff was connected with in the service of the employer was constructing the building; that while such crew was raising one of the girders it fell, striking against the shears at which plaintiff was at work, and, rebounding, struck and injured him; that the conditions of the policy to be performed by the employer subsequent to the accident in order

NOTE.—For insurance against an employer's liability, see also Anoka Lumber Co. v. Fidelity & C. Co. (Minn.) 30 L. R. A. 689.

See also 24 L. R. A. 512.

to fix the liability of the assurer were complied with. The court construed the policy as a contract to indemnify against liability, and upon such construction, and the foregoing facts, and others not necessary to mention, found the appellant liable as garnishee, and ordered judgment accordingly. Appropriate exceptions were made to present the questions here considered. Judgment was entered in accordance with the findings, from which this appeal was taken.

Messrs. **E. F. McCausland** and **Kitchel, Cohen, & Shaw,** for appellant:

The policy of insurance here in question is a contract of indemnity against damage, and the steel company can have no claim thereunder except upon proof of damage sustained.

1 May, Ins. 3d ed. §§ 1, 2; Meredith's Emerigon, Ins. ed. 1850, § 4, chap. 1, p. 13; *Castellain* v. *Preston*, L. R. 11 Q. B. Div. 380.

The construction making the contract one of indemnity against liability carries us into the region of wagering contracts; that construction should be rejected. The construction which makes the policy a contract of indemnity against damage places the agreement upon the fundamental principle of insurance contracts; and that construction, doing justice as it does between the parties to the contract, should be adopted.

Phillips, Ins. 5th ed. chap. 1, § 2, p. 6.

The word "claim" as regards the employer and the corporation means a liability of the employer, under the terms of the policy, which he has paid, either under judgment or by consent of the insurer; and the satisfactory proofs of such a claim must necessarily show an authorized payment of such claim.

Traders' Ins. Co. v. *Race* (Ill.) 21 Ins. L. J. 363, 142 Ill. 338.

A breach of the contract and damages arising from such breach must concur in order to maintain an action for damages.

Valentine v. *Wheeler*, 122 Mass. 566, 23 Am. Rep. 404.

Courts have been reluctant to construe a contract as one of indemnity against liabilities unless compelled to do so under all the circumstances of each case.

Taylor v. *Coon*, 79 Wis. 76; *Thompson* v. *Taylor*, 30 Wis. 68.

The Hoven accident was not within the terms of the policy.

People's Ice Co. v. *Employers' Liability Assur. Corp.* 161 Mass. 122; *Phillipsburg Horse Car Co.* v. *Fidelity & C. Co.* 160 Pa. 350.

The alleged indebtedness from the garnishee to the defendant had not become due absolutely before judgment was entered against the defendant.

Rev. Stat. § 2769, prevents absolutely any recovery against the garnishee in this proceeding.

St. Joseph Mfg. Co. v. *Miller*, 69 Wis. 389.

Messrs. **Victor Linley** and **John Brennan,** for respondent:

Under the policy of insurance in question it was not necessary for the defendant to pay the plaintiff's claim as a condition to its right of recovery.

Selleck v. *Griswold*, 57 Wis. 291; *Smith* v. *Chicago & N. W. R. Co.* 18 Wis. 23; *Thompson* v. *Taylor*, 30 Wis. 68.

If the undertaking is conditioned to save the promisee harmless against liability for a debt there is a breach as soon as the debt becomes legally enforceable against the promisee, and he need not aver and prove payment in order to maintain an action.

10 Am. & Eng. Enc. Law, p. 415; *Anoka Lumber Co.* v. *Fidelity & C. Co.* (Minn.) 30 L. R. A. 689; *Gilbert* v. *Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Trinity Church* v. *Higgins*, 48 N. Y. 536.

Payment of a claim before a recovery can be had in such cases is not necessary.

Conner v. *Reeves*, 103 N. Y. 527; *Gilbert* v. *Wiman, supra; Trinity Church* v. *Higgins*, 48 N. Y. 532; *Carman* v. *Noble*, 9 Pa. 366; *Fish* v. *Dana*, 10 Mass. 46; *Re Negus*, 7 Wend. 499; *Kirksey* v. *Friend*, 48 Ala. 276; *Conkey* v. *Hopkins*, 17 Johns. 113; *Jarvis* v. *Sewall*, 40 Barb. 449; *Banfield* v. *Marks*, 56 Cal. 185; *Martin* v. *Bolenbaugh*, 42 Ohio St. 508; *Rockfellow* v. *Donnely*, 8 Cow. 623; *Chace* v. *Hinman*, 8 Wend. 452, 24 Am. Dec. 39; *Mann* v. *Eckford*, 15 Wend. 502.

The appellant by failing to deny liability on the ground that proof of loss had not been made thereby waived all objection on that score.

Warner v. *Peoria Marine Ins. Co.* 14 Wis. 321; *King* v. *Hekla F. Ins. Co.* 58 Wis. 508; *Harriman* v. *Queen Ins. Co.* 49 Wis. 71; *Campbell* v. *American F. Ins. Co.* 73 Wis. 100.

The Hoven accident is covered by the policy.

The claim owing the defendant by the appellant was garnishable.

St. Joseph Mfg. Co. v. *Miller*, 69 Wis. 389; *Jones* v. *St. Onge*, 67 Wis. 520.

Marshall, J., delivered the opinion of the court:

Did the court err in construing the policy of insurance to be a contract of indemnity against liability, instead of one of indemnity against damages, and in holding that payment of the personal injury claim is not a condition precedent to the right to recover thereon? The policy recites that it is issued on an application for indemnity against claims for compensation for personal injuries. It acknowledges the payment of $1,044 as the premium for such indemnity for a period of twelve months. This is followed by the agreement to pay "to the employer . . . all sums for which it shall become liable to its employees." Certain conditions are indorsed on the policy, and made a part of it, which are consistent with the apparent meaning of the language contained in the body of the contract. By such conditions the assured is prohibited from settling the claims, except by consent of the assurer. They expressly provide that an action may be brought against the assurer before the payment of the claim, by the use of the following language: "The company shall not be sued upon this policy in any court after six years from the time that the injury occurred upon or by reason of which the cause of action accrued, unless at the expiration of said time some suit brought by the injured employee be then pending against

the employer, in which case an action may be brought within six months after the termination of such suit, and not later." This language plainly indicates that payment of the claim is not a condition precedent to a right of action against the insurer on the policy. Again, by one of the conditions, the insurance company assumes entire charge and responsibility for the settlement of the loss and of any legal proceedings, and for the payment of the costs thereof. There is no way provided by which it can be relieved of its liability except by actual payment to the employer of the full amount for which it could, in any event, become liable. It will be seen that both the provisions in the body of the policy and the conditions indorsed thereon and made a part of it are inconsistent with any reasonable theory other than that the contract of insurance is one of indemnity against liability, and that actual damages is not a condition precedent to the maintenance of an action thereon. It not only clearly contemplates that such an action may be brought before actual payment of the claim for damages by the assured, but by plain and unmistakable language it contracts to indemnify the assured against liability, not against damages. The case is not one requiring a resort to rules for judicial construction in order to determine what the parties intended by the language of the contract. Substantially the same kind of policy was under consideration in the recent case of *Anoka Lumber Co.* v. *Fidelity & C. Co.* (Minn.) (1895) 30 L. R. A. 689, cited in the brief of counsel for respondent, where the court held it to be a contract of indemnity against liability, and said: "The intention of the parties appears to be so plainly expressed that any other construction than the one here given to the contract would do violence to the language they saw fit to use."

It is further claimd on the part of the appellant that the accident whereby plaintiff was injured was not within the terms of the contract of insurance; that by the schedule referred to in the body of the policy, and attached to it, liability was restricted to injuries to employees while engaged in operations connected with the business of iron and steel works,—that is, in the operating department of the business, as distinguished from a business like that of constructing necessary buildings. To be sure, plaintiff was injured while at work in the operating department, by the fall of a girder which was being raised to its position by an independent crew, engaged in building an addition to the works. Therefore, if the labor of constructing such addition under a proper interpretation of the policy, is not an operation connected with the business of iron and steel works, appellant is not liable. We are referred to *People's Ice Co.* v. *Employer's Liability Assur. Corp.* 161 Mass. 122, as a case directly in point to sustain appellant's contention. The policy in that case insured the employer against claims for damages on the part of its employees in "all operations connected with the business of ice dealers." The court held that this language covered only employees in the operating department, and that a person injured while engaged in constructing an ice house was not one of the employees mentioned. But this conclusion was reached by reason of representations contained in the application upon which it was issued. The latter contained, among other representations, the following: "Employer's works are situated . . . where cutting ice." "The trade or business is ice dealers." "The operations carried on by the work people are cutting and handling ice." "The machinery in use is such as is necessary in cutting ice." We are not prepared to say but that there was reasonable ground to hold that the policy, taken in connection with the application, and the language of the schedule, "all operations connected with the business of ice dealers," covered only persons engaged in the actual operations of cutting, handling, storing, and delivering ice, and not those engaged in the construction of storehouses; nevertheless we should hesitate to adopt such construction if the precise question were before us. The language was inserted for the benefit of the appellant. It is its language. Therefore, if open to judicial construction at all, that interpretation should be given must favorable to the assured. *Insurance Co. of North America* v. *Garland*, 108 Ill. 220; *Niagara F. Ins. Co.* v. *Scammon*, 100 Ill. 644; *Symonds* v. *Northwestern Mut. L. Ins. Co.* 23 Minn. 491; *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *Stout* v. *Commercial Union Assur. Co.* 11 Biss. 309, 12 Fed. Rep. 554; *Teutonia F. Ins. Co.* v. *Mund*, 102 Pa. 89. This rule is applied rigidly in the construction of conditions inserted in policies restricting the general scope of the contract of insurance. *Burkhard* v. *Travellers' Ins. Co.* Id. 262, 48 Am. Rep. 205. Here there is no application containing representations descriptive of the particular departments of the business covered by the contract as in the Massachusetts case, or to damages caused by particular instrumentalities as in the case of *Phillipsburg Horse Car Co.* v. *Fidelity & C. Co.* 160 Pa. 350. The general language of the contract, "All occupations connected with the business of iron and steel works," is not restricted by anything in the conditions indorsed on the policy or any paper referred to or made a part of it. If the intention was to restrict such language to operations in any particular department, or to any particular branch of the business, or to any particular instrumentalities used in such business, it was easy to have said so in unmistakable language. The court should give the general language the assurer saw fit to use, under the circumstances, a broad and liberal construction in favor of the objects for which the policy was taken out, and by so doing the conclusion is easily reached that it covers the operation of constructing a building for the use of the assured in its business, as one of the operations connected with such business.

It is further claimed that the indebtedness of the garnishee to the iron and steel company did not become due absolutely till judgment was entered in respondent's action against such company, hence not subject to garnishment when this action was commenced. We hardly understand the force of this assign-

ment of error. Judgment was entered against the iron and steel company before the garnishee action was commenced. Entry of such judgment made the indebtedness of the iron and steel company absolute. Section 2769, Rev. Stat., provides that "no judgment shall be rendered upon a liability of the garnishee by reason of any money owing from him to the defendant, unless before judgment against the defendant it shall have become due absolutely." This action was not commenced till January 26, 1894. Judgment was entered in the action against the iron and steel company on the 22d day of December, 1893. Due notice was served upon the insurer of the claim for damages and of the commencement of the action therefor, and it refused to recognize the claim, upon the ground that such claim was not covered by the policy. On the rendition of such judgment, under the circumstances, the liability of the garnishee became absolute for the amount thereof, $1,451.95, and that being before the commencement of this action satisfies the provisions of § 2769, Rev. Stat. *St. Joseph Mfg. Co.* v. *Miller*, 69 Wis. 389; *Jones* v. *St. Onge*, 67 Wis. 520.

There is no other question in the case requiring consideration.

The judgment of the Superior Court is affirmed.

STATE of Wisconsin, *ex rel.* W. H. MYLREA, Attorney General,

v.

JANESVILLE WATER POWER COMPANY *et al.*

(.....Wis.....)

1. **Leave will not be granted to institute proceedings** to forfeit the franchises of a solvent active corporation carrying out the purposes of its creation in supplying the necessities of a large number of people and whose securities are held by innocent persons, in the absence of a clear wilful misuse, abuse, or nonuse of its franchises.

2. **Eight years' delay will estop the state** from proceeding to forfeit the franchises of a corporation for overbonding and issuing stock without payment in money or its equivalent.

3. **Waiver of the right to forfeit the franchises of a water company** whose property a municipal corporation has the option to acquire for neglect to keep accurate accounts of the cost of construction, as required by the ordinance granting permission to erect and operate the works, is effected by long delay in moving for forfeiture, accompanied by active compulsion upon the company as to extension and operation of the works.

(March 10, 1896.)

APPLICATION for leave to bring quo warranto proceedings against defendants to declare a forfeiture of their rights as a corporation. *Denied.*

The facts are stated in the opinion.

Messrs. **M. G. Jeffries, John Winans,** and **W. H. Mylrea,** Attorney General, for plaintiff.

Messrs. **William Ruger, E. M. Hyzer,** and **W. G. Wheeler** for defendants.

Marshall, J., delivered the opinion of the court:

This is an application by the attorney general for leave to file an information in the nature of a quo warranto against the Janesville Water Power Company and others to forfeit the corporate franchise of such company and other franchises owned by it. The petition states, in substance, that the company was incorporated July 16, 1887, for the sole purpose of constructing, acquiring, and operating a system of waterworks in the city of Janesville, and has ever since existed as such corporation; that during the year 1887 said city, pursuant to chapter 164, Private & Local Laws 1887, by ordinance, upon terms and conditions therein specified, granted to the firm of Turner, Clarke, & Rawson a franchise to establish a system of waterworks, to furnish said city with fire protection, and to supply wholesome water to the inhabitants thereof, for public and domestic use; that such ordinance was duly accepted by said firm; that they thereafter conveyed their rights under the same to said water company; that such company thereafter contracted with a construction company, composed of stockholders and officers of the water company, for the building of such waterworks; that the water plant was duly constructed, satisfactorily to the city, and accepted by it on or before August 6, 1888, and that the water company has since operated the same. The grounds upon which it is claimed the corporate and other franchises should be forfeited are mainly as follows: (1) Violations of the conditions of the ordinance upon which the franchise was granted, in that the said water company has failed to furnish wholesome water as therein provided, has refused to sell water to the inhabitants of the city at meter rates, has neglected to comply with the ordinance in respect to furnishing fire protection, and has neglected to furnish water wholly from artesian wells. (2) Violations of law in respect to the organization and business management of the corporation, in that it has issued bonds in excess of the cost of constructing the waterworks, and has issued stock without the same having been fully paid in money or its equivalent. (3) Violations of the ordinance in respect to keeping accurate books of account of the cost of constructing the works and operating the same, in that it was provided by such ordinance that the city should have the right to acquire the works by purchase at the end of seven years from their acceptance by the city, at a sum sufficient to return to the owners the full cost thereof and 7 per cent annual interest thereon, the same to be ascertained from the books of such owners, together with a sworn statement of the cost of construction, with expenses and earnings, and that the grantees of the franchise, their successors and assigns, should keep accurate books showing such cost, expenses, and earnings, and that

NOTE.—For forfeiture of the charter of a waterworks company for failure to supply good water, see Capital City Water Co. v. State, Macdonald (Ala.) 29 L. R. A. 743.

See also 34 L. R. A. 92; 40 L. R. A. 203.

a fraudulent failure so to do should vacate and annul the franchise and all privileges granted under it; that the city gave due notice of its election to purchase the works under such reserved right, and required the sworn statement to which it was entitled; that, in response thereto, a fraudulent and false statement was rendered; that it was not taken from books of account accurately kept, as provided in the ordinance, and was known by the officers of the corporation who made it to be false and fraudulent; that there has been a total neglect to keep books of account as required by the ordinance; and that such neglect has been with faudulent purpose, to practically annul that part of the ordinance giving the city the right to acquire the works by purchase. It is plain from an examination of the petition that the ground of complaint chiefly relied upon is the one mentioned in subdivision 3. The allegations are chiefly on information and belief. All are denied, and those in regard to violations of the ordinance in respect to the operation of the works are met by proofs to the contrary of the most positive and satisfactory character. And it is made to appear that substantially all the facts, particularly in regard to the matters referred to in subdivision 3, were fully known and taken official notice of by the city as early as November, 1894, at which time an action was brought in the circuit court to determine the cost of the water plant, and to forfeit its franchises, which action is still pending; that, since the commencement of such action, the city has recognized the existence of such franchises and the water company's obligations in the premises by requiring it to make large and expensive extensions to the water mains, and put in additional hydrants, necessitating other improvements, including an additional artesian well. And it appears that the alleged violations of the ordinance in respect to keeping accounts of the cost of construction are all denied; and that they took place, if at all, before any of the present stockholders of the corporation were interested in the company; and that they have, at considerable expense, endeavored, in good faith, to supply all the information in that regard required; and that in any event the city could not, at the present time, incur the indebtedness requisite to purchase the works without exceeding its constitutional limit.

The foregoing contains, substantially, a correct statement of the case upon which we are to determine the question of whether the sovereign power of the state ought to interfere to forfeit the franchises of the alleged offending corporation, and to wind up its affairs. The granting or refusing this application rests in the sound discretion of the court. The legislature, in providing that an action may be brought, under § 3241, Rev. Stat., only by leave of this court, upon cause shown, obviously did so for a purpose. The law requires that the power thus intrusted to the court shall be exercised and leave granted or denied as the public interest appears to demand, upon due consideration of the facts of each particular case. To merely examine the petition, and if, taking all the allegations thereof, whether upon information and belief or otherwise, into consideration as true, it prima facie states a cause of action or facts that might support a judgment, would be a failure to exercise that sound judicial discretion which the law contemplates, amounting to an abuse of judicial duty. While courts differ on this question, the weight of authority is in favor of the rule that the facts and circumstances of each particular case, and even the motives for instituting the proceedings, may be considered. *Atty. Gen.* v. *Sheffield Gas Consumers Co.* 3 De G. M. & G. 304; *Atty. Gen.* v. *Cambridge Consumers Gas Co.* L. R. 4 Ch. 71. And especially in case of a solvent, active corporation, carrying out, at the time of the application, the purposes and designs of its creation, performing duties of a quasi public character, having to do with the daily necessities of a large number of people, and where large sums of money have been invested, and securities therefor are held by innocent parties, whose security depends upon a continuance of the corporation, unless there is a clear, wilful misuse, abuse, or nonuse of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain, wilful abuse of power or violation of law within the meaning of the statute on the subject, whereby the corporation fails to fulfil the very design and purpose of its organization—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises. *State* v. *Farmers' College*, 32 Ohio St. 487; *Atty. Gen.* v. *Erie & K. R. Co.* 55 Mich. 15; *State, Prosecuting Atty.*, v. *Commercial Bank*, 10 Ohio, 535. Leave will not be granted if to forfeit the franchises under the circumstances will be inequitable, or will not have the effect of remedying the grievances complained of, or the proceeding is not in good faith. The counter affidavits used on the application should be considered, and material allegations on information and belief, which are so overcome by positive affidavits and proofs in opposition thereto as to establish the fact involved against the petitioner beyond dispute, should not be considered. Thomp. Corp. § 6786. The rule which generally prevails in this regard is well stated in *State, Prosecuting Atty.*, v. *Commercial Bank*, *supra*, as follows: The court proceeds with extreme caution in proceedings having for their object the forfeiture of corporate franchises, and such forfeitures are not to be allowed except under express limitations of the charter, or for plain abuse of power, by which the corporation fails to fulfil the design and purpose of its organization, also, in effect, that the extreme remedy of forfeiture will not be allowed where there are other remedies adequate to redress the grievances complained of; that the remedy of forfeiture is the last resort, certainly not allowed where compensation in damages will substantially remedy the violation. High, Extr. Legal Rem. § 649. Without proceeding further to discuss the principles of law involved and the prac-

tice in such cases, we are warranted in saying that the allegations of the petition presented, in respect to violations of the franchises in matters pertaining to the operation of the works and the water service, are so overcome by the affidavits and other proofs that the case in that respect fails to show any warrant for the institution of proceedings to forfeit the franchise of the corporation.

In regard to violations of law alleged in respect to overbonding and issuing corporate stock without payment in money or its equivalent, which happened at or about the time of the organization of the corporation, upward of eight years ago, it is not perceived how, under the facts of this case, the public have a sufficient interest or are sufficiently prejudiced in the matter that, after the lapse of such a period of time, the state should interfere to forfeit the corporate franchises. While such forfeiture might have the effect to punish the corporation itself, to the great and irreparable damage of the present stockholders and the holders of the bonds, it is not perceived how it would have any other effect; and we think, on the whole, the doctrine of estoppel by laches, hereafter referred to, should apply. We suggest in this connection, on a subject of practice, that the water company is the only proper defendant here; that this proceeding is not in the nature of a bill in equity, where all persons may be made defendants who have or claim an interest in the controversy adverse to the plaintiff, or are necessary to a complete determination or settlement of the question involved; it is a proceeding under the statute solely against the alleged offending corporation, and it, only, should have been named as defendant.

As to the neglect to keep accurate books of account of the cost of construction and operating expenses and the earnings, whereby it is alleged that the city is prejudiced in respect to exercising its option to acquire the works by purchase, it is by no means clear that a failure to observe conditions inserted in the ordinance to aid the city in determining the cost of the works in the event of a desire to purchase constitutes a ground for forfeiture at the suit of the state; but the view we take of the matter renders it unnecessary to decide that question. It is claimed on the part of the defendant company that, in any event, the right of the state to forfeit its franchises has been waived. On the contrary, it is claimed on the part of the petitioners that the state cannot be held to have waived such right by any laches shown or any act on the part of the city. That the forfeiture of the franchises of the corporation may be waived by the state is not seriously denied. *Atty. Gen.* v. *Petersburg & R. R. Co.* 6 Ired. L. 456; *People* v. *Ulster & D. R. Co.* 128 N. Y. 240; *People* v. *Manhattan Co.* 9 Wend. 361; *State* v. *Fourth N. H. Turnpike*, 15 N. H. 162; 5 Am. L. Reg. N. S. 577; *Com.* v. *New York, L. E. & W. C. & R. Co.* 10 Pa. Co. Ct. 129; and *Foster* v. *Joliet*, 27 Fed. Rep. 899,—are among the authorities on the subject brought to our attention in the briefs of counsel, to which many more might be added. But it is contended that the state, only, can waive the forfeiture; that acts on the part of the city of Janesville do not affect the matter. It is true that a waiver by the city is not binding upon the state. Nevertheless it would be going too far to say that acts which would estop the city cannot be taken notice of and given effect to on this application. The state may waive the right to bring an action on behalf of the public by mere delay in moving to institute proceedings while the corporation, in carrying cu', in good faith, the purposes of the organization, expends large sums of money; so held in *Atty. Gen.* v. *Sheffield Gas Consumers Co.* 3 De G. M. & G. 304, a well-considered, leading English case, where Lord Justice Turner uses the following language: "That delay will affect the attorney general as much as a private individual I am not prepared to say; but, in my opinion, it is a circumstance to be considered in determining the question whether this court shall interfere, although the application to the court be on behalf of the attorney general." In *Com.* v. *Bala & B. M. Turnp. Co.* 153 Pa. 47, the court goes further, and holds that in case of delay, accompanied by circumstances which would estop individuals, the state is equally estopped. The circumstances there were: A corporation had been allowed to proceed and expend large sums of money, when the facts relied upon in the application for leave to bring the action to forfeit its franchises were notorious. Held, that the delay, under the circumstances, created an estoppel, so as to effectually prevent the institution of such proceedings. The court, in effect, said: If the complainant were a private individual, the court would not hesitate to say that his laches were a bar; and the same rule holds good notwithstanding the application is by the attorney general on behalf of the state. The question involved is not one under the statute of limitations, but one of laches, which may be imputed to the state as well as to an individual. While time does not run against the state, time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights. To the same effect are *Willmott* v. *Barber*, L. R. 15 Ch. Div. 105; *Atty. Gen.* v. *Johnson*, 2 Wils. Ch. 102; *Atty. Gen.* v. *Delaware & B. B. R. Co.* 27 N. J. Eq. 1. The principles here maintained should be quite rigidly applied where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known.

Without taking further time to discuss the subject, we hold that delay in moving for leave to commence the action, with the other elements referred to, constitutes, on this application for the exercise of the discretionary power of the court, an effectual waiver of the harsh and extraordinary remedy of proceedings under the statute to forfeit the franchises of the company, and that this application should therefore be denied.

The application for leave to bring an action against the Janesville Water Power Company to forfeit its franchises is denied.

NORTH CAROLINA SUPREME COURT.

Solomon CHITTY, *Appt.*,
v.
J. M. CHITTY.

(.....N. C.....)

A fugitive from the state intending to return as soon as a criminal proceeding against him is dropped, while his wife and children remain on the family homestead, does not cease to be a resident of the state within the protection of the homestead from attachment by his creditors.

(*Clark, J., dissents.*)

(April 21, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Forsyth County in favor of defendant in an action brought to recover property sold under an attachment which plaintiff claimed as exempt from execution. *Reversed.*

The facts are stated in the opinion.

Mr. **J. S. Grogan** for appellant.

Messrs. **Watson & Buxton** for appellee.

Faircloth, Ch. J., delivered the opinion of the court:

The facts found by the referee and sustained by the court are as follows: (1) That plaintiff, in November, 1887, owned and occupied, as his home place, the land now in controversy, and left the state in that month to avoid a warrant out against him for false pretense, with the intention of returning as soon as the case against him should be thrown out of court, and that his wife and children remained on the place until plaintiff returned, about Christmas, 1889; that the plaintiff spent his time in visiting relatives in various states, intending to return to this state when he believed the charge against him to be buried. (2) That during his absence an attachment issued, and the land was sold, and the defendant purchased it; no homestead having been assigned to the plaintiff. His honor held that the plaintiff, during his absence, was not a resident of this state, and therefore not entitled to a homestead. This is the only question presented.

The Constitution guarantees the right to a homestead to every resident on the land occupied by him, and whoever denies the right must show that the case falls within the constitutional exceptions, which is not the case in this instance, or that the owner has lost it by nonresidence. Residence and domicil are so nearly allied to each other in meaning that it is difficult sometimes to trace the shades of difference, although in some respects they are distinct; and the definitions of residence are sometimes apparently conflicting, owing mainly to the nature of the subject with which the word is used, the purpose being always to give to it such meaning and force as will effectuate the intention of that particular statute. The great bulk of cases in the books are cases of statutory residence, as applied to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce proceedings, probate and administrations, limitations, attachments, and the like cases. The word is frequently used in the sense of bodily presence in a place, sometimes a mere temporary presence, and sometimes the most settled and permanent abode in a place, with all the shades of meaning between these extremes, and also with reference to the distinction between an actual and legal residence. So it seems entirely proper to consider its meaning in connection with the subject-matter and the purpose of the statute in which it is found, as well as the relation of the citizen to the subject-matter. The leading purpose of the Constitution (art. 10, §§ 1-3, 8) is to secure the homestead to the debtor and his family, and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. Absence from the state does not necessarily mean a change of residence, in the legal sense, as that question depends upon the intention and other facts. A protracted residence in another state, engaged in a permanent business, with no home in this state, would be at least inconsistent with a residence here. "Residence," strictly construed, would defeat the object of the Constitution (art. 10) in relation to homesteads. If a citizen of Raleigh should go to Baltimore on business, he could not be said to literally reside in Raleigh during his absence but by allowing the doctrine of *animo revertendi* its reasonable force, the business is attended to, and the purpose of the law is secured. The question of domicil and residence has been so fully and frequently discussed by this court that it would be superfluous work to repeat what has been decided. We will only refer to *Finley* v. *Saunders*, 98 N. C. 462; *Fulton* v. *Roberts*, 113 N. C. 421; *State, Hannon*, v. *Grizzard*, 89 N. C. 115, and the several cases therein referred to; and to *State* v. *Johnston* (at the present term) (N. C.) 23 S. E. 921. The general rule from the cases is that when one leaves the state with the intention of returning he does not lose his residence here. This will do for the present case; but to avoid any extreme conclusions from the above statement, we will say that circumstances may easily lead to a different result; for instance, if the lapse of time should be long enough to rebut such intention, or if a residence should be acquired in another state, or by engaging in permanent business elsewhere, without the *animo revertendi*, or by assuming the duties and privileges of a citizen in such other state. The question is one of law, and not of morals, and we could not inquire into the latter. Our opinion is that the court below committed error, and that the plaintiff is entitled to recover on the facts now in the record before us.

Reversed.

Clark, J., dissenting:

The sole question in this case is whether a fugitive from justice, wandering about in other

NOTE—On the question What constitutes nonresidence for the purpose of attachment? see *note* to Munroe v. Williams (S. C.) 19 L. R. A. 665.

states, without intention of returning until a criminal indictment against him in this state can be procured to be dropped, and upon whom, therefore, personal service of summons cannot be made, is liable to be brought into court in a civil action by attachment of his property and publication, and if he can set aside the sale under such attachment proceedings on the ground that his homestead was not set apart. The question is in reality a single one, because, unless such fugitive is a nonresident, the attachment will not lie, and, if he is a nonresident, he is not entitled to the homestead. It would be singular if a party could thus not only defy the criminal process of the court, but by such indefinite and illegal absence from the state could also avoid service of civil process, and on his return could (as this plaintiff is attempting to do) take back his property, with his debt paid by the purchaser at the sale which had been ordered by a court of justice. It would seem that the decisions of the court have been conclusive against this very ingenious and novel proceeding. In *Wheeler* v. *Cobb*, 75 N. C. 21, it was held that one voluntarily removing to another state for the purpose of discharging the duties of an office of indefinite duration, though he may occasionally visit the state, and may have the intent to return at some future day, is a nonresident for the purposes of an attachment. This has been often cited with approval, and as late as *Carden* v. *Carden*, 107 N. C. 214, this court again citing it, adds: "The prominent idea is that the debtor must be a nonresident of this state, where the attachment is sued out, not that he must be a resident elsewhere. The essential charge is that he is not residing or living in the state . . . where process may be served so as effectually to reach him. In other words, his property is attachable, if his residence is not such as to subject him personally to the jurisdiction of the court and place him upon equality with other residents in this respect." The court then goes on to say that "visiting this state only once or twice a year and with only a general intention of returning at some indefinite time and making his home here," would not exempt his property from attachment. The court further adds: "Non residents, within the meaning of the attachment law, means the actual cessation to dwell within a state for an uncertain period, without definite intention as to the time for returning, although a general intention to return may exist." For these propositions the opinion cites, besides *Wheeler* v. *Cobb*, *supra;* Waples, Attachm. 35; *Weitkamp* v. *Loehr*, 21 Jones & S. 79. If former deliverances of our own court are to guide us, this would settle the present case, for this fugitive from justice not only did not "visit the state twice a year," but, so far from having an intention to return at a definite time, he had a most definite and fixed determination, for a very good and sufficient reason, —the terror of the indictment which had been returned against him,—not to return until "this charge against him was buried." There being no statute of limitation after indictment found, it was uncertain as to time and manner when a fugitive could procure the "burial" of the proceedings, and he did not return until it was done; and he was in fact absent from the state somewhat over two years. It was not necessary, as we have seen, that a residence should be obtained in another state. It is sufficient if the party has ceased to reside in this state. In *New York* v. *Genet*, 4 Hun, 487, it is held that a fugitive from justice who leaves the state is a nonresident, and his property is liable to attachment. Brady, J., says: "The effect of such an act must be to deprive the person committing it of his character as a resident. He places himself designedly beyond the reach of the power of the state by leaving its territory, and in terror of its laws. . . . He abandons deliberately his residence. . . . When a man thus conducts himself, he waives acquired rights which depend upon his presence within the state, or circumstances which warrant its presumption, and is to be treated as if he were not present, and had no rights founded upon that legal attitude. He became, in other words, to all intents and purposes, for the enforcement of remedies, a nonresident of this state." On appeal this decision was affirmed by the New York court of appeals by a unanimous bench. 63 N. Y. 646. The same ruling was made as to another fugitive from justice in *Thames & M. M. Ins. Co.* v. *Dimmick*, 51 N. Y. S. R. 41. See also Kneeland, Attachm. §§ 182–193, and cases cited; and 21 Am. & Eng. Enc. Law, p. 125, note 3.

If the attachment was valid, as under the above decisions in our own court and elsewhere it must be, the purchaser acquired a good title; for the plaintiff, if a nonresident, was not entitled to claim a homestead, which is given by our Constitution only if the lot or tract "is owned and occupied by a resident of this state." This point has been uniformly so held; indeed, the language of the Constitution could bear no other construction. In *Baker* v. *Legget*, 98 N. C. 304, Merrimon, J., says: "The right of homestead provided and secured by the Constitution . . . is incident to residence in this state. Only residents have and are entitled to it. A nonresident has no such right, although he may be the owner of real property situate in the state." And the opinion goes on to hold that "when a resident removes from the state" he "abandons and relinquishes his right of homestead." In the next case in order (*Finley* v. *Saunders*, 98 N. C. 462), Smith, Ch. J., says that "by the removal of the debtor out of the state, with a view to a permanent residence elsewhere . . . although his family do not follow him to his new abode, he forfeits his constitutional right" to the homestead. We have seen it is held above that it is not essential to becoming a nonresident that another residence shall be acquired or contemplated elsewhere, if residence in this state has ceased with only an intention to return at an indefinite time. But this case is important as showing that the right to the homestead depends upon the residence of the debtor himself, and cannot be held vicariously for him by his wife and children remaining here. In *Munds* v. *Cassidey*, 98 N. C. 558; Smith, Ch. J., holds that: "The person claiming the exemptions from execution must be an actual, not a constructive, resident. Therefore, one who has been a resident, but has removed from the state with the expectation of returning at some uncertain time is not entitled to the ex-

emptions." In that case the debtor was employed upon a steamboat in Florida, and expected to return to this state. The learned chief justice further adds that this "benevolent provision" is for actual residence, and must not be construed as embracing cases of mere domicil, which is always retained till a right of domicil is obtained elsewhere. This, too, will remove the confusion brought about by cases like *State, Hannon*, v. *Grizzard*, 89 N. C. 115, as to the right of suffrage, eligibility to office, and the like. All these depending upon domicil, the right to vote or hold office can be retained by constructive residence when no actual residence with an *animus manendi* has been acquired elsewhere. But as to attachments and homestead, we see, by this and other decisions above cited, the rights are determined when actual residence ceases in this state. This is reaffirmed in *Lee* v. *Moseley*, 101 N. C. 311, 2 L. R. A. 106, which holds: "The words 'a resident of this state,' employed in the Constitution (art. 10, § 2) in respect to homesteads, have a more restricted meaning than that usually given to 'domicil,' to entitle a person to the constitutional exemption he must be an actual, and not a constructive, resident." In the opinion, Smith, Ch J., combats the idea that the intent to return should be left to the jury, and says that "it is sufficient if in fact the debtor does change his residence, and the effect of his acts cannot be defeated by his declaration that he did not so intend." In the present case, was the fugitive from justice, moving round from state to state for more than two years, not daring to return here, and only expressing the conditional intention to return at some indefinite time, an actual or a constructive resident of this state? If the latter, upon the above unbroken line of authorities he was not such a "resident" as could claim a homestead, or an exemption from attachment of his property, at the hands of the law which he was defying. *Fulton* v. *Roberts*, 113 N. C. 421, cites as authority the above cases of *Munds* v. *Cassidey*, *Baker* v. *Legget*, and *Lee* v. *Moseley*. As bearing upon the present case, it is authority that the burden of showing the nonresidence of a party who has at one time been a resident of the state is upon him who claims that the homesteader has become a nonresident. That has no application here, as the facts are found by the referee, as above stated; and the intent of the party to return at some indefinite time, upon a contingency, as Smith, Ch. J., says above, was immaterial. Our decisions have been uniform, and have become "a rule of property," and at a sale ordered by a court of competent jurisdiction, which order was based on these rulings, the defendant has laid out his money. If he should ever lose it under such circumstances, so long a line of decisions should not be reversed for the benefit and at the instance of an admitted fugitive from justice, who even now has only ventured to return to the state because, by some means undisclosed to us, the criminal indictment against him has been "buried."

It is not necessary, to obtain the benefit of a homestead exemption, that the debtor should be a citizen. It is sufficient if he is a resident of the state. But he must be a resident, whether a citizen or not. Homestead and attachment affect property rights, and are governed solely by residence, not by citizenship. Citizenship once acquired can be retained by constructive residence plus the proper intent. Not so with homestead and attachment, which depend upon actual residence, which is a question of fact upon the circumstances of each case. As citizenship (and with it the right of suffrage and eligibility to office) cannot be acquired by mere residence without an *animus manendi*, it is right that it cannot be lost by mere nonresidence if there is the *animus revertendi*. But exemption from attachment, which is seizure before judgment, and homestead, which is exemption from seizure after judgment, are conferred by residence alone, and must, therefore, be lost by nonresidence. It is not always easy to draw the line between residence and nonresidence, but we know that mere incidental absence, as on a visit or a journey, is not nonresidence; and, on the other hand, we know it would do violence to both the legal and the ordinary use of the word to say that a man who flees the state to avoid being found by its officers, and who is skulking through other states to avoid extradition, for more than two years, with no intention of returning till the criminal proceeding has been dropped, has during all those years been a resident of this state, or to say further that, because he was residing here all that time, the law will protect him from service of civil process by attachment of his property, and preserve for him the homstead, which the Constitution confers upon no one unless he is a resident.

STATE of North Carolina
v.
William L. OSTWALT, *Appt.*

(.....N. C.....)

The provision for an appeal by the mother from an acquittal of the putative father in a bastardy case, made by the act of 1879, chap. 92, is in violation of the constitutional prohibition against placing a person twice in jeopardy, as the statute, by imposing a fine upon him when the issue of paternity is found against him, makes it a criminal proceeding.

(*Clark and Montgomery, JJ., dissent.*)

(April 29, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Iredell County disallowing his plea of former jeopardy in a bastardy proceeding appealed by the state from a justice's judgment of acquittal. *Reversed.*

The facts are stated in the opinion.

Mr. **L. C. Caldwell** for appellant.

Mr. **Frank I. Osborne,** Attorney General, for the State.

Avery, J., delivered the opinion of the court:

In Acts 1879, chap. 92, § 2 (Code, § 35), it

NOTE.—In respect to the criminal character of a bastardy proceeding, see also State v. Brewer (S. C.) 19 L. R. A. 362, and Moore v. State, Vernon (Kan.) 17 L. R. A. 714.

was provided that "when the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding $10, which shall go to the school fund of the county." In the same section it was provided, further, that "the court shall make an allowance to the woman not exceeding the sum of $50, to be paid in such instalments as the judge or justice shall see fit," etc. This provision was first enacted in the chapter of the act of 1879, which was passed for the purpose, as appears upon its face, of enlarging the criminal jurisdiction of justices of the peace under the Constitution (art. 4, § 27), by limiting the punishment so that it could not exceed a fine of $50 or imprisonment for thirty days. After the passage of the act, however, the attention of this court had never been called to the fact that a fine was imposed by this statute until the argument of the case of *State* v. *Burton*, 113 N. C. 655. The court agreed to rest the decision in that case upon other grounds, but the justice who delivered the opinion of the court discussed the question, and expressed for himself the opinion that the act of 1879 had made bastardy a criminal offense, cognizable originally before a justice of the peace. At the next succeeding term the court held, in *Myers* v. *Stafford*, 114 N. C. 234 (Justice MacRae delivering the opinion, and Justice Clark dissenting), that § 35 of the Code made bastardy a petty misdemeanor, and consequently that the county commissioners were not liable for damages for putting a defendant convicted of that offense to work on the public roads until the fine and costs should be paid. At the next term the ruling of the court, that the proceeding was a criminal action, was affirmed, in *State* v. *Parsons*, 115 N. C. 730, and it was held by an undivided court that, where there was a verdict of guilty, the defendant must be discharged from custody, and relieved of all liability as to the fine of $10 and the costs, upon remaining in jail for the requisite time and taking the prescribed oath. But it was held in those cases that the allowance of $50—while the making of it was contingent upon a finding that the defendant was the father, as was the imposition of the fine—was still, like the old allowance, imposed under that part of the act passed by the legislature in the exercise of its power to enact police regulations, but that, as the act made the allowance payable to the mother, she became, in contemplation of law, a creditor of the defendant, and could, under § 2942 of the Code, suggest fraud and contest the defendant's right to discharge, as an insolvent, from its payment In *State* v. *Wynne*, 116 N. C. 981, the court as now constituted held, without a dissent, that bastardy was a criminal offense, complete on the begetting of the child, and was within the exclusive jurisdiction of a justice of the peace for twelve months thereafter. We are now urged to overrule all of these adjudications, made upon full consideration of the question by two courts, the majority of the members of which were differently constituted, and declare that the imposition of a pecuniary fine as a punishment for a violation of law does not *ipso facto* create a criminal offense. This persistent effort on the part of counsel to overturn former rulings of the court makes it necessary to again adduce the authorities upon which they were founded. The Constitution of 1868, as amended in 1875 (art. 1, § 13, and art. 4, § 27), had authorized the legislature to provide for the trial of petty misdemeanors without the intervention of a jury, and the boundary line of a justice's jurisdiction should depend upon the punishment prescribed by statute. It must be inferred that, when the legislature associated bastardy with a number of misdemeanors, the punishment whereof in the same act was reduced so as to make them cognizable before a justice, it was not accidental, but with a purpose to constitute it a criminal offense; that for the first time it was made punishable by a fine of $10. But not only do the circumstances indicate an actual intention on the part of the legislature to create a criminal intention, but the apt words used, *ex vi termini*, can be construed to mean nothing else. Was the construction of the act of 1879 in the three recent decisions of this court erroneous, as it is now contended it was?

It is familiar learning that words in a statute must be construed according to their technical meaning, unless a contrary intent is apparent upon the face of the act. Under this rule, what must be the interpretation of the provision that, on the admission that the defendant is the father, or the finding of the issue of paternity, "he shall be fined by the judge or justice of the peace not exceeding $10, which shall go to the school fund of the county?" "A crime is an act made punishable by law." Broom, Phil. of Law, § 162; 1 Whart. Crim. L. § 14, and note. "A crime," says Bishop, "is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bishop, Crim. L. § 32. Under the Constitution of North Carolina the death penalty can be inflicted in four cases only, all other capital punishment being forbidden. The legislature is empowered to prescribe as a punishment for all other criminal offenses either a fine, or imprisonment with or without hard labor, or both. When an act affecting the public is forbidden by statute, says Bishop, "the doing of it is indictable at common law." 1 Bishop, Crim. L. § 237; *State* v. *Parker*, 91 N. C. 650; 2 Archbold, Crim. L. 2; 2 Hawk. P. C. chap. 25, § 4. If a crime is an act or wrong punishable by law in a proceeding conducted in the name of the state, it would seem that there can be no controversy about the fact that this proceeding, originally conducted in the name of the state, in order to carry out a police regulation, became a crime when made punishable by law by fine appropriated to the school fund, as are all other fines imposed on conviction for crime. It seems never before to have been doubted that the legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally, and by implication empowers the courts to impose either fine or imprisonment, as is the case where the law simply declares that a certain act shall be deemed a misdemeanor, without providing how it is to be punished. *State* v. *Hatch*, 116 N. C. 1005; *State* v. *Hawkins*, 77 N. C. 494; 1 Bishop, Crim. L. § 940. "A fine," says Lord Coke (1 Co. Litt. 126*b*), "signifieth a pecuni-

ary punishment for an offense or a contempt committed against the King." "A fine is a pecuniary punishment for an offense or a contempt committed, imposed by the judgment of a court." 7 Am. & Eng. Enc. Law, p. 991. If a fine is either a punishment for a criminal offense or a contempt, there being no pretense that begetting a bastard is a contempt, it must be a criminal offense. The Scotch definition of a criminal offense, which was founded upon principles identical with the common law, declared any act made punishable by law, either by corporal punishment or pecuniary mulct, to be a crime. Mack. Crim. L. 3. The act of 1741 (Potter, Rev. p. 14, § 10) and all subsequent enactments contain substantially the same provision as is still contained in § 32 of the Code, *viz.*, that the father, upon the finding of the issue of paternity against him, "should stand charged with the maintenance of the child, as the court may order, and shall give bond," etc. Hayw. Man. p. 645; Acts 1814, chaps. 870, 871; 2 Potter, Rev. p. 304; 1 Rev. Stat. chap. 12, § 4; Rev. Code, chap. 12, § 4; Battle, Rev. chap. 9, § 4. The act of 1879, which is embodied in § 35 of the Code, is in direct conflict with the language quoted from § 32, in providing that "the court shall make an allowance to the woman not exceeding the sum of $50 to be paid in such instalments as the judge or justice shall see fit, and shall give bond," etc., instead of standing chargeable to the county as to amount as well as date of payment, as the court might determine. Clearly the effect of the passage of the act of 1879 was, until the Code took effect in 1883, to repeal this portion of the Old Revised Code as compiled in Battle's Revisal. Either the court had the power to make an unlimited allowance, or one limited to $50. It is manifest that the commissioners inadvertently brought forward, and the legislature inadvertently enacted, in the Code, provisions apparently conflicting. In the same way the later provision of the Code (§ 35), in making bastardy a criminal offense, deprives the state of the right of appeal from a verdict of not guilty. "The pre-existing law and practice, recognized and enforced in numerous adjudications," said the court, in *State* v. *Powell*, 86 N. C. 643, "had settled the principle, that when a party charged with any offense before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the state to correct any error committed by the court, and this has been uniformly maintained since the adoption of the new Constitution, as before. *State* v. *Jones*, 1 Murph. 257; *State* v. *Taylor*, 1 Hawks, 462; *State* v. *Martin*, 3 Hawks, 381; *State* v. *Credle*, 63 N. C. 506; *State* v. *Phillips*, 66 N. C. 646; *State* v. *West*, 71 N. C. 263; *State* v. *Armstrong*, 72 N. C. 193. The right of the state to appeal from erroneous rulings in the court below exists only where judgment is given for the defendant upon a demurrer to the bill, or upon a special verdict, or on a motion to quash, or in arrest of judgment. *State* v. *Lane*, 78 N. C. 547; *State* v. *Swepson*, 82 N. C. 541; *State* v. *Moore*, 84 N. C. 724. The reason given by Chief Justice Pearson and Judge Daniel in *State* v. *Carson*, 2 Dev. & B. L. 370, and *State* v. *Pate*, Busbee, L. 244, for declaring that the legislature had no power to make a criminal offense, without indictment or presentment, ceased when power was given to the legislature (Const. art. 4, § 14) "to provide other means of trial for petty misdemeanors." A justice's court now has jurisdiction to try misdemeanors, and the attorney general frankly conceded that no appeal on the part of the state lies from a finding of a court of competent jurisdiction that a defendant is not guilty. When the Constitution was so altered as to permit the substitution of the justice of the peace as a trior of the fact, for the jury, as intimated by Chief Justice Smith in *State* v. *Powell*, *supra*, the principle was in no way changed. In speaking of the constitutional provision that no person shall be twice put in jeopardy of life or limb, Bishop (1 Crim. L. § 997) says: "We have seen elsewhere, that while so much of a statute as is against the accused is interpreted strictly, the parts in his favor are extended liberally, and the same distinction applies to a written Constitution. Therefore the constitutional provision now under consideration should be liberally construed, as covering cases within its reason, while not within its words. On which principle, plainly, the courts should, as we have seen they generally do, hold it applicable to misdemeanors, the same as to treason and felony." Again, Bishop says (Id. § 1026): "A statute which, by a device of an appeal by the state, undertakes to authorize the retrial of one acquitted on a valid indictment, is void."

Granting, then, that the act of 1879 created a criminal offense, the re-enactment of the old provision in § 32 of the Code, that "from the judgment and finding, the affiant, the woman, or the defendant may appeal to the next term of the superior court," etc., would be void, if the principle is properly stated by Bishop. It is the duty of courts, however, as far as it can be done without violating a constitutional principle, to reconcile apparent conflicts in two statutes, and construe them so as to give effect to both. *Winslow* v. *Morton* (at this term) (N. C.) 24 S. E. 417. It has been held in *State* v. *Wynne*, *supra*, that the criminal offense is within the exclusive jurisdiction of a justice, for twelve months from the time the child is begotten, and, if that was true, the justice here had jurisdiction, and any statute providing for an appeal would be *pro tanto* void. While the defendant, on conviction, may be commited to a house of correction or to prison, yet, when committed to prison or prayed into custody, without further action by the state or the complainant, he will be discharged on taking the required insolvent oath. *State* v. *Burton* and *State* v. *Wynne*, *supra*; *Myers* v. *Stafford*, 114 N. C. 234. In these cases the right of the mother has been held to be an incidental one, growing out of conviction, which was compared to the right to have a nuisance abated in certain instances; and it is difficult to see how we would have gone further, in the face of the prohibition against placing a person twice in jeopardy, and subject a defendant to a second trial. The utmost length that this court has gone, since attention was called to the act of 1879, was when it was conceded that, after conviction,—not after acquittal,—the mother acquired the rights of a judgment creditor,

and, where she showed due diligence in giving notice, could insist upon contesting the right to discharge as an insolvent on the part of the defendant, and might appeal in apt time to vindicate her right. This privilege can be given her under the statute without infringing the constitutional rights of the defendant. But the unfortunate bringing forward of the old statute could not annul rights acquired under the later statute, embodied in a subsequent section of the Code. After the passage of the act of 1879, and before the attention of this court was called to the fact that a fine had been imposed by that act, several cases came before this court, which were cited in *State* v. *Burton*, and have been considered in every subsequent opinion in which this subject has been discussed. It would seem needless to thresh over such old straw for the fourth time. The fact that the imposition of a fine creates a criminal offense is none the less true because the court overlooked for a time the fact that it had been done. For the reasons given, the judgment of the court below is reversed, and the defendant is entitled to be discharged.

Reversed.

Clark, J., dissenting:

Up to and including *State* v. *Edwards*, 110 N. C. 511, in which the authorities are collected, the decisions of this court were uniform that proceedings in bastardy were civil, not criminal. In *State* v. *Burton*, 113 N. C. 655, it was intimated, but not decided, that they might be construed to be criminal actions. This has been followed by *Myers* v. *Stafford*, 114 N. C. 240 (dissenting opinion on page 689, 114 N. C.), which held, by a divided court, that it was a criminal action, and two decisions to that effect have since been made; but the constantly increasing perplexity and difficulties arising from this construction, and which threaten to virtually nullify the act, warn us to return to the ancient landmarks and show the peril of departing from them. For the first time, the effect of the new departure has brought us face to face with this question. The legislature has provided (Code, § 32) that from the judgment and finding on the trial before the justice "the affiant, the woman or the defendant, may appeal to the next term of the superior court of the county where the trial is to be had *de novo*." Now we are asked to nullify this express provision of the lawmaking power upon the ground that, this being a criminal action, no appeal lies from the judgment of the magistrate if in favor of the defendant. The power of the legislature to enact laws cannot be abridged or denied, except when their action is clearly contrary to some provision of the Constitution. But it is contended that the Code (§ 35), authorizing a fine of $10, turns the action into a criminal proceeding, and *ergo* the express provision (§ 32) giving affiant or the woman the right to appeal is abrogated, and of no effect. This cannot be so.

1. If §§ 32 and 35 are incompatible, the provision of § 35, authorizing the $10 penalty, should be held nullified, rather than the express provisions of § 32. To disregard the latter is to change the whole nature of the proceeding. In construing statutes, particular stress is laid upon the mischief to be remedied. The mischief to be remedied here is not to make the begetting of a bastard child a criminal offense, and to collect the petty penalty of $10 therefor. Clearly not, for there is already the criminal offense of fornication and adultery, admitting of far heavier penalty, and even when no child is begotten. Besides, if bastardy is a criminal offense, the woman would be liable as an aider and abetter, a coprincipal, which is clearly not contemplated by the statute. The object of the statute, through and through, is to provide for the maintenance of the child, and prevent it being a charge upon the county, which is a civil, not a criminal, proceeding. This is the evident purport of the whole chapter on bastardy, and has been so recognized by a long, and until very recently an unbroken, line of decisions. Section 32 directs that the judgment, if against the defendant, shall be "for the maintenance of the child,"—a civil judgment. If the incidental power given by § 35 to impose a penalty of $10 conflicts with the entire balance of the chapter and the evident purpose of this long-established legislation, then that provision should be held a nullity, and not the other provisions and evident intent of the entire chapter.

2. But the addition of the penalty of $10 cannot consistently be held to change this proceeding, which is essentially civil in its nature, and has always been so held till very recently, into a criminal action. In exactly similar manner it is provided that the board of county commissioners are liable in certain cases for all losses sustained in the collection of taxes, and also guilty of a misdemeanor, and liable to a fine of not less than $500. Code, § 2075. Again, Code, § 2703, provides that the sheriff, for failure to make proper returns of the election for state officers, is liable to forfeit $2,000 to anyone who shall sue for the same, and shall be guilty of a misdemeanor punishable by imprisonment in the penitentiary. In the same manner a penalty of $2,500 is allowed against the sheriff for failure to settle his taxes, and is added to the amount of the judgment. *State, Davenport*, v. *McKee*, 98 N. C. 500. But it was not held that this made such proceeding a criminal action. There are numerous like cases. Can it be contended that because, in these cases, a fine or imprisonment is imposed, the civil action is turned into a criminal proceeding, so that the defendant has the benefit of a superior number of challenges, the benefit of reasonable doubt, and if he gets a verdict by errors of the judge in the court below there is no review by an appeal? In bastardy proceedings the woman is given the right to institute proceedings to obtain judgment for the maintenance of the child by the defendant, and that he pay in a sum fixed by the court for that purpose, and if the penalty of $10 is a criminal proceeding, it is simply, as in the above instances, a separate matter which cannot change the woman's civil remedy into a criminal proceeding which would protect the man from review by appeal if the civil issue is found in his favor. If the provisions of §§ 32 and 35 are incompatible, the latter, being merely incidental, and not the former, should give way. They should, however, rather be construed together, and, if so, § 32 gives the woman a

civil proceeding, and § 35 is a criminal proceeding (as in so many sections of the Code, of which two sections are above cited) for the petty penalty limited to $10.

3. If, however, the recent doctrine were reiterated that the incidental $10 penalty changes the whole nature of the proceeding, still it does not follow that the express provision of the statute giving the woman the right of appeal is unconstitutional. The provision that no one shall be twice in jeopardy means simply that no one shall be tried in another action for a criminal offense after a verdict either of conviction or acquittal in a trial for the same offense. It does not forbid a review of the same case by appeal, which is merely a continuation or prolongation of the same. It is true that appeals, except on special verdicts and in certain other limited cases, are not given to the state. But that restriction is simply by virtue of the statute, and not by any constitutional provision. *State* v. *Taylor*, 1 Hawks, 462, is put expressly on that ground, and is cited as authority for a similar ruling in *State* v. *Credle*, 63 N. C. 506. Accordingly, appeals from a general verdict of not guilty were recognized in this state (*State* v. *Haddock*, 2 Hayw. (N. C.) 162; *State* v. *M'Lelland*, N. C. Conf. Rep. 523) till restricted by statute (Acts 1815, chap. 895). But, even if this be a criminal proceeding, the legislature has chosen to give the "woman and the affiant" the right to appeal, and in so doing the legislative department acted within the limits of its constitutional authority. That an appeal can be authorized by statute on behalf of the state from a judgment discharging the prisoner on a special verdict, or on a motion to quash, or in arrest of judgment, or from a verdict procured by fraud, is conclusive that the cases in which the state can appeal from a judgment and verdict in favor of the defendant, are to be determined by the statute law. If this be a criminal action, the Code (§ 32), by giving the affiant or the woman the right of appeal, has simply added this proceeding to the instances in which the state can appeal from a judgment discharging the defendant. The matter lies entirely with the people, acting through their representatives in the legislature. It is not likely that they will increase the number of instances already existing by law in which the state can appeal from a judgment in a criminal action discharging the defendant, but the power exists. The Constitution forbids that a defendant be tried for the same offense in another action. The statute allows a defendant to apply for another trial in the same action, and that the state may do the same in certain specified instances. It is in the legislative power to increase or diminish at will the instances in which the state may have the matter re-examined upon appeal.

Montgomery, J., concurs in the dissenting opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Dennis J. GRIFFIN
v.
UNITED ELECTRIC LIGHT COMPANY.

(164 Mass. 492.)

1. The question of due care in touching an electric-light wire on the outside of a building, by a person who is not an expert, is for the jury.

2. Touching an electric-light wire is not negligence, as a matter of law, when touched by a tinsmith with a conductor pipe on the outside of a building, who does not know that an electric-light wire would do any hurt, or that such wires run on the outside of buildings.

3. The duty of insulating electric-light

NOTE.—*Negligence as to electric wires on or in buildings.*

I. *In general.*
II. *Wires on roofs.*
III. *Contributory negligence.*

I. *In general.*

The extent to which electric wires, some of them carrying dangerous currents of electricity, have in recent years been placed in buildings or on the roofs or attached to their walls, has suddenly given rise to very important questions respecting the care required to prevent injury to persons from contact with such wires. A considerable number of important cases have already been decided in which this question was presented.

In one of the first cases of this sort there was involved a failure to comply with a municipal ordinance requiring an electric-light company to have the splices on its wires perfectly insulated. But it is doubtful if this ordinance added anything to the duty or liability of the company, as it would seem to be very clearly chargeable, on general principles of law, with the duty to provide such insulation for dangerous electric-light wires when stretched 2 or 3 feet above the roof of a building. This was the case of Clements v. Louisiana Electric-Light Co. 44 La. Ann. 692, 16 L. R. A. 43. It is more fully discussed under *infra*, II., as to *Wires on roofs.*

What is called an electrical explosion is described in Yates v. Southwestern Brush Electric Light & P. Co. 40 La. Ann. 467. In this case wires passing into a building to convey electricity for incandescent lighting by contact with other wires outside of the building became accidentally charged with an arc current of high tension. This resulted in causing an explosion of a brass pipe through which the electric wire ran, and fragments thereof wounded a person engaged in the building. The safety fuses or safety catches which had been provided to prevent such accidents were insufficient, either in number or capacity, to break the circuit and cut off the flow of electricity accidentally received by the wire outside of the building. The court held that the insufficiency of the fuses or catches was the proximate cause of the accident, and that the electric-light company was liable for the damages.

An injury to the servant of a contractor in repairing a house, by contact with the untaped ends of electric-light service wires bearing a low tension

See also 34 L. R. A. 812; 40 L. R. A. 799; 41 L. R. A. 410; 45 L. R. A. 267; 46 L. R. A. 745.

wires running on the outside of a building is owed to every person who for purposes of business is rightfully upon the premises.

(October 19, 1895.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Hampden County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in defendant's favor. *Sustained.*

The facts are stated in the opinion.

Messrs. **J. B. Carroll** and **W. H. McClintock** for plaintiff.

Mr. **William H. Brooks,** for defendant:

The plaintiff was not in the exercise of due care. He had his choice of methods in putting up the conductor, and there was no necessity for his coming in contact with this wire, directly or indirectly.

Lothrop v. *Fitchburg R. Co.* 150 Mass. 423; *Boyle* v. *New York & N. E. R. Co.* 151 Mass. 102; *Thompson* v. *Boston & M. R. Co.* 153 Mass. 391; *Watts* v. *Boston Tow Boat Co.* 161 Mass. 378.

This was an unnecessary exposure to a danger which the plaintiff knew or ought to have known.

Hector v. *Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554.

There was no statutory requirement that the wires should be insulated with any kind of covering, and there is no statute giving the plaintiff any right of action for an injury arising from his coming in contact with these wires. If he has any such right it must be on the principles of the common law.

Illingsworth v. *Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552.

The defendant was not negligent.

Hector v. *Boston Electric Light Co. supra.*

Lathrop, J., delivered the opinion of the court:

This is an action of tort, for personal injuries sustained by the plaintiff by receiving an electrical shock from a wire of the defendant company. The plaintiff was a tinsmith, and was at work, with a fellow servant, placing a galvanized iron conductor on the rear of a building called the American House. He was upon the ground, and his fellow servant was on a ladder near the roof of the building, which was about 22 feet from the ground. The wire from which the plaintiff received the shock ran along the wall of another building until it reached a point about 2 feet from a corner

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of from 115 to 230, which was insufficient to cause death or great bodily harm, was held not to make the electric company liable, in Mullen v. Edison Electric Illum. Co. 13 Misc. 392. Here the wires had been disconnected from the house-distributing wires pending repairs on the house, and were inclosed in a box about 8 feet from the cellar floor, where they would have caused no injury if the man had not stood upon a box and taken hold of the ends of two of them at the same time, so as to make a short circuit.

In the case of GRIFFIN v. UNITED ELECTRIC LIGHT CO. an electric-light wire ran along the wall of a building, and thence for 8 or 10 feet, at the height of about 12 feet from the ground, to another building. As the insulating material had become worn off at some places upon it, and a person was injured in consequence, the negligence of the electric-light company owning the wire was held to be a question for the jury.

A peculiar case of the destruction of a building by a wire attached to it is that of Jackson v. Wisconsin Teleph. Co. 88 Wis. 243, 26 L. R. A. 101, where a dead telephone wire was left attached to a building, running from that to a pole on another building, from which it conveyed lightning which struck the pole to the former building, causing its destruction. In this case the wire was originally attached to the building without the owner's consent, and was negligently left there. The court held that this negligence was the proximate cause of the destruction of the building by lightning.

II. *Wires on roofs.*

In the case already mentioned, of Clements v. Louisiana Electric-Light Co. 44 La. Ann. 692, 16 L. R. A. 43, in which there was a failure to comply with an ordinance to have the splices on electric-light wires perfectly insulated, such wires ran about 2 feet 4 inches over the roof of a gallery. Two of these wires were about 17 inches distant from each other, and were fastened to a support or horse. The wires were visible and to all appearances were safe, but there was a defect in the insulation which caused the death of a person who attempted to go over or under the wires. The court held that the electric-light company was responsible for his death. The wires were over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs or laborers to sweep off or clean the roof. The court said: "It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who by their occupation were brought in close proximity to them."

Placing electric-light wires over the metallic roof of a hotel where persons may come in contact with them, without raising them high enough to prevent such contact, is held in Giraudi v. Electric Improv. Co. 107 Cal. 120, 28 L. R. A. 596, to be negligent in case of injury to a person by an electric shock from such wires. The electric-light company was therefore held liable for such injury to an employee of the hotel, who went out with his employer in a dark night, during a heavy rain storm, and accidentally came in contact with the electric-light wires. The wires were supposed to be insulated, but, either by reason of the wet or of imperfection in the insulation, they conveyed an injurious electric shock. The court says if the wire was not in good condition it was the fault of the electric-light company.

It may be proper to mention here that an ordinance prohibiting the suspension of electric wires over or upon the roofs of buildings was sustained in Electric Improv. Co. v. San Francisco City & County (C. C. N. D. Cal.) 45 Fed. Rep. 593, 13 L. R. A. 131. It is held to be within the legitimate police power of a city, where the suspension is extremely dangerous, both as being liable to originate fires and as obstructing the extinguishment of fires otherwise originated.

In the recent case of Ennis v. Gray, 87 Hun, 355, the plaintiff was by occupation a roofer, and at the time of the accident was at work on a cornice of a house in New York. Upon the cornice, near the end, and not far from the wall of the house, was a converter, which is an electrical device whereby a portion of the very powerful current carried over the main street conduits of electric-light lines is withdrawn on to the distributing lines for house

formed by this building with the American House, and then ran diagonally across the corner to the wall of the American House, at a point 8 or 10 feet from the same corner, where it entered a square iron-block attached to the wall of the American House. This wire was about 12 feet from the ground. Six or 8 inches higher than this wire, and about 8 inches nearer to the building, another wire ran along, and went into the same box. The conductor was to be placed in the corner formed by the two buildings, for the purpose of carrying off water from a gutter under the eaves of the American House. We are of opinion that there was evidence for the jury that the plaintiff was in the exercise of due care. The jury might well have found, on the evidence, that the injury was caused by the pipe coming in contact with a place on the wire where the insulating material had become worn off. It cannot be said, as matter of law, that this condition was so apparent to the plaintiff that he must have seen it, or ought to have seen it, although the accident happened in the forenoon. While an expert may consider it dangerous to touch any wire, unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt, or that electric light wires ran on the sides of buildings. The question of his due care was for the jury. *Illingsworth* v. *Boston Electric Light Co.* 161 Mass. 583, 588, 25 L. R. A. 552.

We are of opinion, also, that there was evidence of the defendant's negligence, proper to be considered by the jury. There was certainly evidence that the insulation of the wire was gone, and its condition was such that the jury might have found, from the description given of it by the witnesses, that it had been in that condition for such a length of time that the defendant ought to have known of it. The plaintiff was not a trespasser, or a mere licensee, who must take the premises of another as he finds them. He was rightfully on the premises, for purposes of business. On these premises the defendant had rightfully placed, as the case finds, two electric wires. These were a

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lighting in such a manner as to be changed into a current of comparatively small potential, but greater volume, for the purposes of domestic lighting. The cornice in question was 2 feet and 2 inches wide, and the distance between the converter and the wall was 14½ inches. The converter was connected by wires to a cable carrying a current of a thousand volts in a standpipe coming up from the street at the south end of the cornice. The wires ran from the standpipe to two fuse boxes on top of the converter, the primary wires hanging between the converter and the wall. The testimony showed that the plaintiff was on his knees facing south, and had in his hand a small whisk broom, and was sweeping the tin roof around the northeast corner of the converter when he received a shock and became unconscious. He was found shortly after, with his clothes on fire, lying between the converter and the wall. Upon the questions of how the accident happened, and whether there was any negligence, it was shown that the insulation had worn off from the wires on the cornice in five places, and also that a splice or joint of the wires was left entirely uninsulated. An electrician also testified that to put the wires and converter on the cornice in front of a window and where they were exposed to contact with anyone on the cornice was improper construction. The court held that this was sufficient evidence of negligence. The defendant tried to escape liability by alleging that there was no contractual relation with the plaintiff, that he had not contracted with the plaintiff to install the apparatus, and that as to the plaintiff the construction and maintenance of the apparatus were *res inter alios*. The court, however, held that the defendant was engaged in supplying electric-light to the houses and streets, and, considering the high voltage of the wires, which rendered the business dangerous unless conducted with care and skill, there was a duty, not only to the public generally, who in the streets might come in contact with the wires, but also with respect to any individual engaged in a lawful occupation where he was entitled as of right to be. The court says that as the defendant was engaged in placing wires in streets and making connections with houses intended for occupancy, and as his business was of a character highly dangerous and likely to result in injury to others unless it was conducted with care and prudence, the duty was created, in the conduct and management of such business, of using the necessary care and prudence to prevent the happening of the accident.

In case a city and an electric-light company both have wires on one frame on the roof of a building, the negligence of the electric-light company in leaving uninsulated joints of its wires within 12 or 15 inches of the frame, up which persons are required to go in the performance of duty, makes that company liable to a lineman in the employ of the city for injuries received by accidental contact with such uninsulated wire. Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L. R. A. 552. The fact that contact with an electric-light wire, though bare and uninsulated, would cause no injury unless other conditions supervened, was held in this case to constitute no defense for leaving it uninsulated, where other circumstances were likely to occur which would make the wire dangerous.

But the lack of safe insulation of electric wires over the roof of a building to which no wires of any kind are attached, and on which persons have no right to go by reason of permission to use a standard for the support of wires, which is located on a neighboring building, does not make the electric-light company liable to a lineman of a telegraph and telephone company whose duty it is to affix a telephone wire to such standard, but who goes on the roof of the former building and there comes in contact with a defectively insulated wire; even if he was there with permission of the owner of the building. Hector v. Boston Electric Light Co. 161 Mass. 558, 25 L. R. A. 554.

The court says that whatever may be the duty of the electric-light company to the owner of that building and to its servants, there is no evidence that it intended to authorize the use of that roof by the telegraph and telephone company or its servants, and that whatever duty the electric-light company owed to a servant of the telegraph and telephone company under its license to the latter company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the electric-light wires, and that the electric-light company is not required for the protection of the servants of the telegraph and telephone company to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, and at places where it had no reason to expect the servants of the other company would go in the performance of their duties in using its standard, and where it

source of danger, unless properly insulated. This fact was recognized by the defendant, by insulating them. But it was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises. What its duty was, in this respect, as to other persons, we have no occasion to inquire. See *Illingsworth* v. *Boston Electric Light Co. supra.*

The ruling of the justice of the superior court in favor of the defendant is stated in the report, upon which the case comes before us, to be based upon the case of *Hector* v. *Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554. But that case differs essentially from the one before us. There a lineman of a telegraph and telephone company was sent to attach a wire to a standard owned by the defendant on the roof of a building numbered 45 Temple Place, in Boston. Instead of entering this building, and going out upon the roof, he went up through the building numbered 29 Temple place, passed over the roofs of several intervening buildings until he came to the roof of No. 41, which was next to, but higher than, the roof of No. 45. A bunch of wires ran from the standard on No. 45 over a small portion of the roof of No. 41. The plaintiff stooped under these wires, to see how he could get onto the roof of No. 45, and was injured by reason of the insulation being worn off from one of these wires. The case was decided in favor of the defendant upon the ground that the defendant owed no duty to the plaintiff to maintain an effectual insulation of its wires over other buildings than that upon which its standard was placed, which was the only place to which the telegraph and telephone company sent the plaintiff, or where he had a right to be. In the case at bar the plaintiff was rightfully where he was when injured. The question of the defendant's negligence was for the jury.

By the terms of the report, the order must be: *Case to stand for trial.*

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had neither invited nor licensed them to go. In this case a verdict for plaintiff was set aside on exception to rulings.

So, where a boy went on the roof of a coal shed to get a ball, and came in contact with a naked copper wire used to conduct electricity to light a railroad station and works, it was held that the railroad company maintaining the wire was not liable, because the boy was at most a mere licensee. Sullivan v. Boston & A. R. Co. 156 Mass. 378. In this case a verdict was directly for defendant.

In most of the above cases the question of negligence in respect to dangerous wires is held to be a question for the jury, and it may be doubtful if the two cases just referred to ought to have been exceptions, and if they do not too strictly apply the rule as to assumption of risks by licensees or trespassers. It is not very clear that the owner of an electric wire carrying a dangerous current ought to be at liberty to leave it uncovered and uninsulated where any person, although a mere licensee or trespasser, is liable to come in contact with it. Even licensees or trespassers seem entitled to protection against such dangers, as much as against danger from excavations near a highway or frequented path. That they are entitled to protection in the latter class of cases, see *note* to Lepnick v. Gaddis (Miss.) 26 L. R. A. 686. Manifestly the right to such protection increases with the extent of the danger.

III. *Contributory negligence.*

On the question what constitutes contributory negligence in case of an injury to a person by an electric wire in or upon a building, the case is usually, if not always, for the jury. So it was held in Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43, where a tinsmith employed to repair a roof attempted to step over or to go under electric-light wires about 2 feet 4 inches above the roof, and there was nothing to indicate that the wires were not properly insulated. It was not certain in this case whether he attempted to step over or go under the wires, but the court held that with wires of that height it was not negligence to attempt either mode of passing them, if all necessary and prudent care was used in proportion to the danger. It was also declared that such workman had a right to believe that the wires were properly insulated in compliance with an ordinance requiring their insulation.

So, where an employee in a hotel went out on a metallic roof in a dark night to help his employer secure signs which seemed to be endangered by a heavy rain, and came in contact with electric-light wires which he knew were above the roof, but which he may not have known were dangerous, his negligence was held to be a question for the jury. Giraudi v. Electric Improv. Co. 107 Cal. 120, 28 L. R. A. 596.

So, the negligence of a lineman in going up a frame for the support of electric wires, on which were electric-light wires as well as fire-alarm wires on which he was working, is held to be a question for the jury, where his plyers caught on a wire and in endeavoring to free them his hand came in contact with uninsulated joints of electric-light wires within 12 or 15 inches of the frame. Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L. R. A. 552.

Likewise, in Ennis v. Gray, 87 Hun, 355, the contributory negligence of a roofer at work on a cornice was held to be a question for the jury, when he was injured by an electric shock from wires connected with a converter by which a portion of the powerful current in main street conduits of an electric-light line is withdrawn to distributing wires for house lighting.

For police regulation of electric wires see *note* to State, Laclede Gaslight Co., v. Murphy (Mo.) 31 L. R. A. 798.

As to liability for injuries by electric wires in highways, see *note* to Denver Consol. Electric Co. v. Simpson (Colo.) 31 L. R. A. 566.

B. A. R.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Amelia C. PLATE
v.
George L. DURST, *Plff. in Err.*

(.....W. Va.....)

***Where a minor residing with a near relative** other than her parents is led to believe, by the kindness, conduct, and conversations, in jest or in earnest, of such relative, that she is to receive compensation for her future services rendered in promotion of his business, in some form, and, in expectation of such compensation, she faithfully performs such services, and he afterwards discharges her without compensating her in the manner in which he led her to believe he would do, and denies all liability to her, she is entitled to recover the actual value of such services in an action of assumpsit, even though such relative testifies that such promises were made in jest, and he had no expectation or intention of recompensing her for her services, but was only acting towards her *in loco parentis*.

(April 4, 1896.);

ERROR to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in an action brought to recover the value of services rendered by plaintiff for defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. P. Hubbard** and **Henry M. Russell,** for plaintiff in error:

The conversation testified to by the plaintiff, if for the moment and for the purpose of argument it may be described as a contract, was directly within the provisions of the statute of frauds.

Kimmins v. *Oldham*, 27 W. Va. 258; *Pitcher* v. *Wilson*, 5 Mo. 46; *Emery* v. *Smith*, 46 N. H. 151; *Freeman* v. *Foss*, 145 Mass. 361.

A contract of that nature, if it is to be used for any purpose as an element of the plaintiff's case, is clearly within the reason of the statute of frauds.

Dunphy v. *Ryan*, 116 U. S. 491, 29 L ed. 703.

The claim that a contract which is not enforceable because not in writing may be used to rebut the presumption that services were rendered without expectation of specific wages for them, is directly in conflict with the law governing the class of cases to which this case belongs.

Riley v. *Riley*, 38 W. Va. 291; *Stansbury* v. *Stansbury*, 20 W. Va. 23; *Kirkpatrick* v. *Gallagher*, 34 S. C. 255.

Evidence to show what the other clerk in the store was paid tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them.

1 Greenl. Ev. § 52.

In the case at bar the intent or motive or state of mind of the promisor is not material.

17 Am. & Eng. Enc. Law, p. 336.

Question of the rightfulness of the discharge must in each case depend upon the nature of the services, the terms of the engagement, and the particular circumstances of the case.

Wood, Mast. & S. § 109.

Plaintiff could not recover.

Hays v. *McConnell*, 42 Ind. 285; *Wayman* v. *Wayman*, 15 Ky. L. Rep. 374; *Reynolds* v. *Reynolds*, 13 Ky. L. Rep. 793; *Barbite's Appeal*, 126 Pa. 404; *Kirkpatrick* v. *Gallagher*, 34 S. C. 255.

Messrs. **Erskine & Allison** and **Caldwell & Caldwell,** for defendant in error:

Wherever service is rendered and received a contract of hiring or an obligation to pay will be presumed.

2 Parsons, Cont. 5th ed. p. 46.

One who has rendered services in execution of a verbal contract which on account of the statute cannot be enforced against the other party can recover the value of the services upon a *quantum meruit.*

Kimmins v. *Oldham*, 27 W. Va. 258; Browne, Stat. Fr. § 117; 3 Parsons, Cont. 38; Wood, Mast. & S. § 189.

The coversation was certainly admissible "to rebut any presumption which otherwise might have obtained, that the services rendered were to have been gratuitously performed."

Grant v. *Grant*, 63 Conn. 530; *Stewart* v. *Small*, 11 Ind. App. 100; *Kettry* v. *Thumma*, 9 Ind. App. 498; *Young* v. *Herman*, 97 N. C. 280; *Sohoonover* v. *Vachon*, 121 Ind. 3; *Hartwell* v. *Young*, 67 Hun, 472; *Cooey* v. *Porter*, 22 W. Va. 120; *Stone* v. *Dennison*, 13 Pick. 1, 23 Am. Dec. 654; *Jeffrey* v. *Walker*, 72 Hun, 627; *Re Kessler's Estate*, 87 Wis. 660; *Mack* v. *Bragg*, 30 Vt. 571.

It is competent to show what others engaged in the same class of service receive.

Wood, Mast. & S. § 67; *Van Arman* v. *Byington*, 38 Ill. 443; *Chiles* v. *Craig*, 4 Dana, 544; *Baum* v. *Winston*, 3 Met. (Ky.) 127; *Weeks* v. *Holmes*, 12 Cush. 215; *Murray* v. *Ware*, 1 Bibb, 325, 4 Am. Dec. 637; *Bagley* v. *Bates*, Wright (Ohio) 705; *Edgecomb* v. *Buckhout*, 146 N. Y. 332, 28 L. R. A. 816.

The presumption that the services were gratuitous is weaker as the relationship is more remote, and where it is not in fact that of parent and child slight circumstances will be sufficient to raise a promise.

Wood, Mast. & S. §§ 72, 76, pp. 122, 123, 145; *Thornton* v. *Grange*, 66 Barb. 507; *Robinson* v. *Raynor*, 28 N. Y. 494; *Dye* v. *Kerr*, 15 Barb. 444; *Broderick* v. *Broderick*, 28 W. Va. 378; *Conrad* v. *Conrad*, 4 Dall. 130.

As between son in-law and father in-law the presumption is that they deal on the mutual footing of debtor and creditor.

Wright v. *Donnell*, 34 Tex. 291; *Schoch* v. *Garrett*, 69 Pa. 144; *Rogers* v. *Millard*, 44 Iowa, 466.

Whether the presumption applies in cases of this kind depends largely on the character of the services.

Harshberger v. *Alger*, 31 Gratt. 52; *Thornton* v. *Grange*, 66 Barb. 507.

Whether the presumption applies depends largely on how the parties treated each other in their business relations.

Broderick v. *Broderick*, 28 W. Va. 378.

*Headnote by DENT, J.

NOTE.—On the question of a presumption as to gratuitous services rendered to one occupying a parental relation, see Ulrich v. Ulrich (N. Y.) 18 L. R. A. 37, and cases there cited.

Where the claim is not against an estate, and the parties are brother-in law and sister-in-law, and the services were not household duties, and the parties treated each other simply as proprietor and clerk, a contract to pay for the services should be implied from very slight circumstances.

When there is evidence of a contract, if it be unwritten, it is always for the jury to say whether it establishes the claim of the plaintiff or not.

Neel v. *Neel*, 59 Pa. 347; *Hill* v. *Hill*, 121 Ind. 255; *Broderick* v. *Broderick*, 28 W. Va. 386; *Des Moines Valley R. Co.* v. *Graff*, 27 Iowa, 99, 1 Am. Rep. 256; *Forester* v. *Forester*, 10 Ind. App. 680.

If there was not an express contract there was either an implied contract or an obligation created by law.

Clark, Cont. pp. 134, 785; *Walker* v. *Wilmington, C. & A. R. Co.* 26 S. C. 80; *Cadman* v. *Markle*, 76 Mich. 448, 5 L. R. A. 707; *Koch* v. *Williams*, 82 Wis. 186; *Schoonover* v. *Vachon*, 121 Ind. 3; *Miller* v. *Eldridge*, 126 Ind. 461; *Taggart* v. *Tevanny*, 1 Ind. App. 339.

From a mutual understanding that services will be paid for, a contract to pay will be implied.

Guild v. *Guild*, 15 Pick. 129; *Cann* v. *Cann*, 40 W. Va. 138; *Riley* v. *Riley*, 38 W. Va. 290; *Broderick* v. *Broderick*, 28 W. Va. 378.

Dent, J., delivered the opinion of the court:

George L. Durst, defendant, on writ of error to the judgment of the circuit court of Ohio county rendered in favor of Amelia C. Plate on the 26th day of February, 1895, for the sum of $877.40, interest and costs, assigns the following errors, to wit: "(1) The said circuit court erred in admitting certain evidence against your petitioner's objections, on the trial of the cause before the jury. (2) The circuit court erred in excluding from the jury, upon the trial of the cause, certain evidence offered by your petitioner. (3) The circuit court erred in overruling your petitioner's motion, made when the plaintiff rested her case, to exclude the plaintiff's evidence from the jury. (4) The circuit court erred in giving to the jury certain instructions against your petitioner's objections, and in refusing to give certain instructions requested by your petitioner, and in modifying certain other instructions requested by your petitioner. (5) The circuit court erred in overruling your petitioner's motion to set aside the verdict of the jury and grant him a new trial."

As to the third assignment, it is sufficient to say that the law concerning the same has been settled by repeated decisions of this court to the effect that a motion to exclude the plaintiff's evidence is waived by the defendant when he elects to proceed with the case, and introduces evidence in defense. *Core* v. *Ohio River R. Co.* 38 W. Va. 456, followed by a number of cases decided, but not yet reported.

Able counsel hotly contested the present case from beginning to end, and allowed no point of advantage to escape their ever-vigilant eyes. So that every possible chance for an exception is presented for the consideration of this court. The main and important questions for consideration—and, indeed, all other questions—arise on the motion to set aside the verdict of the jury and grant a new trial. No one informed of the circumstances could, in any view, consider the damages excessive or exorbitant. The proof is abundant to establish the nature and value of the services rendered, and there is therefore but the naked legal question as to whether the evidence is sufficient to justify any recovery; in other words, whether the services, however valuable, were given gratuitously in excess of voluntary gifts on the one part, and received on the other without any expectancy of recompense or remuneration.

The material facts in the case are as follows, to wit: When the plaintiff was about twelve years of age, in the absence of other home, she went to live with the defendant, her brother in-law. This was in the year 1885. For the first three or four years she was sent to school, and during the whole period she lived in the family as the defendant's own daughter might have done. She was furnished with a comfortable room, with suitable clothing and other necessaries, was supplied with money for shopping and other purposes, accompanied the defendant's wife on various pleasure trips, went to the World's Fair with money furnished by the defendant, received numerous presents at Christmas and other times, and was treated by the defendant with great kindness and consideration in every way. On her part the plaintiff rendered services such as might have been required and expected from a daughter; attending to the marketing, and assisting in the care of the young children. In addition to these services the plaintiff assisted the defendant in his store, attending to customers, looking after entertainments the defendant had in charge, and doing whatever else the exigencies of the business, and her own capacities, from time to time suggested. The defendant and his wife had an unfortunate misunderstanding, and in August, 1894, the defendant's wife with her two young children, went to Oakland, accompanied by the plaintiff and another friend. The misunderstanding had existed for some time, and there had been more or less coolness between the plaintiff and the defendant on account of it. The Oakland party made their preparations without informing the defendant, and started off with no more notice to him, according even to the plaintiff's claim, than a statement, just as they were going out of the door, that they were going to Oakland. The defendant resented this, and when the plaintiff and the others returned he told the plaintiff that she could leave his home. She did so and soon afterwards instituted this action. During all the time of the plaintiff's stay with the defendant, she had never received or demanded any pay for her services. The money, clothing, and presents which she received she herself says were not regarded as wages. She never brought forward in any way the question of compensation, and, even after the alleged conversation on which the case was made to turn in the court below, no visible change was made in the relations between the parties. According to the plaintiff's testimony, a conversation took place four years before August, 1894, late one evening in the store of the defendant. This conversation was repeated several times in the plaintiff's testimony, and was given by her as follows: "Mr. Durst asked me if I was

tired. I said, 'Yes, sir.' and he said, 'How long have you been with me now?' and I told him, 'Five years;' and he said, 'Well, when you are with me ten years I will give you $1,000.'" On another occasion, defendant remarked that when she (the plaintiff) should get married he would give her $1,000, and a $500 diamond ring. Defendant does not positively deny either of these conversations, except as to the time of the first, but intimates that he was not in earnest, but jesting. It must be admitted, in any view of the matter, that this was jesting on a very serious subject to this unfortunate and parentless young girl,—still in the eyes of the law, an infant,—engaged early and late, week days and Sundays, at home and abroad, actively, earnestly, and faithfully endeavoring to promote the worldly interests of the defendant. Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile. The law discountenances deceit, even practised under the form of a jest, if the weak, immature, or confiding are thereby imposed on to their injury. Where the law raises a presumption of gratuitous service, because of the relationship of the parties, the person rendering such service must rebut such presumption by either showing an express contract, "or such facts and circumstances as will authorize the jury to find the services were rendered in expectation by one of receiving, and by the other of making, compensation." This is the rule as announced in the case of *Riley* v. *Riley*, 38 W. Va. 290, and followed in the case of *Cann* v. *Cann*, 40 W. Va. 138. In this case there is no express contract on which the plaintiff could sue, and hence it must be determined whether, in the absence thereof, the facts and circumstances warranted the finding of the jury. The services were rendered in advancement of the defendant's business. They were valuable and necessary, and he so regarded them. Up until she was seventeen, nothing was said as to compensation; but she was clothed, fed, furnished spending money, and received some so-called presents from the hands of the defendant. She had then arrived at an age when she had become quite proficient in his business,—that of a caterer and confectioner; was very useful to him, and diligent and attentive about his business. It was also quite time for her to begin thinking about her own future. He, as a sensible business man, undoubtedly realized this fact, and also that he was receiving gratuitously services to which he was not wholly entitled, and that, as soon as she became fully informed as to her own worth and rights, she would ask compensation at his hands, or seek other employment. Under such circumstances as this, he, in a sympathetic manner, approached plaintiff, and asked her if she was tired, and she answered, "Yes." He then asked her how long she had been with him, and she replied, "Five years." He said, "When you are with me ten years, I will give you $1,000." And at another time, admitted by the defendant, he told her that when she got married he would give her $1,000 and diamond earrings. For five years she had given unremitting service to his affairs, and he, evidently moved by a righteous obligation to do so, temporarily inspires her with the hope of future reward. The defendant says he was not in earnest, but only jesting. Admitting such to be the case, these conversations, whether he was in earnest or not, were calculated to mislead her, and leave the impression on her mind that in any event he would deal justly by her, and fully compensate her for her services; and in this manner he retained her in his employ until it suited his convenience to discharge her without compensation, which he did, to say the least, in an unkind and heartless manner, ill becoming a stranger, much less a brother-in-law. And now it devolves upon us to say whether she is entitled to pay for what her services were actually worth, or does the law, from the fact that he was only misleading her, and never intended to pay her, excuse him from doing so? A person is estopped from denying the sincerity of his conduct, to the injury of a person misled thereby. We therefore must conclude that these promises, in spite of the declaration of the defendant to the contrary, were made in sincerity, as an inducement to her future service. As these promises are not here sued on, the question of the statute of frauds does not arise; but, the plaintiff having been prevented by the defendant from performing her part of the undertaking, she is entitled to recover for the services already rendered, in view of the compensation promised. 2 Tucker, Bl. Com. 131; 1 Story, Cont. §§ 12, 18, 21; *Brooks* v. *Scott*, 2 Munf. 345. The conversations were therefore proper to go to the jury, not as a complete basis of recovery, within themselves, but as facts and circumstances tending to rebut the presumption that the services were gratuitous, and to show the peculiar means adopted by the defendant to induce the plaintiff to remain quietly in his service, to promote his pecuniary interests, without expecting, on his part, to be called upon to compensate her therefor. The statute of frauds cannot be used as an instrument of fraud. 3 Am. & Eng. Enc. Law, p. 860; 17 Am. & Eng. Enc. Law, p. 339; 8 Am. & Eng. Enc. Law, pp. 658, 660, 661.

The plaintiff asked the court to give the jury seven instructions. The court gave two, to both of which the defendant objected. The defendant asked for ten instructions. The court gave two modified, and gave six, and refused to give two. For this court to copy into its opinion, and comment on, all these instructions separately, is an unnecessary and burdensome task not required of it, in the due and orderly administration of justice, but would greatly interfere with the consideration, and occupy the space belonging to other more weighty matters. And when the court finds, on examination of the whole case, that substantial justice has been done, it will not reverse the judgment, simply to gratify litigious dispositions, for any error committed by the circuit court, unless such error, if it had not been committed, would have tended, in some measure, to have produced a different result.

Defendant's counsel, in their able, scholarly, and exhaustive brief, complain of the admission into the record by the circuit court of "a mass of useless verbiage and trifling repetition,"

which they ask this court to remedy. In view of the many exceptions and instructions "useless in verbiage and trifling in repetition," with which the counsel have encumbered the record, their attention is respectfully called to the celebrated decision of a beam against a mote with which they are familiar. Since, by the provisions of § 9, chap. 131, Code, this court is required to consider the whole evidence, there appears no other way properly to do so, except on a certificate of the whole evidence just as it was taken in the circuit court, unless counsel mutually waive this provision, and certify the facts proved. The circuit court should be commended, instead of condemned, for obeying the law strictly, although it may uselessly add to the cost of litigation. The legislature, and not the court, should provide the remedy.

Most of the instructions asked by the defendant, and refused or modified, were based on the theory that the plaintiff was bound to prove a distinct or express contract; and they were modified by the court so as to include a mutual understanding, to be derived from the circumstances and relationship of the parties, and in no event could she recover unless it appeared that the defendant expected to pay her for her services. These instructions were founded on the law as stated in the cases of *Riley* v. *Riley*, and *Cann* v. *Cann*, before cited. Both those cases were suits against decedents' estates, wherein one of the alleged contracting parties was dead, and therefore the other was held to a strict compliance with the law. In this case both parties are alive, and both testify. If the defendant had been dead, and the plaintiff had just as fully established her case as she has done with him living, her right to recovery would have been unquestionable. *Thompson* v. *Stevens*, 71 Pa. 162; *Pollock* v. *Ray*, 85 Pa. 428; *Thornton* v. *Grange*, 66 Barb. 507; *Young* v. *Herman*, 97 N. C. 283; *Howe* v. *North*, 69 Mich. 272; *Hogg* v. *Laster*, 56 Ark. 382. But the defendant being alive, and being permitted to testify that he had no expectation or intention of compensating the plaintiff for her services, but what he said with regard thereto was a mere jest, distinguishes this case from the cases above cited, so as to render the principle established by them to some extent inapplicable to the present case. His having fully established the want of intention or expectation on his part presents the question whether, in the absence of such expectation or intention, the law, against his will and protest, will compel him to pay her what her services were reasonably worth. In § 508, 1 Story, Cont., it is said that, if a contract is understood by the parties thereto as a mere jest, it has no binding force. But it is also held that if one of the parties thereto accepted it in earnest, and acted thereon to his own detriment and loss, to that extent it would be binding and valid. *Armstrong* v. *M'Ghee*, Add. Rep. 261; 1 Story, Cont. § 12, note 1. In Addison on Contracts, 24, it is said: "In a third class of cases the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities which exist in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all." When any deceit is practised, by which a man obtains the labor, money, or other property of another, with the other's consent, in the expectation of recompense, although such deceiver has no intention of paying therefor, but expects the benefit thereof wholly without just recompense, the law implies a quasi or constructive contract; for it never permits a wrongdoer to take advantage of his own wrong, to the detriment or injury of another. The plaintiff was deceived into the belief, by the kindness, conduct, and conversations of the defendant, that he intended to faithfully compensate her services, justly and fully, at such time as she might marry, or reach an age when she might feel like undertaking business for herself; and he thereby secured her careful attention, labor, and co-operation in the advancement of his business affairs. But, before the time arrives for his meeting his promised undertaking, he gets rid of her, without fulfilment of such undertaking, and pleads that he was merely jesting, and that, as he never intended or expected to compensate her for her services he is entitled to them gratuitously. She testifies that she accepted his promises in earnest, and expected him to fulfil them. What course she might have pursued, had these promises not been made to her, it is impossible for us to say, except that, presumptively, at least, as soon as her eyes became open to her true worth, she would have asked him to pay her a just wage, or have sought other employment, although, on account of her tender years and female dependency, she may have hesitated to take such a step. However this may be, his jesting promises, taken by her in earnest, were sufficient to justify the court in compelling him to treat her with fairness and honesty. The instructions, therefore, in so far as they required the existence of a distinct contract or a mutual understanding, were erroneous as to the plaintiff; but the jury having properly disregarded them, and found a verdict in her favor, in accordance with the law as it should have been given them, they furnish no grounds for the reversal of the judgment thereon. We therefore conclude that the circuit court did not err in refusing to give any of the defendant's instructions, or in giving any of the plaintiff's, but the errors committed were against the plaintiff, wholly. Numerous exceptions were taken by the defendant as to the admission and refusal to admit evidence, but, if the circuit court erred in all of these (which is in no wise apparent, from our view of this case), such errors could not have possibly changed the just result reached.

The judgment is therefore affirmed.

FIRST NATIONAL BANK OF PARKERSBURG
v.
William W. HARKNESS and John W. Dudley, Admr., etc., of Samuel Simes, Deceased, *Plff. in Err.*

(.....W. Va.....)

*1. **A pledge is a bailment** of goods by a debtor to his creditor, to be kept by him until his debt is discharged.

2. **Where a party residing in Philadelphia gives the following order** to his agent in the the city of Parkersburg: "Mr. C. S. Fewsmith, Parkersburg, W. Va.: Will you please hold to the order of Peter C. Hollis and J. L. Richards, trustees of the estate of Samuel Simes, deceased, my stock of lubricating oil stored in my oil tank in Parkersburg, W. Va., as collateral security for the return of $7,500, borrowed and received of them, and oblige, truly, Wm. W. Harkness;"—which paper was indorsed: "Accepted. Parkersburg, W. Va., May 23rd, 1888. [Signed] Crowell S. Fewsmith,"—said Fewsmith being at the time the agent of said Harkness in possession of said oil,—the acceptance of such order transferred the possession of the oil to said trustees of Samuel Simes, deceased, and the oil was thereby pledged for the payment of said borrowed money.

3. **An attachment subsequently levied** upon said property as the property of said William W. Harkness would be subject to the lien created by said pledge.

4. **Although said pledge was evidenced** by writing, it need not be recorded to make it effective as a lien on said oil.

(April 8, 1896.)

ERROR to the Circuit Court for Wood County to review a judgment disallowing a claim of petitioner to certain oil owned by defendant Harkness which had been attached by plaintiff and which defendant Dudley claimed under a pledge from Harkness. *Reversed.*

The facts are stated in the opinion.

Mr. **J. W. Vandervort,** for plaintiff in error:

If the transaction was a pledge the papers need not have been recorded and petitioner is entitled to the oil as against subsequent attaching creditors.

Doak v. *Bank of the State*, 6 Ired. L. 309.

A pledge is a bailment of personal property as security for some debt or engagement.

18 Am. & Eng. Enc. Law, p. 588; Jones, Pledges, § 14; *Bank of British Columbia* v. *Marshall*, 11 Fed. Rep. 19; Schouler, Bailm. § 205; *St. Losky* v. *Davidson*, 6 Cal. 647.

A transfer of property as collateral security for a debt is now regarded as a pledge unless the form of the transfer be clearly a mortgage in its terms.

Jones, Chat. Mortg. § 5.

The delivery of possession is sufficient wherever it would be so in case of a sale of the same property.

Parks v. *Hall*, 2 Pick. 207.

It is not necessary that the pledgee should place anyone in charge over such property, or that he should immediately take any other possession of it after the possession constructively given.

Jones, Pledges, § 36; *Jewett* v. *Warren*, 12 Mass. 300, 7 Am. Dec. 74.

Possession by owner is not conclusive evidence of fraud.

Macomber v. *Parker*, 14 Pick. 497; *Casey* v. *Cavaroc*, 96 U. S. 479, 24 L. ed. 785.

A delivery of goods to a workman or clerk employed by the pledgeor and possession by such party on behalf of the pledgee, are sufficient to create and continue the lien.

Jones, Pledges, § 35; *Homes* v. *Crane*, 2 Pick. 607; *Collins' Appeal*, 107 Pa. 605, 52 Am. Rep. 479; *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Williams* v. *Gillespie*, 30 W. Va. 591; 3 Parsons, Cont. 372; *Sumner* v. *Hamlet*, 12 Pick. 76; *Fletcher* v. *Morey*, 2 Story, C. C. 555.

Messrs. **Hutchinson, Hutchinson, & Camden,** for defendant in error:

Possession must accompany a pledge.

Story, Bailm. §§ 287, 288; *Homes* v. *Crane*, 2 Pick. 607; *Ward* v. *Sumner*, 5 Pick. 59; *Casey* v. *Cavaroc*, 96 U. S. 467, 24 L. ed. 779.

The transmutation of possession in this case is not sufficient.

Yenni v. *McNamee*, 45 N. Y. 621; *Williams* v. *Gillespie*, 30 W. Va. 586.

If the possession of Fewsmith had been of such a character as to be effectual to complete the transfer, and therefore to put upon creditors the burden of inquiring how he held the oil, the plaintiff in error could not now avail himself of it because it is admitted that upon inquiry the trustee and agent who had the possession, if anyone, told the bank that the oil belonged to Harkness and concealed the bailment, if any; and the plaintiff in error is now estopped by the act and declara ions of its agent and trustee. Possession was restored to Harkness by such declarations and representations.

Bigelow, Estoppel, p. 577; *Sage* v. *McLaughlin*, 34 Wis. 550.

English, J., delivered the opinion of the court:

On the 29th day of March, 1894, the First National Bank of Parkersburg brought an action of debt in the circuit court of Wood county against one William W. Harkness, and at the same time obtained an order of attachment directed to the sheriff of Wood county, who levied the same on a certain lot of land situated in the city of Parkersburg, and described in the return on said order of attachment; also upon the following personal property located on said lot, to wit, one iron oil tank of the capacity of about 3,000 barrels, and on about 1,800 barrels of crude oil in said tank, near the outer depot of the Baltimore & Ohio Railroad, Parkersburg, W. Va., on the 30th day of March, 1894, at half past 8 o'clock A. M. On the same day another order of attachment was issued in said suit, directed to the sheriff of Ritchie county, which was levied on the 30th of March, 1894, upon two tracts of

*Headnotes by ENGLISH, J.

NOTE.—In connection with the above case as to the sufficiency of a constructive delivery of possession in case of a pledge, see also the *note* as to the validity of a pledge which makes the pledgeors' agent the depositary, which is found in *Re* Succession of Lanaux (La.) 25 L. R. A. 577.

land situated in Ritchie county, belonging to said William W. Harkness, described in the return of said sheriff. On the 13th day of July, 1895, John W. Dudley, sheriff of Wood county, and as such administrator with the will annexed of Samuel Simes, deceased, filed a petition against the said First National Bank setting up title to or interest in the oil levied on under said attachment, and advertised to be sold by H. P. Camden and John F. Hutchinson, special commissioners, under attachment and order of sale against William W. Harkness, to which petition the First National Bank appeared by attorneys, and the petitioner filed bond in the penalty of $200, conditioned as required by § 23 of chap. 106 of the Code of 1868, and the counsel agreed to the facts upon the matters arising on said petition and claim, and by agreement a jury was waived, and the whole matter of law and facts submitted to the court. The facts agreed were as follows:

"Upon petition of John W. Dudley, sheriff of Wood county, and as such administrator *de bonis non* with the will annexed of Samuel Simes, deceased, against the First National Bank of Parkersburg: Be it remembered that upon the trial of the matters arising on the foregoing petition the facts in said cause were agreed upon between said petitioner and the First National Bank of Parkersburg, which agreement of facts was in writing, and is in the words and figures following:

"The petitioner and the defendant, the First National Bank of Parkersburg, by their counsel of record in the above-entitled cause, hereby waive a jury to try the matters in controversy presented by said petition, and agree that the whole matter of law and fact shall be submitted to a determination by the court in lieu of a jury, and said parties agree to the facts, as follows: That some years ago, prior to 1886 William W. Harkness, a citizen of Pennsylvania, and resident of Philadelphia, became the owner of about 1,800 barrels of crude petroleum oil which he caused to be stored in an iron tank situate on a lot on Depot street in the city of Parkersburg, county of Wood, and state of West Virginia, which oil and tank and land belong to the said Harkness then and ever since. Harkness gave the order hereinafter mentioned. The said tank and the oil therein have ever since remained on said lot, and the said Harkness has ever since resided in the city of Philadelphia, and has ever since continued to own said lot. Some time after the said Harkness became the owner of said oil, and after he had caused it to be stored in said tank, the said Harkness kept and employed a watchman to guard said oil and tank, and said watchman lived in a house on the premises where the oil tank stands in which said oil was stored. That about the year 1886 C. S. Fewsmith came to Parkersburg to reside, and was employed by the said Harkness as agent to have a general oversight in and over the property of said Harkness and said oil and said tank for the purpose of preserving and protecting the same, which the said Fewsmith did, as the agent of said Harkness, from about the year of 1886 up to the 23d day of May, 1888, when he accepted the order hereinafter mentioned, and thereafter said oil was held as shown by the facts herein admitted; and on and after the date of the acceptance of said order dated May 22, 1888, the trustees of the estate of Samuel Simes, deceased, relied upon said C. S. Fewsmith, holding said oil tank, as their agent under said accepted order, and have never been notified at any time since then by said Fewsmith, Harkness, or any one else that said possession was held by anyone but for said trustees and said estate of said Simes, deceased; but of this order, and their reliance as aforesaid on it and Fewsmith, they gave no notice to said bank or otherwise; and it is not agreed by said bank that said Fewsmith was at any time the agent of said trustees and estate of Simes, but the court will determine whether said Fewsmith was the agent of said trustees and said estate, or of said Harkness, from the facts and circumstances herein stated. Since the lien of said attachment, the possession of the same said oil, etc., has been in John W. Dudley, sheriff of Wood county, under and by virtue of the levy of said attachment in favor of the defendant against the property of W. W. Harkness. From and after said date of said order the said Fewsmith had general watch and supervision over said oil. His expenses and the expenses of the watchman residing upon the premises where said tank stands, and who had immediate control and charge of said oil for Harkness, for the purpose of guarding the same against accident or injury, had and have been paid by William W. Harkness. That during the time said Fewsmith had charge of said tank of oil he resided in the city of Parkersburg, in another part thereof, and away from the lot of land and premises where said oil tank stands, and exercised no other acts of control or possession of said oil except to look after it as stated. That said Fewsmith caused said oil to be insured in the name of said Harkness, and kept it insured, paying the premiums thereon in the name of said Harkness during the time of said insurance, up to within the last year or two; and the taxes on said oil were paid by said Harkness through said Fewsmith, and in the name of said Harkness. It is further agreed that on the 22d day of May, 1888, the said Harkness, then being in Philadelphia, gave the order addressed to the said Fewsmith, a copy of which is filed as an exhibit with the petition in this case, which order the said Fewsmith accepted, as shown on the face of the said order; that after the date of said order and the date of the acceptance thereof said trustees and estate of Samuel Simes, deceased, relied on said Fewsmith as the agent of the trustees of the estate of Samuel Simes, and that they have so continued to rely on C. S. Fewsmith as their agent up to the date for the purposes set forth in said order aforesaid, dated May 22, 1888; but of these claims and said order said bank had no notice, and if said Fewsmith, in managing and controlling said oil, has acted otherwise than as agent of the trustees of the estate of Samuel Simes, except to pay the taxes thereon and insure the same, such dealings had been without any notice thereof to the trustees of the estate of Samuel Simes, deceased, and said bank had no notice of the reliance of said trustees on the claim that Fewsmith was their agent; that the said oil has remained in the same tank, in the same place, on the same lot

of said Harkness, precisely as it was at the date of said order of May 22, 1888, under which the petitioner claims in this suit, and since that date no change has been made whatever in the place of storage of said oil, but that the said oil and said tank have there remained and continued down to and including the time of issue of said attachment. It is further agreed that no notice was given of the execution of said order or the acceptance of the same to the public, or to said First National Bank, but that the said Harkness obtained credit, by virtue of the claim of ownership by him of said oil and tank and lot on which it stands, from said First National Bank; and the said Fewsmith and the said Harkness have claimed and represented to the said bank at various times that the said Harkness owned said oil, and the loan made at the First National Bank to the said Harkness, upon which the said suit and attachments in its favor against him was instituted and sued out, was made to him, the said Harkness, upon the representations made by his agent, Crowell S. Fewsmith, that the said Harkness was the owner of said oil and of other property in the state of West Virginia, and in the city of Philadelphia, but it does not appear that any of these facts were disclosed to the estate of Samuel Simes, deceased, or to its trustees or personal representative. It is further agreed that on the 29th day of March, 1894, the First National Bank of Parkersburg instituted an action at law in the circuit court of Wood county, West Virginia, against said Harkness to recover the sum of $6,000 due upon the note of said Harkness, the said bank executing an attachment bond as required by law, whereupon the sheriff of said county, John W. Dudley, by his deputies, levied upon and attached said oil and said tank, and took possession thereof under said attachment, as required by order of attachment in said suit, and since that time the said sheriff has had possession of said oil and tank by virtue of said order of attachment, and not otherwise; that afterwards, in said suit of the said bank against said Harkness, a personal judgment was rendered upon process personally served upon said Harkness, and an order of sale entered therein, directing the sale of said oil and tank and real estate attached to pay said debt of $6,000, with interest and costs; and other banks also sued out attachments and levied upon the property of said Harkness; but of the pendency of said action and of the proceedings therein, including the issuing out of said attachment and of the levy of the same on said tank and oil, the estate of Samuel Simes, nor its trustees nor its personal representatives, had any notice until long after the same had taken place, and not until recently. It is agreed that the papers, affidavits, bonds, orders of attachment, and returns in said suit of the First National Bank of Parkersburg against said Harkness shall be made and considered as parts of this agreement of facts. It is further agreed as a fact that after the said attachment was levied in favor of the First National Bank of Parkersburg, to wit, on the 30th day of April, 1894, the said Harkness, who had accepted service of the summons in the action of the First National Bank of Parkersburg against him, made the memorandum in writing, marked 'Ex. 3,' with the petition in this case, in which he acknowledges the debt of $7,500, due under the note of May 28, 1888, and that said Exhibits Nos. 1, 2, and 3, with the petition in this case, it is admitted, were executed under the circumstances and for the purpose and at the times more fully stated therein. And it is further agreed that the said order of May 22, 1888 — Exhibit No. 2,—filed with said petition, has never been recorded in the office of the county clerk of Wood county, West Virginia, at any time. And it is further agreed that John F. Hutchinson and H. P. Camden, special commissioners, have advertised said tank and oil for sale under and by virtue of an order made in the action in favor of the defendant, the First National Bank of Parkersburg, in which said attachment was issued and levied, and that said sale has been adjourned and continued until July 13, 1895, by H. P. Camden and John F. Hutchinson, special commissioners, and that said special commissioners have advertised for sale July 23, 1895, certain real estate in Wood county, and on August 2, 1895, certain real estate in Ritchie county, for the purpose of realizing proceeds with which to pay said judgment of the First National Bank and other judgments amounting to about $12,000, against said Harkness. It is agreed to submit the whole matter of law and fact to the court for such judgment as he may render, reserving to either party the right to review such judgment by writ of error or otherwise. Witness our hands this 13th day of July, 1895.

"'First National Bank, by Hutchinson, Hutchinson, & Camden.

"'John W. Dudley, Adm'r *de bonis non* with the will annexed of Samuel Simes, deceased, by Vandervort & Moats, his Attys.'

"And the matters of law and fact, a jury having been waived, were submitted to the court; and the court, after maturely considering the petition and the claim of the said petitioner, dismissed the said petition, and ordered that the First National Bank recover its costs against said petitioner, etc.; and thereupon said petitioner moved the court to set aside said judgment, and grant him a new trial, because said judgment was contrary to the law and the evidence and the facts agreed as aforesaid, which motion, being considered by the court, was overruled; to which opinion and judgment of the court in overruling said motion said petitioner excepts, and prays that this his bill of exception No. 1 may be signed and made part of the record in said cause, which is accordingly done. A. I. Boreman. [Seal.]"

From this judgment John W. Dudley, administrator with the will annexed of Samuel Simes, deceased, obtained this writ of error, and relies upon the following assignments of error: First, that the court erred in its judgment dismissing said petition; second, in refusing to set aside said judgment and grant a new trial to plaintiff in error.

The controversy in this case is in regard to the oil in an iron oil tank described as being of the capacity of about 3,000 barrels, amounting to about 1,800 barrels of crude oil in said tank, described in the levy indorsed on said order of attachment. The defendant in error claims said property by virtue of the levy of said attachment thereon, while the plaintiff in error,

as administrator *de bonis non* with the will annexed of Samuel Simes, claims it as having been pledged by William W. Harkness to Peter C. Hollis and Joseph L. Richards, trustees of the estate of Samuel Simes, deceased, to secure the payment of $7,500. It appears from the agreement of facts which is made part of the record that prior to the year 1886 the defendant, William W. Harkness, became the owner of about 1,800 barrels of crude petroleum oil, which he caused to be stored in an iron tank situate on a lot on Depot street in the city of Parkersburg, Wood county, W. Va., which lot and oil tank then belonged to said Harkness, and have ever since belonged to him. After said Harkness had caused said oil to be stored in said tank, he employed a watchman to guard said oil tank, who lived in a house on the lot where the oil tank stands in which the oil was stored. About the year 1886 one C. S. Fewsmith came to Parkersburg to reside, and was employed by said Harkness as agent to have a general oversight over the property of said Harkness, and said tank and the oil stored therein, for the purpose of preserving and protecting the same, which said Fewsmith did as the agent of said Harkness from the year 1886 until the 23d day of May, 1888, when he accepted an order from said William W. Harkness, which reads as follows:

Philadelphia, Pa., May 22, 1888.

Mr. C. S. Fewsmith, Parkersburg, W. Va: Will please hold to the order of Peter C. Hollis and J. L. Richards, trustees of the estate of Samuel Simes, deceased, my stock of lubricating oil stored in my oil tank in Parkersburg, W. Va., as collateral security for the return of $7,500, borrowed and received of them and oblige, truly [Signed] Wm. W. Harkness,—

which order was accepted by said C. S. Fewsmith in the following words:

Accepted. Parkersburg, W. Va., May 23rd, 1888. [Signed] Crowell S. Fewsmith

What was the legal effect of this order and acceptance? We can regard it in no other light than that of a pledge of the oil in this tank as collateral security for the payment of the sum of $7,500, mentioned in said order, to said trustees of the estate of Samuel Simes, deceased. Jones, in his valuable work on Pledges (§ 1), says: "A pledge may be defined to be a deposit of personal property as security, with an implied power of sale upon default. Lord Holt, who was the first to make a systematic statement of the general law of bailment, defined a pawn to be that sort of bailment, 'when goods or chattels are delivered to another, to be a security to him for money borrowed of him by the bailor.' Sir William Jones defined it to be 'a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged.' The definition given it by Judge Story is 'a bailment of personal property as a security for some debt or engagement.'" In order that a pledge of personal property may be effectual, it is necessary that the possession of the property be given to the pledgee. So in the case of *Williams* v. *Gillespie*, 30 W. Va. 586, fourth point of syllabus, this court held that an agreement to pledge personal property for the security of a debt is ineffectual to create a pledge of or lien on the property unless the property is put in the possession of the pledgee. Now, in order to determine whether that was done in this instance, we must first consider the character of the property. The tank is an immense iron tub sitting on top of the ground, in this instance having the capacity of 3,000 barrels, and containing 1,800 barrels of crude petroleum. This tank was and is located upon a lot belonging to said William W. Harkness, in the city of Parkersburg. At the time said order was given, said tank and oil were in the possession of C. S. Fewsmith as the agent of said W. W. Harkness, and by him had been given special control and supervision of this tank and the oil it contained. The tank was so immense, and the quantity of oil it contained so great, that actual possession could not be delivered to said trustees; but when we look at the face of the order it is perceived that said William W. Harkness thereby requests his agent, C. S. Fewsmith, to hold, subject to the order of Peter C. Hollis and Joseph L. Richards, trustees of the estate of Samuel Simes deceased, his stock of lubricating oil stored in his iron tank in his yard at Parkersburg, W. Va., as collateral security for the return of $7,500 borrowed and received of them. By this order he requests C. S. Fewsmith to become the agent of said trustees in holding the possession and caring for said property, and C. S. Fewsmith, by accepting said order, thereby agreed to become the agent of said trustees, and hold the property, as requested, for them. Can we regard this transaction, taken as a whole, in any other light than that of a pledge? Previous to this order, the possession of this 1,800 barrels of oil was held by C. S. Fewsmith as the agent of William W. Harkness, and by the order or request and its acceptance was transferred to said Fewsmith, as the agent of the trustees of Samuel Simes, deceased, and as security for said sum of $7,500. Jones, Pledges, § 1, says: "Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. In Georgia, a pledge or pawn is declared to be property deposited with another as security for the payment of a debt." And that, as it seems to us, was done in this case. It appears in the agreed statement of facts that subsequent to this transfer said W. W. Harkness paid the taxes and insurance on this oil, but such payments were not inconsistent with the fact that the property had been pledged for the payment of the $7,500 he had borrowed from the estate of Samuel Simes. He had not sold the property to any person, but had merely pledged it, and it was incumbent on him to pay the taxes to prevent a sale of the property, and it was consistent with prudence that he should insure the property in order to prevent loss to himself, and to avoid the destruction of the security to the Simes estate for the money he had borrowed. The distinction between a pledge and a mortgage is stated in Jones, Chat. Mortg. § 4, as follows: "The chief distinction between a mortgage and a pledge is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition: while by a pledge, the pledgeor retains the general title in himself, and parts with the possession for a special purpose." And the same author in his work on Pledges (§ 7) says: "A

pledge differs from a mortgage of personal property in being a lien upon property and not a legal title to it. The legal title to property pledged remains in the pledgeor, while a mortgage passes the legal title of the property itself to the mortgagee, subject to be revested in the mortgagor, upon the performance by him of an express condition subsequent." The legal title to the property did not pass in this instance; the possession, however, went from Fewsmith, agent of Harkness, to Fewsmith, agent of the trustees of Samuel Simes' estate. As to the manner in which possession may be held by the pledgee, Jones on Pledges (§§ 3, 4) says: "But possession may be held by a third person for the pledgee, when such person will be considered as the pledgee's agent." So in the case of *Brown* v. *Warren*, 43 N. H. 430, it was held that, "where property is pledged as security for a debt or liability, it is immaterial where the pledgee holds the property or a third person holds it for him." "If property of A be held by B and C jointly, A may assign the same in pledge to B or C severally, and the pledge will be good if both B and C have knowledge of the same, and assent to hold the property for the pledgee."

It is claimed by counsel for the defendant in error that there was no possession accompanying the pledge, and for that reason it was inoperative. The question is as to the possession of the property at the time the pledge is claimed to have been made. It appears that after said C. S. Fewsmith came to Parkersburg, in 1886, he was employed by said Harkness as agent to have a general oversight in and over the property of said Harkness and said oil and said tank for the purpose of preserving and protecting the same, which said Fewsmith did as agent of said Harkness, up to the 23d day of May, 1888, when he accepted said order. Said oil, on account of its character, was not susceptible of being transferred from hand to hand, and all possession that could be taken was a general supervision and control, guarding it from danger of fire, paying taxes and insurance, which Fewsmith was doing at the time of the acceptance of said order. Upon this question of delivery of possession, Jones on Pledges (§ 36) says: "A symbolical delivery is sufficient wherever such a delivery would be sufficient in case of a sale of the same property. Such a delivery may be made of all property incapable of manual delivery. Thus logs in a boom may be effectually pledged by going in sight of them, and pointing them out to the pledgee." *Jewett* v. *Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Nevan* v. *Roup*, 8 Iowa, 207; *Whitney* v. *Tibbits*, 17 Wis. 359. In the case of *Nevan* v. *Roup* it was held that "delivery and possession are essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing." In the case of *Whitney* v. *Tibbitts*, *supra*, it was held that, "where the question was whether, on a pledge of flour stored in a warehouse in Milwaukee, a delivery by the pledgeor of the warehouse receipt without indorsement constituted a sufficient delivery of the property to sus ain the pledge as against subsequent attaching creditors of the pledgeor, and it appeared that said receipt did not run to bearer, but stated that the flour was 'deliverable only on return of the receipt,' etc., held, that the plaintiff was entitled to show that by a general custom in Milwaukee flour in store was transferred by a delivery of such receipts without indorsement." In the case we are considering, however, there was an acceptance of the order by Fewsmith in accordance with the terms of the order, and Jones on Pledges (§ 37) says: "A delivery of a document of title which serves to put the pledgee in possession of the goods is equivalent to an actual delivery of them." In § 229 the same author says: "The delivery of a bill of lading is a symbolical delivery of the property represented by it. The person who takes a bill of lading for a valuable consideration, whether this arises at the time or rests upon a previously existing debt, has the right to the property without taking actual possession of it, or doing any further act to perfect this title." See *Neill* v. *Rogers Bros. Produce Co.* 40 W. Va. ——. So it is said: "Warehouse receipts, by custom, have long been considered as representing the property mentioned in them; and the assignment or indorsement of such instruments has long been regarded as equivalent to the delivery of such property." See Jones, Pledges, § 280. As we regard this transaction, the possession of Fewsmith before said written order was drawn on him and accepted was the possession of Harkness; by such acceptance he agreed to become the agent of said trustees in holding the possession of the oil and controlling the same, and did so become; and in this manner the possession was transferred from Harkness to said trustees, Harkness holding the possession by his agent *facit per alium facit per se*, transferred to Fewsmith as the agent of these trustees, and they held it, as did Harkness, through their agent. "Though a pledge be evidenced by a writing, it need not be recorded if the writing constitute a pledge and not a mortgage." Jones, Pledges, § 6.

The case under consideration by its record presents a contest between the defendant in error, the First National Bank, claiming the oil stored in this tank under an attachment, levied thereon subsequent to the date of said written request signed by W. W. Harkness, and directed to said C. S. Fewsmith, and accepted by him; and the question is, What right to said oil remained in W. W. Harkness at the time said attachment was levied, after pledging said property in the trustees of Samuel Simes, deceased? What right could said W. W. Harkness assert in any court to repossess himself of said 1,800 barrels of oil without paying said sum of $7,500, for which it was pledged? He certainly could maintain no such claim successfully, and the question is, If said Harkness had no right to said oil superior to said pledgee's, could the defendant in error, under its attachment lien, have or take more than Harkness had at the time of the levy? We find the law upon this question stated by Shinnon, Attachments, p. 611, § 318, who thus states the law: "A creditor cannot, by attachment, acquire any higher or better right in the property attached than the debtor himself had at the time of the levy of the attachment, unless he can show that there has been fraud or collusion to his detriment." The lien obtained by attachment is subject to all previous liens

by bona fide creditors; therefore the effect of the attachment is to subject only the interest which the defendant has in the property at the time of its seizure, and, having reached the conclusion that the oil in said tank was pledged to the payment of said sum of $7,500, with its accrued interest, we hold that said attachment is subject to said pledge, and can only be satisfied out of the surplus remaining from the sale of said oil after the satisfaction of the said sum of $7,500, with its accrued interest; and *the judgment of the court below dismissing the petition filed by the plaintiff in error is reversed*, the judgment is reversed so far as it gives said attachment lien priority over said pledge as to the oil levied on thereunder, and the case is remanded, with costs to the plaintiff in error.

Brannon, J., absent.

E. S. HONAKER *et al.*
v.
BOARD OF EDUCATION OF POCATALICO DISTRICT *et al.*, *Appts.*

(.....W. Va.....)

*1. **The board of education of a school district,** composed of the president of the board of education and two commissioners, is a public corporation, created by statute (Code, § 7, chap. 45), with functions of a public nature expressly given, and having no other; and therefore it can exercise no power not expressly conferred or fairly arising by necessary implication, and it can exercise its functions in no other mode than in that prescribed or authorized by the statute.

2. **The members of the board,** acting individually and separately, and not as a board convened for the transaction of business, cannot accept a proposal or make any contract whatever that will bind them as a corporation.

3. **As a board it cannot incur any debt** to be paid out of the school money of any subsequent year.

4. **All who deal with the board** of education are charged with notice of the scope of their authority, and that they can bind their district only to the extent and by such contracts as are expressly authorized by law.

5. **The board of education** may, under the head of "appliances," provide for the schoolhouses maps and charts; but it must be made to appear that they are not mere school books in some other form or under some other name, but something of which a few will answer the needs of all, suitable to the school, and reasonably necessary to enable the teacher to impart instruction to the pupils more efficiently in such branches as are required to be taught.

6. **The giving of anything of value to a commissioner of the board** of education of a school district, intended to influence him in the discharge of a legal duty, or his receiving anything of value in corrupt payment of an official act done or to be done, renders void any contract to the making of which he was thus induced in whole or in part, directly or indirectly, and to the validity of which his vote or assent was necessary.

7. **A school commissioner of a district is notified** to attend an adjourned meeting of the board of education, set to pass upon a proposed contract for the purchase of certain charts for the public schools of their district at the price of $750. He refused to go until the agent selling the charts handed him $2.50 in money to pay him for his time and reimburse him for loss sustained by closing his place of business. Then he attended the meeting of the board at the time and place fixed, and he and the president of the board voted for making the purchase and signed the contract; but the third commissioner voted against it, and refused to sign the contract. *Held*, such contract, thus procured and made, is against public policy, and void, for want of the sanction of a competent majority of the board to make it.

8. **Where a principal sends forth his agent** to conduct his affairs and contract for his benefit, and the agent procures a contract by fraudulent or corrupt practices, although the principal may not have been privy in any way to such conduct of his agent, yet the principal claiming the benefit of the contract must take it tainted as it may be with such practices.

9. **A court of equity has jurisdiction** of a suit by and on behalf of the resident taxpayers of a school district to set aside a contract made by and with the board of education, when the same is illegal, as made in fraud of the rights of such taxpayers, and so far as the same creates a debt to be paid out of the school money of any subsequent year, or is made for the purchase of things which the school board had no authority to buy; there being no other adequate remedy.

(April 8, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Putnam County in favor of plaintiffs in a proceeding to enjoin defendants from paying for certain apparatus purchased for the use of the school. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. H. Nash** and **J. B. Menager** for appellants.

Messrs. **Bowyer & Green,** for appellees:

A court of equity has jurisdiction of a suit by and on behalf of the resident taxpayers of a school district brought to set aside and hold for nought a contract made by the board of education so far as the same creates and incurs a debt to be paid out of school money of subsequent years.

Shinn v. *Ripley Dist. Bd. of Edu.* 39 W. Va. 497; *Crampton* v. *Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; 2 Dill. Mun. Corp. §§ 914–919; *Davis* v. *Ft. Spring Dist. Bd. of Edu.* 28 W. Va. 382.

*Headnotes by HOLT, P.

NOTE.—The fact that a member of a board receives compensation for attending a meeting from a person who is interested in action to be taken at such meeting is clearly regarded by the court in the above case as amounting to unlawful influence, having the effect of bribery so far as to annul action taken by the aid of such member. The case in this respect makes an important precedent, especially in respect to school boards which are often convened to take action on a particular question. For other cases as to the necessity of the members of a board getting together and having a meeting in order to take valid action, see Cary Library v. Bliss (Mass.) 7 L. R. A. 765, and Stockton v. Powell (Fla.) 15 L. R. A. 42.

Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute creating them.

Pennsylvania Lightning Rod Co. v. *Cass Twp. Bd. of Edu.* 20 W. Va. 360.

It has no powers derived from usage not expressly confirmed by statute or which fairly arise by necessary implication.

Harris v. *School Dist. No. 10*, 28 N. H. 61; *Frazier* v. *School Dist. No. 1*, 24 Mo. App. 250.

In the purchase of these series the board created a debt in that year beyond its assets for the year, which, under § 45, chap. 45, was unlawful, and makes the contract illegal and one that cannot be enforced.

Yaggy v. *Monroe Dist. Twp.* 80 Iowa, 121.

The acceptance of the charts by the board cannot ratify the illegal contract; nor does the use of the series amount to a ratification of the contract or impose any obligation on the district.

Kane v. *Calhoun School Dist.* 48 Mo. App. 408; *Johnson* v. *School Dist. No. 1*, 67 Mo. 321; *Crutchfield* v. *Warrensburg*, 30 Mo. App. 456.

The contract was void because obtained by bribery, fraud, and undue influence.

2 Am. & Eng. Enc. Law, pp. 532, 534; *Simpson* v. *Yeend*, L. R. 4 Q. B. 626; *Davis* v. *United States*, 23 Ct. Cl. 329; *State, Bradford*, v. *Cross*, 38 Kan. 696; *Shakespear* v. *Smith*, 77 Cal. 638; *Jones* v. *Surprise*, 64 N. H. 243.

Holt, P., delivered the opinion of the court:

On appeal from a decree of the circuit court of Putnam county, pronounced on the 28th day of February, 1894, perpetually enjoining the Caxton Company from collecting and the school board from paying a debt for $750, which the board contracted in the purchase of school charts. The bill of injunction is based on three distinct grounds:

1. That the members of the board of education, in making this purchase in the year 1893, incurred the debt of $750, to be paid one half out of the school money of the subsequent year; and this was done in violation of § 45, chap. 45, of the Code. The plain and commendable purpose of this provision of the statute is to make the available funds of each year pay the demands of that year, and to protect the taxpayer from indebtedness beyond what each year's means will pay. *Davis* v. *Ft. Spring Dist. Bd. of Edu.* 38 W. Va. 382, 385. And a court of equity has jurisdiction of a suit by and on behalf of the resident taxpayers of a school district brought to set aside and hold for naught a contract made by the board of education, so far as the same creates and incurs a debt to be paid out of the school money of subsequent years, there being no other plain, adequate, and complete remedy. *Shinn* v. *Ripley Dist. Bd. of Edu.* 39 W Va. 497. This could hardly have been the ground on which the circuit court based its decree, for the written contract for the purchase of the charts as amended and finally executed was entered into on the 15th day of July, 1893. One half of the $750—the purchase money—was to be paid on the 1st of December, 1893, and the other half on the 1st of April, 1894, and provision was made for payment out of the school levy of the current fiscal year, that day laid by the board. But there is no question that the contract as first made did create a debt with one half of it to be paid out of the school money of the subsequent year.

Ground No. 2 is that the school law (chapter 45 of the Code) does not confer upon the board of education the power to buy such things; that they do not come within the meaning of the term "appliances," as used in the statute. The board of education of a school district is a corporation created by statute (§ 7, chap. 45), with functions of a public nature, expressly given, and no other; and it can exercise no power not expressly conferred or fairly arising from necessary implication; and in no other mode than that prescribed or authorized by the statute. *Shinn* v. *Ripley Dist. Bd. of Edu.* 39 W. Va. 498. It is a public corporation, created for public educational purposes (1 Thomp. Corp. § 25), laying throughout the United States annual levies of more than $160,000,000. All who deal with the board of education are charged with notice of the scope of their authority, and that they can bind their district only to the extent and by such contracts as are authorized by law. See *Honey Creek School Twp.* v. *Barnes*, 119 Ind. 213. And the members of the board, acting individually and separately, and not as a board convened for the transaction of business, cannot make a contract that will bind them as a corporation. *Pennsylvania Lightning Rod Co.* v. *Cass Twp. Bd. of Edu.* 20 W. Va. 360.

The evidence shows that this contract of sale as just made was in plain violation of this important rule of law, but was afterwards called in, and the present one was put in its place. Whether the law confers upon the board the power to make such purchase depends upon the scope and meaning of § 34 of chapter 45, read in connection with other sections and clauses bearing on the same subject. It reads as follows: "The board of education of every district shall provide by purchase, condemnation, leasing, building, or otherwise, suitable schoolhouses and grounds in their districts, in such locations as will best accommodate the inhabitants thereof, and improve such grounds and provide such furniture, fixtures, and appliances for said schoolhouses as the comfort, health, cleanliness, and convenience of the scholars may require, and keep such grounds, schoolhouses, furniture, fixtures, and appliances in good order and repair." Appliance is anything brought into use as a means to effect some end. An educational appliance is something necessary or useful to enable the teacher to teach the school children. No educational means of imparting instruction to school children is more essential than the proper school books; therefore, according to the argument in this case, it is the duty of the board to provide them. But no one, I believe, contends for the conclusion to which this reasoning leads us. There must be some additional qualifying restriction. The appliance must be something like a blackboard, map, or dictionary, in that one or two may be enough for the use of the whole school, and can be used by the teacher in giving instruction to the pupils. No person being required to furnish such common but necessary property for the benefit of the whole school, they can only be supplied by the board

of education. See *Honey Creek School Twp.* v. *Barnes*, 119 Ind. 213, 217. But there are still other necessary restrictions. It must not be a school book in disguise. This is vitally important, for the opening for the sale of school books in the United States is so large, and the pressure brought to bear to make sales, whether the books be needed or not, so great, that it seems to be almost irresistible, and quasi-school books are gradually creeping in under the name of appliances. They must not only be genuine appliances, but they must be shown to be suitable and reasonably necessary for the use of the public schools, for the board has no authority to buy any appliance which is not suitable and necessary; for example, an appliance or apparatus suitable to some branch of learning not required to be taught. There is a distinct charge in the bill that the agent of the Caxton Company succeeded in palming off these charts on the board by false and fraudulent representations, and at a price fraudulently excessive, *viz.*, $37.50 for each chart. The testimony of twenty witnesses was taken; and a dozen or more of high character and intelligence, who have had experience in such matters, and occasion and opportunity to observe and to know, testify with great unanimity that object teaching is of prime importance in teaching the young,—the very young,—and that without some such thing as these charts it could hardly be done. They also say that these charts are not mere school books in disguise, but aids essential to the teacher in teaching and to the pupil in learning; that one or two will answer for the whole school; and that they relate only to such branches as the law requires to be taught. As to the price, two say $5 would be enough; one says they ought to cost about $15; the others, who know them best, say that, as compared with other charts, the agreed price of $37.50 is not exorbitant. There is a lame and unsuccessful attempt to make good by proof the charge of misrepresentation, nothing more; and it needs no comment.

The third and last charge in the bill of injunction is that the Caxton Company, by and through its agents and salesmen, offered to the board of education and to the individual members thereof money and other things of value, and used various other undue, illegal, and fraudulent inducements, with the view and for the express purpose of securing an order and contract for the purchase of the Caxton School Series illegally and for an exorbitant price, to the great detriment of the plaintiffs and all other taxpayers of the school district. Bribery is defined as "the voluntary giving or receiving of anything of value in corrupt payment for an official act, done or to be done." 2 Bishop, New Crim. L. § 85. See *Dishon* v. *Smith*, 10 Iowa, 221; *State* v. *Ellis*, 33 N. J. L. 103, 97 Am. Dec. 707. The payment or offer of a valuable consideration to a public officer to influence him in the discharge of a legal duty constitutes the offense. See 2 Am. & Eng. Enc. Law, p. 532; Anderson, Law Dict. p. 136. See, on the subject, §§ 4 *et seq.* of the Code, and § 13 of chapter 45; *Com.* v. *Callaghan*, 2 Va. Cas. 460. A promise to pay for loss of time is bribery. *Simpson* v. *Yeend*, L. R. 4 Q. B. 626; *Cooper* v. *Slade*, 6 H. L. Cas. 746; *People* v. *O'Neil*, 48 Hun, 36, 43. Every public officer being a guardian of the public welfare, no transaction growing out of his official services or position can be allowed to inure to his personal benefit; and from such transactions the law will not imply a contract. *Davis* v. *United States*, 23 Ct. Cl. 329. When a contract grows out of and is connected with an illegal act, it will not be enforced. *Jones* v. *Surprise*, 64 N. H. 243. Courts of justice will not enforce any contract which is injurious to public rights, contravenes public policy, or violates public law. A contract with the state, procured by bribery upon the officers having power to make it, is against public policy and void. *State, Bradford*, v. *Cross*, 38 Kan. 696. An order by two of the trustees of a school district, one of whom is personally interested in it, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board, whether the interested trustee has acted fairly or not. *Shakespear* v. *Smith*, 77 Cal. 638. The evidence shows without any attempt at contradiction that one of the commissioners of the board of education, when notified of the time and place of the meeting of the board for the purpose of passing on the proposed contract for the purchase of the Caxton Series, refused to go on account of the loss he would sustain by closing his place of business. Thereupon the agent of the Caxton Company paid him $2.50 in money to reimburse him for his loss, telling him at the time he did not do this to try to bribe him, or with the intention of influencing his decision in any way. The board is composed of three commissioners. The commissioner who was thus induced to attend and the president of the board signed the contract, the third one refused to sign it. The state pays the commissioner $1.50 per day. Code, § 6, chap. 45. It was his plain duty to attend the meeting and pass upon this important contract without being influenced in the discharge of such legal duty by requiring or receiving from the party who proposed the contract any pay for his time or his loss in closing his place of business. The people of the state take pride in their public schools, in their growing usefulness and efficiency, and to that end give of their means without stint and without complaint, until now it has reached the sum of $1,664,527 a year; and they have a right to feel indignant when they have reason to suspect the pressure of corrupt practices or tampering in any way with the school boards who control the school money of the districts. This contract was void because made by only two of the board, one of whom had rendered himself incompetent to act by accepting pay from the party contracted with for attending the meeting at which the contract was made. Without his vote in favor of it, it would not have been made; hence, so far from having the sanction of two of the board, the number required by the statute to constitute a quorum, it had under the law the sanction of but one, and therefore had only the semblance of a contract. Besides, it is a plain case of money demanded, given (and received) with intent to influence the commissioner in the discharge of the legal duty of attending the meeting and passing on the question of the acceptance of the proposed contract. I should be reluctant to believe that his signing the con-

tract was also thus induced. The first is enough to require the contract to be held void, and that much is established by the concurrent testimony of both parties to the transaction. But it is proper to add that there is nothing in this record tending in the slightest degree to bring home to the principal in this contract knowledge or sanction of this conduct on the part of their agent; but, notwithstanding their innocence, when they come into court, and insist upon its validity and enforcement, they are met with the maxim upon which the law of agency rests, "What one does through another, that he does himself," so far as the illegality of the contract itself is involved. The doctrine of *ultra vires*, in that attitude of the transaction, does not apply. See 1 Am. & Eng. Enc. Law, 2d ed. p. 1180. Although the principal may have had nothing to do with this tampering of their agent with a member of the school board in order to influence him in the discharge of his official duty, may not have been privy to the transaction in any way, yet the company sent him out to sell and contract in their name and for their benefit; therefore they were bound to see that it was so made as not to be a fraud on the rights of the taxpayers, and as they claim under it they must take it as tainted with these corrupt practices.

In our view of the facts of this case and of the law applicable thereto, *the decree complained of is right, and must be affirmed.*

G. W. KIRK
v.
NORFOLK & WESTERN RAILROAD COMPANY, *Plff. in Err.*

(.....W. Va.....)

*1. **Where a railroad company leaves its railroad uninclosed** through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railroad track, it is the duty of the railroad company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals, when found in the way of a train on the road.

2. **The paramount duty of the agents of a railroad company** engaged in propelling a train is owed to the persons and property in their charge on the train; and if, in freezing weather, it is found that the use of salt on switches is the only effective mode of freeing them from ice, and thus protecting their passengers and themselves from the dangers consequent upon a wreck, they may avail themselves of this method, although it may have a tendency to lure stock to the track, and endanger their lives.

3. **If the servants of the railroad company in charge of a train,** by exercise of ordinary care, can see and save domestic animals which have wandered on the railroad, it is their duty to do so; but this duty must be exercised consistently with the paramount duties they owe to the passengers on the train under their charge.

(*Dent, J., dissents.*)

*Headnotes by ENGLISH, J.

(March 25, 1896.)

ERROR to the Circuit Court for Logan County to review a judgment in favor of plaintiff in an action brought to recover the value of cattle alleged to have been killed by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Campbell & Holt** for plaintiff in error.

Mr. **J. B. Wilkinson,** for defendant in error:

If the ox was on the track when the train came in sight the engineer must have seen him, if keeping a proper lookout, and should have resorted to the usual appliances for driving the ox away by giving the alarm, slackening his speed, and even stopping the train if necessary in order to avert the injury. If the ox was near the track when the train came in sight and started to go towards it as though to get on it then the same duties devolved upon the engineer as before, but so far as the evidence discloses he utterly failed to sound an alarm or even to slacken his speed, much less to stop his train.

Thornton, Railroad Fences & Private Crossings, p. 474, § 300; *Alabama Great Southern R. Co.* v. *Powers*, 73 Ala. 244; *Western R. Co.* v. *Lazarus*, 88 Ala. 453; *Missouri P. R. Co.* v. *Gedney*, 44 Kan. 329.

It was held to be negligence in a company to let salt remain on its track after notice of it or after sufficient time elapsed to charge it with notice, and the plaintiff was not guilty of contributory negligence in turning out his stock, knowing of the salt, upon the commons adjoining, having a right to pasture thereon.

Brown v. *Hannibal & St. J. R. Co.* 27 Mo. App. 394.

So the jury may find the same is true if the company allows the salty water to accumulate and attract cattle.

Morrow v. *Hannibal & St. J. R. Co.* 29 Mo. App. 432.

So of hay left an unreasonable time at a depot, or corn, even if put there by a tenant, or dripping molasses at a warehouse.

Schooling v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 518; *Gilliland* v. *Chicago & A. R. Co.* 19 Mo. App. 411; *Page* v. *North Carolina R. Co.* 71 N. C. 222; *Little Rock & Ft. S. R. Co.* v. *Dick*, 52 Ark. 402.

English, J., delivered the opinion of the court:

This was a civil action brought by G. W. Kirk against the Norfolk & Western Railroad Company, before T. J. Mead, a justice of the peace of Logan county, for a wrong alleged to have been committed by the defendant, in which damages to the amount of $300 were claimed. In the complaint filed before the justice, the plaintiff alleged that between the 1st day of October, 1892, and the 1st day of March, 1893, the defendant killed three oxen, and crippled another one, which belonged to the plaintiff, of the value of $45 each for two that were killed, and $65 for the other, and $25 for the one that was crippled. On the 17th day of

NOTE.—The above case is believed to be a novel one in respect to the liability of a railroad company for using salt upon its switches and thus attracting cattle. As to how far the statutes can make railroad companies absolutely liable for injuries to cattle, see *note* to Matthews v. St. Louis & S. F. R. Co. (Mo.) 25 L. R. A. 161.

See also 32 L. R. A. 170.

June, 1893, the case was heard, and judgment rendered for the plaintiff for $160, with interest till paid and costs. An appeal was taken to the circuit court. An amended complaint was filed. The plea of not guilty was interposed. Issue was joined. A jury was waived, and the matters of law and fact were submitted to the court, and resulted in a finding for the plaintiff, and assessing his damages at $125. The defendant moved the court to set aside its finding, as contrary to the law and the evidence, and grant it a new trial, which motion the court overruled, and entered judgment for the plaintiff. The defendant excepted, and took a bill of exceptions, setting forth the evidence introduced upon the trial of said cause; and thereupon the defendant applied for and obtained this writ of error.

Now, the injuries complained of occurred at different times. The evidence shows that about the 15th day of December, 1892, the plaintiff found one of his work oxen had been killed, about 100 yards below the Vinson switch, on the Norfolk & Western Railroad, in Logan county, W. Va. The steer was badly bruised up, and some of its limbs broken, and it was lying by the side of the railroad track. He did not see it killed. It was worth $40. This was all of the evidence adduced in regard to the killing of this steer. The testimony is entirely silent as to the circumstances under which it was killed. So far as appears, it may have been killed in the night, when it could not have been seen. It may have come suddenly onto the railroad track, and no negligence could properly have been imputed to the defendant; and the burden of proving negligence rests upon the plaintiff, so that, as to this steer, the court surely would not be warranted in assessing any damages against the defendant. Another one of plaintiff's steers was found dead by plaintiff, lying near the railroad track, about two weeks after the first one was killed, at the Breeden switch, in said county, on the line of said railroad. This steer had both of its hind legs broken, and was lying on the switch. He identified the steer, but knew nothing of the circumstances attending the killing. A witness, however, by the name of Ferguson, who resides near the Breeden switch, states that some time in January, 1893, he saw an ox which belonged to the plaintiff struck by a train near said switch; that he heard the train coming down the creek, and looked out of the window of his house, and saw some cattle standing near the track; that one of plaintiff's steers was struck and thrown off of the main track onto the switch. It was badly crippled, but not killed, and shortly afterwards it was buried by the railroad hands working on that section. This train whistled just before or about the time it came in sight, and was running fast. He heard but the one whistle, which sounded like it was for a whistle post. If any other alarm was given before the steer was struck, he did not hear it. He was about 50 feet from the track where the steer was struck. That stock could have been seen about 175 or 200 yards from the direction of the approaching train. It was a passenger train, and did not appear to slacken its speed either before or after striking the steer. This occurred in the evening. Now, it will be perceived that the cattle, when seen by the witness Ferguson, were not on the track, but were standing near it. He was only 50 feet away, and could see the position of the cattle. At what time this steer came onto the track, so as to be in the way of the train, does not appear. He may have been alarmed by the whistle or the noise of the approaching train, and have attempted to cross the track. At any rate, he went on to it, and his hind legs being broken would indicate that he was moving along the track in front of the train, or attempting to leave it. How near the train was when this occurred does not appear, but it must have been very near, as it was a passenger train, and was approaching rapidly, while the ox was changing his position from near the track onto the track itself. From this testimony, we may readily infer that, when the cattle were first seen by the trainmen, they were near the track, but not on it, as Ferguson so places them when he heard the whistle of the rapidly approaching train. The cattle could have been seen, say, for 200 yards; Ferguson says, from 175 to 200. A train running at the rate of twenty-five miles an hour would run 200 yards in about 15 seconds, which would allow the steer but a quarter of a minute to change his position after the train came in sight; and, as the engineer states, the train could not have been stopped if he had had the entire 200 yards in which to stop after the steer came on the track, but, so far as appears, he must have stepped on the track immediately in front of the train, and no amount of diligence on the part of those in charge of the train could have prevented the collision or the death of the steer. Under these circumstances, we think the court erred in finding against the defendant the value of this steer.

About the 15th of January, 1893, the plaintiff had another steer killed, and a fourth one crippled, at or near Vinson switch, in said county. He did not see it done. The one killed was found lying near the track, and the crippled one was also found near the railroad track. The one killed was worth $40, and the damage done the crippled one was at least $25. The only testimony in regard to the circumstances of this last occurrence is that detailed by one William Kirk, who states that he was working near said Vinson switch, hauling saw logs; that a short time before the killing of this last steer and crippling another at said switch, about the 15th day of January, 1893, some salt had been used at said switch, and it attracted the cattle which were being used there to haul saw logs; that the railroad at that point, and for some distance above and below, was not inclosed in any way, there being no station or depot, only a switch to receive saw logs on the cars; that, on that evening, he noticed the cattle at the switch, licking where the salt had been used, and he drove them away, fearing a train would come along and kill some of them. After driving them away, he returned to his log shanty, on the opposite side of the creek. A few moments afterwards he heard a train coming down the creek, and stepped out of his shanty, and saw the engine run in among the cattle, which had returned and were again licking salt at the switch. He went across to the railroad track, and found one ox

killed, and one crippled, both of which belonged to plaintiff. He describes the injuries received by the cattle, and says they were both found near the switch, and were part of the cattle which he had a short time before driven away from the switch. This was at or near dusk. The train consisted of a locomotive, baggage car, and two passenger coaches, and was running about twenty-five miles an hour, and, after striking the cattle, kept on at the same rate without stopping. Stock could have been seen a distance of about 200 or 300 yards on the track from the direction in which said train was approaching. If any alarm was sounded by either bell or whistle, he did not hear it. Now, it will be perceived that there is no evidence that these cattle were on the track at the time this train came in sight of the switch. They had been driven away by the witness Kirk a few minutes before, but when they returned he does not know, and does not state. He states that he saw the engine run in among the cattle when he stepped out of his shanty, but when they returned he does not know or say. So far as the evidence shows, the cattle may have gone on the track immediately in front of the approaching train. If they had been on the track sooner, it must be presumed that self-preservation, if nothing else, would have prompted the trainmen to do their duty by sounding the alarm; and the fact that no alarm was sounded strongly indicates that nothing was seen on the track; and it is incumbent on the plaintiff to show that the cattle were on the track, and were killed and crippled by the negligence of the defendant.

It is contended by counsel for the defendant in error that the use of salt in thawing out the switches, and thus preventing the accumulation of ice from throwing the train from the track or creating such a liability, which had the effect of attracting cattle to the switch, was negligence on the part of the plaintiff in error, and cites *Brown* v. *Hannibal & St. J. R. Co.* 27 Mo. App. 394, and *Morrow* v. *Hannibal & St. J. R. Co.* 29 Mo. App. 432, in support of his contention. An examination of said authorities however shows a very different state of facts. In the first named case the railroad company allowed quantities of salt to be piled on and near its track, and to remain there after it knew the salt was there, by reason of which a horse was attracted to it and killed. In the second case, several merchants had a refrigerator near the railroad track, and the brine running from said refrigerator caused the ground near the railroad to be saturated with brine, which attracted a cow to the track, which was killed. It was shown that the railroad had notice, and had neglected to take any steps to correct it, and this was held to be negligence on the part of the railroad, and that it was liable. It is, however, shown in the case under consideration that the use of salt at switches is an absolute necessity, to protect the lives of passengers and others that travel on railroad trains, and not to use it would, in case of accident caused by such failure, be regarded as an act of negligence. In the case of *Blaine* v. *Chesapeake & O. R. Co.* 9 W. Va. 252 (point 5 of syllabus), this court held: "There is no law in this state, of general operation, requiring any person to fence his land, uninclosed; but the person who leaves his lands uninclosed takes the risks of intrusions thereon, by the domestic animals of others running at large, and the owner of such animals, in allowing them to run at large, takes the risk of their loss, or of injury to them by unavoidable accident from any danger into which they may happen to wander." And in point 12 the law is thus stated: "Where a railroad company leaves its railroad uninclosed, through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railway track, it is the duty of the railroad company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals, when found in the way of a train on the road. The first and paramount duty of the agents of the company is a due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care; and, so far as consistent with its paramount duty, they are bound to the exercise of what, in that peculiar business, would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road, and, if the servants of the railroad company in charge of a train can, by the exercise of ordinary care, see and save domestic animals which have wandered on the railroad, it is their duty to do so, and for any injury to animals arising from a neglect of such care the company is liable in damages to the owner." See also *Baylor* v. *Baltimore & O. R. Co.* Id. 271, where this court held it to be the duty of the servants of the railroad company, so far as consistent with their other and paramount duties, to use ordinary care to avoid injuring cattle on the track. They are bound to adopt the ordinary precautions to discover danger, as well as avoid its consequences after it becomes known. And, applying these principles to the facts and circumstances of this case, we conclude that the court erred in fixing any liability upon the defendant by reason of imputed negligence upon its part.

On appeal, however, to the circuit court, the plaintiff filed an amended complaint, in which he alleged that the defendant, on the last day of January, 1893, unlawfully killed and appropriated to its own use three oxen of the plaintiff, of great value, to wit, of the value of $125; and the testimony shows that one of said oxen was lying on the Breeden switch, with both of its hind legs broken; and, as it was in good order, he proposed to take charge of it, and use it for beef, but the section foreman refused to let him have it, and the steer was buried by said foreman, and workmen under his control. The witness also states that this steer was worth $60; but as we cannot say whether this valuation applied to the steer in its crippled and mutilated condition, to the value of its carcass for beef, or to the steer as it stood on the railroad when struck by the train, we are of opinion that the circuit court had before it no data by which to determine the value of said steer; and while we are of opinion that the plaintiff was entitled to something for the dead carcass of the steer demanded by him, and refused by the section boss, we cannot determine the amount, and the court below was

not warranted on the evidence in fixing any amount.

For these reasons *the judgment complained of must be reversed*, the finding set aside, and the case remanded.

Brannon, J., concurring:

We hold the company not responsible for killing or crippling the cattle, but we think it responsible for not yielding to the owner one of the cattle after it was killed, and demanded by the owner, and, as the complaint called for damages for its conversion, the plaintiff ought to have judgment for that much for its conversion. But no evidence showed its value when dead, and therefore only nominal damages could be given for it. As we do not know how much to subtract for that steer from the amount of damages found against the company, and could only subtract nominal damages, we cannot say the amount of grievance to the company is reduced below the jurisdictional amount of $100.

Dent, J., dissenting:

I dissent from the conclusion in this case, for the reason that in my view of it the plaintiff was entitled to recover not less than $30, which would reduce the residue of the recovery below the jurisdiction of this court, and therefore the appeal, in any event, should have been dismissed for want of jurisdiction, in accordance with the settled rule established in the case of *Love* v. *Pickens*, 26 W. Va. 341, as follows, to wit: "To give this court jurisdiction in a cause involving matters simply pecuniary the record must show not only that the party complaining has been prejudiced by the decree or judgment of the inferior court, but also that the amount in controversy in this court exceeds the value of $100, exclusive of costs." In short, every presumption in this court is in favor of the judgment, and the duty devolves upon the party complaining to show that he is prejudiced in excess of $100. If he falls one cent short, he is not entitled to his appeal. *Greathouse* v. *Sapp*, 26 W. Va. 87; *Neal* v. *Van Winkle*, 24 W. Va. 401; *Bee* v. *Burdett*, 23 W. Va. 744; *Rymer* v. *Hawkins*, 18 W. Va. 309.

But the merits of this case are with the plaintiff. It is the law that in the country where the railroad is not fenced, and cattle are legally permitted to run at large, the company must use at least ordinary care to prevent the injury of stock wandering on the track. The use of salt or anything else that attracts stock upon the track is not ordinary care. If the company would merely scatter the salt along its tracks without excuse for so doing, no one would for an instant pretend that such conduct was not negligence, in the highest degree criminal, creating a nuisance or trap to lure such domestic animals whose systems crave salt to their certain destruction. The company having done this the question is, Has it furnished an unavoidable, justifiable, and reasonable excuse for so doing? It introduced a witness Moloney, who testified, "that he was in the employ of the defendant as road supervisor on the Kenova division of said railroad, from Kenova to the mouth of the Pigeon; that the road where the injuries complained of occurred was under his supervision; that in cold, frozen, snowy weather the frogs at switches along said line of railroad would get frozen up, and would become dangerous to run trains along said road; that there had been some cold, snowy weather in December, 1892, and that he applied to the superintendent of the division for salt to apply to said switches, by which means they could be kept open, to avoid danger to running trains; that the superintendent refused to send it, unless it was absolutely necessary to use it, as the use of it would attract stock; that some time in January, during a severe spell of weather, it became absolutely necessary to use salt, for the safety of the trains, and several barrels were sent to him to use along his division, and that he distributed it along the line of said road, to be used at the switches and stations, and it was so used, part of it being used at the said Binson switch prior to the killing and crippling of the steers, about January 15, 1893; that the use of said salt was absolutely necessary for safety to trains; and that there was no substitute for it." This testimony shows that the company were fully aware of the danger of using salt, but the witness says that its use was absolutely necessary to keep the frogs and switches free from ice and snow in cold whether, and that there was no substitute for it. Admitting this to be true, then it was the duty of the company, in using it, to provide against the danger thereof, by providing, by necessary fencing or watchmen, to keep stock away from it, not only for the safety of the stock, but of the trains and passengers under its control; for stock, dead or alive, may derail a train as well as ice or snow, and, if a train should have been thus derailed, could the company have escaped liability to injured passengers by showing that the salt which attracted the stock, and caused the accident, was necessarily used in providing for their safety? Such a plea would be treated as ridiculous, on the theory that the company, in providing against a lesser evil, had no right to incur a greater, but that it also should have provided against the greater if it was in its power to do so; and it certainly was at small expense, comparatively, at least, to the risk it was assuming. In deciding such questions because of the testimony of witnesses, the court cannot devest itself of good common sense. It is plain to be seen that while the witness says the use of the salt was absolutely necessary and that there was no known substitute for it, yet that the real object in its use was to avoid the additional expense caused by the necessary labor involved in keeping the frogs and switches free from ice and snow in cold weather. In other words, it was a "penny wise and pound foolish" policy, causing the unnecessary destruction of other people's property, and increasing the dangers to its trains and passengers, which could have been avoided by a small outlay, less than the expense of defending this suit; for it alone will cost the company more than sufficient to have kept these particular frogs and switches free and clean from snow and ice, and properly lubricated, by manual labor, for many winters,—or if the salt was absolutely necessary, which sounds like mere foolishness to an untutored savage,

at least, to have kept a man on guard for many cold nights and days, and secured the plaintiff and others from the loss of their stock, and avoided a decision by this court of that as law which must be repugnant to the sense of justice of every reasonable man not learned in the intricacies of railroad jurisprudence. To say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather is to close our eyes to ordinary human experience. But to say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather without an additional expense for manual labor and proper lubricants is, no doubt, true. If the company adopts the cheaper of two modes to accomplish the same purpose, it is no more than justice to require it to provide against the increased danger, occasioned by its choice, to the property of others. If, necessarily, I must maintain for my own benefit that which may be a nuisance to my neighbors, and I can provide against its dangerous character, it is my duty to do so, or be responsible to my neighbor for his loss resulting from my neglect. The company knew that the use of the salt in this instance would result just as it did. It, by a small additional expenditure of labor and money, could have provided against it. This it failed to do, and therefore it should be made to pay the damage. In my opinion, the judgment is just, and should be affirmed.

MISSOURI SUPREME COURT.

CARSON-RAND COMPANY, *Appt.*,
v.
Meyer J. STERN *et al.*, *Respts.*

(129 Mo. 381.)

An action by a foreign corporation which had not at the time of commencing it complied with the statutory requirements to enable it to do business in the state will not be dismissed on motion, if at the time of the motion it has so complied, under a statute providing that foreign corporations which have not complied with the requirements cannot "maintain" any suit or action in the state.

(June 25, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendants in an action brought to recover the amount alleged to be due for goods sold and delivered. *Reversed.*

The facts are stated in the opinion.

Messrs. **Boyle & Adams** and **William A. Kinnerk**, for appellant:

The act of April 21, 1891, is highly penal and must be strictly construed.

State, Clinton County, v. *Chicago, R. I. & P. R. Co.* 19 Mo. App. 104; *Parish* v. *Missouri, K. & J. R. Co.* 63 Mo. 284; *State* v. *Bryant*, 90 Mo. 534.

The agreed facts show no failure to comply with the conditions of this law or no failure to comply with this act.

Livingston v. *Stickles*, 7 Hill, 255; *Catlin* v. *Springfield F. Ins. Co.* 1 Sumn. 439; 1 Platt, Leases, p. 116; *Jackson, Stevens*, v. *Silvernail*, 15 Johns. 278.

Plaintiff complied with the requirements of § 2 of the act after instituting this suit and before the return day and before the defendant filed the motion to dismiss; and this was sufficient to entitle it to maintain this suit.

Towne v. *Bowers*, 81 Mo. 497; *West* v. *Citizens Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294; *Catlin* v. *Springfield F. Ins. Co. supra;* Martindale, Cont. §§ 99, 126, 335, 339; *Rush* v. *Frost*, 49 Iowa, 183; *Ball* v *Keokuk & N. W. R. Co.* 71 Iowa, 306; *Blood* v. *Harrington*, 8 Pick. 553; *Huttig Bros. Mfg. Co.* v. *Denny Hotel Co.* 6 Wash. 123.

Mr. **Gustave L. Stern**, for respondents:

A corporation created by one state can exercise none of the functions or privileges conferred by its charter in any other state of the union except by the comity and consent of the latter.

Paul v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 28 L. ed. 1084.

The act of April 21, 1891, is not a violation of art. 1, § 8, cl. 3, of the Constitution of the United States, declaring that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Davis & R. Bldg. & Mfg. Co. v. *Dix*, 64 Fed. Rep. 406; *Pembina Consol. Silver Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649.

The act of April 21, 1891, is not a violation of art. 4, § 2, cl. 1, of the Constitution of the United States declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Corporations are not citizens within the meaning of this clause of the Constitution.

Paul v. *Virginia*, and *Pembina Consol. Silver Min. & M. Co.* v. *Pennsylvania, supra; Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972.

The appellant failed to comply with the requirements of the act of April 21, 1891, before filing this suit; the suit was therefore properly dismissed upon the motion of defendants.

Pierce Steam Heating Co. v. *A. Siegel Gas Fixture Co.* 60 Mo. App. 148; *Williams* v. *Scullin*, 59 Mo. App. 30; *Neuchatel Asphalt Co.* v. *New York*, 9 Misc. 376; *Walter A. Wood Mowing Mach. Co.* v. *Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Domestic Sewing Mach. Co.* v. *Hatfield*, 58 Ind. 187; *Daly* v. *National L. Ins. Co.* 64 Ind. 1; *Singer Mfg. Co.* v. *Brown*, Id. 548;

NOTE.—As to the exclusion or recognition of foreign corporations, see extensive *note* to Cone Export & C. Co. v. Poole (S. C.) 24 L. R. A. 289.

Christian v. *American Freehold Land Mortg. Co.* 89 Ala. 198; *Dundee Mortg. & T. Invest. Co.* v. *Nixon*, 95 Ala. 318; 2 Cook, Stock & Stockholders, 3d ed. § 694, and cases cited in note 2; 2 Morawetz, Priv. Corp. 2d ed. §§ 661–665, 959, 960, and cases cited; *Travellers' Ins. Co.* v. *Heath*, 95 Pa. 333; *Cincinnati Mut. Health Assur. Co.* v. *Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Haworth* v. *Montgomery*, 91 Tenn. 16; *Cary-Lombard Lumber Co.* v. *Thomas*, 92 Tenn. 587.

This suit was properly dismissed even though respondent complied with the law subsequent to the filing thereof. The suit was prematurely brought and must abate.

Neuchatel Asphalt Co. v. *New York, Cary-Lombard Lumber Co.* v. *Thomas, Haworth* v. *Montgomery*, and *Singer Mfg. Co.* v. *Brown, supra; Farrior* v. *New England Mortg. Secur. Co.* 88 Ala. 275.

Barclay, J., delivered the opinion of the court:

Plaintiff brought an action against defendants August 25, 1893, to recover upon certain notes and accounts for goods sold and delivered, amounting to a total of more than $3,400. The action was in usual form, accompanied with an attachment under which some property of defendants was seized on the same day.

The summons was served on defendants, September 11, 1893.

The writs were returnable to the October term, 1893. At that time the defendants appeared, and moved the court to dismiss the cause on the ground that the plaintiff had omitted to comply with the conditions prescribed by the act of 1891, concerning foreign corporations (Laws 1891, p. 75). The motion specified the particular facts, showing the alleged omission. But it is not necessary to recite them at the moment.

The trial court sustained the motion and dismissed the cause. The plaintiff appealed after the usual formalities.

The motion, which formed the basis of the judgment on the circuit, was submitted on an agreed statement of facts. We need not quote it at length. The substance of it is that the plaintiff was a corporation, duly organized under the laws of Iowa, at all the dates mentioned in the case, and that it had not complied with the requirements of § 2 of the act of 1891, before beginning this action.

After the action was brought, the company did comply fully with said act in every particular, September 6, 1893, long before any motion, answer or plea was filed by defendants. On the date last mentioned the company received from the secretary of state the certificate of authority to do business, described in the 2d section of the act.

On these facts the question is whether or not the omission of the company to meet those requirements, before action brought, totally defeats its right to maintain the action.

The terms of the statute thus brought under construction are found in the 3d section, which provides that all such corporations, which shall neglect or fail to comply with the conditions of the law, shall be subject to a fine of not less than $1,000 to be recovered before any court of competent jurisdiction; ". . . in addition to which penalty, . . . no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort."

At the time the motion to dismiss was filed, plaintiff had fully met the demands of the law. But it did not meet them before beginning the action. That is all there is in the objection to the proceeding as made by the motion to dismiss.

The statute does not, in express terms, forbid the bringing of an action by such a company. It declares that it cannot "maintain" an action, not having complied with the law.

What was the paramount object of the enactment? Not to exclude such concerns from participation in the business done in Missouri; but to compel a compliance with certain conditions by them. Those conditions were imposed with a view, probably, to please foreign and domestic companies on a footing of equality in the field of commerce.

The object of the law was rather to induce observance of those conditions than to deprive any foreign corporation of a right of action, or other property.

Keeping the general purpose of the law in view, what are we to understand by the word "maintain," as used in the 3d section? As its structure suggests, it signifies, literally, "to hold by the hand;" hence (in ordinary use) "to uphold, to sustain, to keep up." While in pleading it is defined to mean, "to support what has already been brought into existence." Anderson, Law Dict.

It is nothing new to the law that a party may maintain an action, although at its outset a legal barrier to it existed. This is illustrated by the law touching the defense of another action pending, which defense, though good when put of record, may be defeated by a dismissal of the prior action and a statement of that fact by way of reply to the answer containing that defense. *Warder* v. *Henry* (1893), 117 Mo. 530; 1 Enc. Pl. & Pr. 755.

It is not necessary at this time to consider whether this statute should receive a broad or narrow construction at our hands, or whether it should be viewed as penal or remedial. It certainly must have a fair and reasonable reading, and should not be enlarged beyond its natural meaning to accomplish the forfeiture of a right of action.

No corporation, having failed to obey this law, can maintain an action. The corollary is that, when it has complied, it may maintain the action. The prohibitory command does not reach the right to begin the action. We should not broaden the language to destroy that right. There is a well defined distinction between beginning and maintaining an action, viewed with reference to the facts of the controversy now before us.

We are bound to assume that the word "maintain" was chosen to express the exact shade of meaning intended by the lawmakers. It does not, with its present context, seem to us to include also the word "begin." *Philpott* v. *Jones* (1834) 2 Ad. & El. 41.

We are of the opinion that the learned trial judge was in error in sustaining the motion to dismiss, under the terms of the law, without entering into any of the constitutional questions as to its validity.

The judgment is reversed and the cause remanded for further proceedings.

Brace, Ch. J., and **Macfarlane** and **Robinson,** JJ., concur.

NEBRASKA SUPREME COURT.

Elmer CARPENTER *et al., Plffs. in Err.,*
v.
Mary E. LINGENFELTER *et al.*

(42 Neb. 728.)

***1. When a party, on cross-examination, asks a witness an immaterial or irrelevant question,** he is bound by the evidence so elicited, and cannot rebut it by other witnesses.

2. The doctrine of accession of property applied where one has wilfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article, and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus ex-

* Headnotes by NORVAL, Ch. J.

NOTE:—*Title by accession to crops, fruit, and timber, wrongfully severed.*

I. *General doctrine.*
II. *When severed under bona fide belief of title.*
III. *When severed and converted with wrongful intent.*
IV. *Distinguishable though changed or mixed.*
V. *When article changed by process.*
VI. *Position of purchaser.*
VII. *When title in or derived from the states or the United States.*

Upon the question of injunction against trespass to cut timber, see *note* to Carney v. Hadley (Fla.) 22 L. R. A. 233.

As to liability of tenant in common to action of trover for crops or other property, see note to Waller v. Bowling (N. C.) 12 L. R. A. 261.

As to fruit on overhanging branches, see *note* to Hickey v. Michigan C. R. Co. (Mich.) 21 L. R. A. 729.

The doctrine as applied in the principal case of CARPENTER v. LINGENFELTER is in accord with the prior decisions upon the question, and fully establishes the principles therein laid down.

I. *General doctrine.*

Accession has been defined as a manner of acquiring property in a thing which becomes united with that which a person already possesses. Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46, 49.

In Zeller v. Southern Yacht Club, 34 La. Ann. 837, 838, it is said that accession is that which is united to, or incorporated with, the property, and under certain conditions belongs to the owner of the property to which it has become united, the term being generally applied to what is united to the property by artificial means.

And in speaking of rights by "accession" the authorities generally mean accession of other materials as well as skill or labor. Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

Title to personal property may be acquired by accession, but to acquire title by accession the accessory thing must be united to the principal so as to constitute part and parcel of it. Mather v. Chapman, *supra.*

The general rule is, that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. Peirce v. Goddard, 22 Pick. 559, 33 Am. Dec. 764.

And the title applies not only to what is produced by one's own property, but also to that which is united to it, either naturally or artificially. Eaton v. Munroe, 52 Me. 63.

The right may accrue whenever materials belonging to several persons are united by labor into a single article; and the ownership of an article so formed is in the party to whom the principal part of the materials belonged. *Ibid.*; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582.

The rights of the parties, however, are made to depend to a great extent upon the intent with which the conversion of the property has been brought about. Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

The general doctrine of accession, and the foundation upon which it rests, is, Did the party have knowledge that he was violating the rights of another, and deliberately disregard such rights. Baker v. Meisch, 29 Neb. 227.

The animus of the taking and conversion is an important element, and if the parties taking it did so with a knowledge that they had no right, they obtain no title, although by the manufacture of such article they change its identity. Lake Shore & M. S. R. Co. v. Hutchins, *supra.*

Therefore the motive which prompted the act of the defendant, whether bona fide, or actuated by wilfulness and a disregard of the rights of others, should be considered. Heard v. James, 49 Miss. 236.

And this is so for the reason that the law makes a distinction, in acquiring title to property by accession, between a wilful and involuntary wrongdoer, and, as it will not permit any man to take advantage of his own wrong, so the former can never acquire any title, however great the change wrought in the original article may be, while the latter may acquire such title. Gray v. Parker, 38 Mo. 160, 166; Hyde v. Cookson, 21 Barb. 92, 104.

There are two comprehensive and fundamental rules pervading all the authorities consulted, on the doctrine of accession and of specification; from the first of which it is not known that there are any exceptions, and from the last of which, it is believed there cannot be many. These rules are: (1) That no trespasser, who takes property of another wantonly and without the owner's consent, can ever acquire a right to it, by any "accession" or "specification," whatsoever; (2) when the property of one comes to the possession of another, innocently, he may acquire the right to it, if by "accession" or "specification" *the species* be changed. Lampton v. Preston, 1 J. J. Marsh. 459, 19 Am. Dec. 104.

Every case must, however, depend upon its own peculiar circumstances, with only this guide, that the case must be an extreme one, which will authorize an exception to the general rule. *Ibid.*

In the above case it was stated that the rule for these cases was arbitrary, and must depend upon a

See also 42 L. R. A. 474.

pended his labor, the original owner to recover the value of the original article.

3. The owner of property which has been taken by another in good faith, believing he had a right to do so, may recover the value of the property at the time of the conversion, and not the value after the same has been improved by the other's labor and skill.

(November 20, 1894.)

ERROR to the District Court for Pierce County to review a judgment in favor of defendants in an action brought to recover possession of certain hay. *Reversed.*

The facts are stated in the opinion.

Messrs. **O. J. Frost, W. W. Quivey,** and **Wigton & Whitham** for plaintiffs in error.

Messrs. **G. T. Kelley, J. B. Smith,** and **Frick & Dolezal** for defendants in error.

Norval, Ch. J., delivered the opinion of the court:

This is an action in replevin by Elmer Carpenter, John Carpenter, and I. W. Peed against Mary E. Lingenfelter and D. C. Lingenfelter, to recover the possession of 157 tons of hay. The property was taken under the writ and possession thereof delivered to the plaintiffs. The defendants recovered a verdict and judgment for the value of the hay, in the sum of $350, and $5 damages for withholding possession. The plaintiffs prosecute a petition in error.

The testimony introduced by the plaintiffs tends to show that one Hugh Spencer, who was the owner of the Se. W. ¼ of Sec. 28, T. 27, R. 3, in Pierce county, by his authorized agent, R. J. Spencer, rented the same to the plaintiff I. W. Peed for the year 1889 at a rental of $25; that in April, 1890, R. J. Spencer had a conversation with Peed about renting him the land for that year, in which conversation the former told the latter that if he would pay the taxes on the quarter section he could have the use of the land for 1890, and Peed replied that he would take the land if he could keep the cattle off; that subsequently Peed made a contract

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sound discretion, exercised on the peculiar circumstances of each individual case, and that therefore a decision in one case could not be conclusive authority for any other case of different circumstances; and further, that it was not the excess of the artificial over the natural value, but the degree of such excess, that was the controlling principle in such cases, which degree was not and could not be ascertained with precision, and therefore the decision could not be expected to present an exact conformity to any well-defined principle; and further, that all that could be known was that when the disproportion of the value of the material to that of the product was so great as to impress on the mind the justice of considering the material as accessory, and the products of the operator as the substantive species, the thing belonged to the producer of the new species.

So, if the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession. *Ibid.*

But to acquire a title by accession, not only must the commixture be bona fide, but the materials, which belong to another, must be incapable of being restored to him in their original form; a material must not possess all its original distinctive qualities, as if it does there has been no specific change in the nature or elements of the thing. *Ibid.*

There is no forfeiture of ownership, except where one wilfully intermingles his property with that of another, or intermingles it so that it becomes impossible to distinguish what belongs to one and what to the other. Allen v. Kirk, 81 Iowa, 658.

Where the facts show an agreement between the plaintiff and another for the working of the land upon shares, and ouster by the defendant who harvested and removed the wheat and rye sown by the party working on shares with the plaintiff, possession being afterwards retaken by the plaintiff, it was held that replevin would not lie, but that the proper remedy was by action trespass *quare clausum fregit.* DeMott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443.

II. *When severed under bona fide belief of title.*

Where the plaintiff shows title in himself, and there is evidence leading to the conclusion that the defendant has severed the property in question in good faith, believing himself to be the owner, the question whether he so severed the property in question in good faith under the belief that he was the owner of the property should be left to the jury. Hungerford v. Redford, 29 Wis. 345.

In Gates v. Rifle Boom Co. 70 Mich. 309, where trover was brought against the company for the value of logs received from the plaintiff and delivered to parties claiming they had been cut from their lands, it was held that an instruction to the jury that if the plaintiff cut the logs innocently supposing them to be upon his own land, and mixed them with his own so that the logs cut from the owners' land could not be identified, then the owners had the right to select from the common mass a quantity of an average quality with their own equal to the quantity taken from their lands, was correct.

And in the above case it was further stated that if the plaintiff cut the logs and marked and mingled them with his own in good faith, believing them to be his own, then, if the owners took more than they were entitled to, the plaintiff might recover the excess.

So it has been held that where a person bona fide has employed materials not belonging to him in making another article, the owner of the materials has a right to claim the thing made out of them on reimbursing the price of the workmanship, but that there is an exemption where the workmanship is so important that it greatly surpasses the value of the material. Eastman v. Harris, 4 La. Ann. 193, 194.

Therefore where a party trespasses upon land of another, but in good faith, and under the supposed proper authority, takes therefrom property upon which by his own labor he bestows a value very greatly disproportionate to the value of the raw material, he acquires title by accession to the manufactured article, and the original owner can recover only the value of the material taken. Murphy v. Sioux City & P. R. Co. 55 Iowa, 473, 474, 39 Am. Rep. 175.

It has, however, been questioned whether the owner of land was not entitled to recover possession of wood cut on the same by one in possession thereof in good faith, under color of title. Kimball v. Lohmas, 31 Cal. 154.

And where the appropriation of the property of another is incidental, as through mistake of fact, and labor has in good faith been expended upon it which converts it into something entirely different and very greatly increases its value, the original article being comparatively of but little value, the title to the property will be held to pass to the per-

with one Kidd, by which the latter agreed to keep the cattle off the land; that Peed also paid the taxes about October 1, the tax receipt being delivered to R. J. Spencer at his special request; that in June or July, 1890, Peed sublet the land to the Carpenters, they agreeing to cut the grass growing thereon, stack and bale the hay, and deliver to Peed one half thereof, on board the cars; that the Carpenters commenced cutting the grass and making the hay in controversy during the latter part of August, and had it all in stack by September 25; that in November following, after they had baled a part of the hay, the defendants drove the plaintiffs off the land and took possession of the hay,—that which was baled as well as the portion which was then in stack. It further appears from the testimony that R. J. Spencer rented the land upon which the hay was made, on or about the 21st day of August, 1890, to the defendant Mary E. Lingenfelter. There is likewise in the bill of exceptions evidence tending to establish that Peed refused to take the land for 1890 upon the terms proposed by Mr. Spencer, and that, although the defendants knew the Carpenters were cutting the grass and making the hay early in September, no claim to the hay was made by the defendants until after it had been all stacked.

The first assignment of error is based upon

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son by whose labor the change has been wrought, and the original owner may recover the value of the article as it was before its conversion. Baker v. Meisch, 29 Neb. 227; Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, 523.

Where the defendant proved that he purchased the right to make the hay of one who claimed to have authority to sell the grass, and that he entered upon the land, made and removed the hay in good faith, with the belief that he had a right to do so, it was held, in an action to recover the possession of such hay brought by the plaintiff, who claimed to be the legal owner thereof, that he was only entitled to recover the value of the grass and not the value of the hay, the defendant cutting in good faith and not as a wilful trespasser, the value of the grass before it was cut being small, and the defendant's labor and time expended thereon greatly increasing its value. Lewis v. Courtright, 77 Iowa, 190.

Where the logs were cut by mistake, and the party so cutting discovered it prior to mixing such property with his own, it was held that the owner might retake his logs or a quantity of the mass sufficient to replace his loss, no matter in what place or condition they were at the time of such retaking, without being liable to pay the diference in value between the stumpage and the value at the time and place of taking. Alpin v. Burch, 68 Wis. 619. Jenking v. Steanka, 19 Wis. 127, 88 Am. Dec. 675; Mowry v. White, 21 Wis. 418; Root v. Bonnema, 22 Wis. 539; Sterns v. Raymond, 26 Wis. 74; Single v. Barnard, 29 Wis. 463; Willard v. Rice, 11 Met. 493, 45 Am. Dec. 226, to the same effect.

And in an action to recover timber which had been made into hoops, it was held that the defendant had a right to show that he had manufactured the hoops in good faith and in the belief that he had the proper authority to do so, and that if he should succeed in making that showing he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass and not in replevin. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

In Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, 523, the defendant had, by mistake and in good faith, expended labor upon a quantity of cordwood which he had taken and cut from the lands of the plaintiff and hauled and piled upon the bank of a lake, and it was held that the original owners were entitled to the same, and were not liable for the value of the labor expended upon such timber, although they availed themselves of its benefit, as the identity of the property was not destroyed, neither was it converted into an article substantially different, nor was its value greatly enhanced, the court distinguishing the case from that of Wetherbee v. Green, *supra*, upon the ground that in that case there was a great disparity in value between the standing trees and the hoops which were made from such trees.

Where industrial accessions had been made to property in good faith, by a person having the legal title to the property, so that the real owner was compelled to resort to chancery to assert his equitable title, it was held that equity, upon the civil-law rule of natural equity, would act upon, and compel the complainant to compensate the adverse party for such industrial accessions, or improvements, as a condition of granting the equitable relief asked for in the suit. Putnam v. Ritchie, 6 Paige, 390.

The rule of the civil law in regard to industrial accessions to the property of another, made in good faith by a bona fide possessor, has not been adopted in England or in the state of New York, except so far as to allow him to offset or recoup, in damages, the value of such industrial accessions against the owner's claims for rents and profits during the occupancy of the person who made the improvements upon the property. *Ibid.*

A purchaser when in possession of land under a contract of purchase on time may use the property as his own, as he would if he had the title, the only remaining interest of the vendor being a right to have the purchase secured, and therefore the purchaser in possession cannot be looked upon as proceeding tortiously *per se*, so that all who purchased wood, boards, etc., of him, taken from the land, would be liable to the owner of the soil for any value, much less that increased by the labor of the purchaser; and therefore if the articles so sold were raised and sold under such circumstances the vendor has no right to recover such articles in trover. Woolsey v. Seely, Wright (Ohio) 360.

In Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663, the action was brought to recover possession of grain sown and harvested by the defendant upon lands to which he claimed title, and of which the defendant had the actual adverse and exclusive possession, and it was held the action would not lie.

See also Lampton v. Preston, 1 J. J. Marsh. 445, 19 Am. Dec. 104, *supra*, I.; Newton v. Porter, 69 N. Y. 133, 136, 25 Am. Rep. 152, 5 Lans. 425, *infra*, IV.; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, *infra*, III.

As to measure of damages in such cases, see Bailey v. Chicago, M. & St. P. R. Co. (S. D.) 19 L. R. A. 653.

III. *When severed and converted with wrongful intent.*

By the common law of England, as well as by the civil law, a trespasser who wilfully takes the property of another can acquire no right to it on the principle of accession, but the owner may reclaim it whatever alteration or form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state, and even then, the trespasser by the civil law can acquire no right by accession, unless the materials have been taken away in ignorance of their being the property of another. Peirce v. Goddard, 22 Pick. 559, 33 Am. Dec. 764.

the ruling of the trial court in admitting the evidence of D C. Lingenfelter, to the effect that, upon the trial in the county court of Pierce county of the case of *State* v. *Lingenfelter*, Elmer Carpenter, one of the plaintiffs herein, testified that he did not know who was the owner of the S. W. ¼ of Sec. 28, T. 27, R. 3. This evidence was offered and admitted for the purpose of impeachment, by showing that Mr. Carpenter had testified differently in the county court from what his testimony was on the trial of this case concerning his knowledge of the ownership of the land upon which the hay in dispute was made. Whether Mr. Carpenter knew or did not know who owned the land was not relevant to any issue in the case, since it in no manner tended to prove who had the right of possession to the property in controversy at the commencement of the action. The Carpenters claim the right to the hay as sublessees from Mr. Peed, who, it is insisted, is the tenant of Spencer, the owner of the land. The defendant Mary E. Lingenfelter claims under a lease from Spencer. One of the main points in the case, and the one to which the testimony was largely directed, was whether Spencer had rented the land to Peed for the year 1890, and the testimony above referred to sheds no light whatever upon the subject. It is only as to matters relevant

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It is an elementary principle of the law that no man can be deprived of his property except by his own voluntary act, or by operation of law, and therefore the thief who sells a chattel or the trespasser who takes it by force acquires no title by such wrongful taking, the subsequent possession by the thief or trespasser being a continuing trespass, and if, during its continuance, the wrongdoer enhances the value of the chattel by labor and skill, as by sawing logs into boards, splitting timber into rails, the manufactured article belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. Silsbury v. McCoon, 3 N. Y. 379, 381, 53 Am. Dec. 307.

In Puffendorf it is stated that if a man, out of wilful and designed fraud, puts a new shape on my matter, that he may by this means rob me of it, he neither gains any right over the matter by this act, nor can demand of me a reward for his labor, any more than a thief who digs through my walls can desire to be paid for his great trouble in making a new door into my house. Puffendorf, Law of Nature, B. 4, C. VII., § 10, p. 186.

The acknowledged principle of the civil law is, that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking, or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property. Silsbury v. McCoon, 3 N. Y. 378, 387, 53 Am. Dec. 307; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. To the same effect are the cases of Hyde v. Cookson, 21 Barb. 104; Baker v. Wheeler, 8 Wend. 508, 24 Am. Dec. 66; Newton v. Porter, 69 N. Y. 136, 137, 25 Am. Rep. 152; Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204; Betts v. Lee, 5 Johns. 349, 4 Am. Dec. 368; Snyder v. Vaux, 2 Rawle, 427, 21 Am. Dec. 466; Riddle v. Driver, 12 Ala. 590; Martin v. Porter, 5 Mees. & W. 352, 2 Horn & H. 70; Wild v. Holt, 9 Mees. & W. 672, 1 Dowl. N. S. 876; Dunn v. Oneal, 1 Sneed, 106, 60 Am. Dec. 140.

And this is so no matter whether the property be movable or immovable, the owner having the right to that which is united to it by accession or adjunction as against a trespasser. Mitchell v. Stetson, 7 Cush. 435, 439.

The above principles are borne out by the following cases. Eastman v. Harris, 4 La. Ann. 193, 194; Ricketts v. Dorrell, 55 Ind. 470, 474; Reese v. Jared, 15 Ind. 142, 77 Am. Dec. 88; Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

There is no way in which an innocent person can be permanently and legally deprived of his property against his will by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person. Shoemaker v. Simpson, 16 Kan. 43, 48.

If the specific qualities and distinctive character remain unchanged, a trespasser by the mere modification of the material with a knowledge that it was not his cannot devest the original owner of his rights therein. Burris v. Johnson, 1 J. J. Marsh. 196.

The owner may reclaim it so long as its identity is not changed by conversion into some new product. Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, 523.

If the original owner can prove that the improved article was made from the original material the trespasser can acquire no property therein. Murphy v. Sioux City & P. R. Co. 55 Iowa, 473, 474, 39 Am. Rep. 175; Silsbury v. McCoon, 3 N. Y. 379, 381, 53 Am. Dec. 307.

And if it can be identified so that it can be redelivered, the owner may recover it no matter whether it be changed in form or addition in value by the labor of the wrongdoer. Weymouth v. Chicago & N. W. R. Co. 17 Wis. 550, 84 Am. Dec. 763; Williams v. McClanahan, 3 Met. (Ky.) 420, 423.

The claim of the original owner extends even to the result of the thief's labor upon the ground that the thief is estopped from setting up any claim by virtue of his own wrong. Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

And the owner may pursue and reclaim it specifically by whatever remedy the law gives him for that purpose. Single v. Schneider, 24 Wis. 299.

There must, however, be no obstruction of the substantial identity. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

In Campbell v. Erie R. Co. 46 Barb. 556, it is stated that when property has been feloniously, tortiously, or fraudulently obtained, whenever the owner or creditor is entitled to reclaim, seize, or attach the property itself, if found and identified, the products or the proceeds of, or the substitute for, the original property or thing still follow the nature of the property or thing itself; and this right to take it as a substitute for such thing remains as long as the property can be traced, and only ceases when the subject is turned into money and mixed and confounded in the general view of the same description of property or its identity is destroyed.

A trespasser cannot complain if the owner elects to take his property if he can find it. Gates v. Rifle Boom Co. 70 Mich. 309.

Therefore a wrongdoer cannot, by changing the form of another's property, change the title Single v. Schneider, 24 Wis. 299; Brown v. Sax, 7 Cow. 95.

A stranger to the title, who is a mere trespasser, sowing crops upon the land of another without authority, acquires no title to such crops which belong to the owner of the soil. Freeman v. McLennan, 26 Kan. 151.

to some issue involved in a case that a witness can be contradicted for the purpose of impeachment. This rule is too well settled to require the citation of authorities to sustain it. Another familiar rule of evidence is that when a party is permitted, on cross examination, to ask a witness an immaterial question, he is bound by the evidence so elicited, and cannot rebut it. The statement made by the witness, which it was sought to contradict by other witnesses, was brought out by the defendants upon cross-examination. It follows that it was error to allow the defendants to introduce evidence to impeach Elmer Carpenter upon a matter collateral to the issue involved. For the reason stated above, it was likewise error to admit immaterial evidence offered by the defendants for the purpose of impeaching the witness John Carpenter.

Exceptions were taken to the giving of the sixth and seventh paragraphs of the court's charge to the jury and in the refusing to give plaintiffs' instruction No. 1. For convenience, these instructions will be considered by us at the same time. The sixth and seventh instructions given by the court on its own motion are as follows: (6) "To constitute a valid contract, the parties thereto must have agreed upon the

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So, a trespasser cannot convey any title where the property remains *in specie* and can be identified. Rockwell v. Saunders, 19 Barb. 484.

And this is so for the reason that a wilful trespasser has no rightful possession against the true owner. Galvin v. Bacon, 11 Me. 28, 30, 25 Am. Dec. 258; Bryant v. Ware, 30 Me. 295; Nesbitt v. St. Paul Lumber Co. 2 Minn. 491.

And there is no rule of law which will preclude the owner from recovering the property itself or its value. Strubbee v. Trustees Cincinnati Railway, 78 Ky. 481, 39 Am. Rep. 251, 253; Nesbitt v. St. Paul Lumber Co. *supra*.

So he can maintain an action for its value against the one converting it. Dawson v. Powell, 9 Bush, 663, 15 Am. Rep. 745.

Therefore where timber is cut by a trespasser without the owner's assent, he may claim it as part of the freehold while it remains upon his premises. Altemose v. Hufsmith, 45 Pa. 121; Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612.

And a trespasser entering land and cutting the grass thereon acquires no title to such grass, or the hay made therefrom, as against the lawful owner. Lindsay v. Winona & St. P. R. Co. 29 Minn. 411, 43 Am. Rep. 228; Murphy v. Sioux City & P. R. Co. 55 Iowa, 473, 39 Am. Rep. 175.

And any removal of the hay from the land would, under the Iowa Code, § 3983, constitute a crime. Murphy v. Sioux City & P. R. Co. *supra*.

But it has been held that if a trespasser enters land adjoining a railroad and sows crops thereon he is the owner of such crops. Lindsay v. Winona & St. P. R. Co. *supra*.

Where a person claiming lands which really belonged to another sold the timber growing thereon, and the purchaser cut and removed the same, it was held that the person so selling was liable to the owner as a principal trespasser. Dreyer v. Ming, 23 Mo. 434.

So, in Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466, the defendant, a trespasser, had converted the plaintiff's trees into rails and posts and the plaintiff was held entitled to recover them in replevin, as a wilful trespasser cannot acquire title to property merely by changing it from one article into another, as by working trees cut down into shingles, or into cordwood, logs, or rails.

In Betts v. Lee, 5 Johns. 349, 4 Am. Dec. 368, it was held that the title to trees cut down and converted into timber by a trespasser gave him no title to the shingles made out of such timber, the act of cutting down the trees and sawing them into lumber and shingles being considered wrongful, the defendant being a trespasser.

In Davis v. Easley, 13 Ill. 192, trees had been wrongfully cut and converted into boards, and the owner of the land was held entitled to replevin such boards. To the same effect, Ricketts v. Dorrell, 55 Ind. 470.

In the case of Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204, the defendant cut timber upon the plaintiff's land and converted it into coal without the consent or knowledge of the owner. Although the timber by being cut and converted into coal had lost its primitive form, yet the identity of the original material was ascertained or admitted, and so plaintiff recovered.

So, in Riddle v. Driver, 12 Ala. 590, trover was brought to recover 1,500 bushels of coal which had been made by the defendant from wood claimed as belonging to the plaintiff and hauled and converted into coal by the defendant, and the court held the action would lie.

Where a field of growing corn was unlawfully converted, it was held that the trespasser was not entitled to compensation for labor expended by him upon such crop even though his services increased its value. Stuart v. Phelps, 39 Iowa, 14.

In Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189, the defendant forcibly took possession of the plaintiff's corn as it stood in the field, drove the plaintiff away and harvested and sold the grain, and in an action to recover for the conversion of the wheat, the defendant claimed to be entitled to the value of his labor, but the court denied his claim and found for the plaintiff, following the principles laid down in Betts v. Lee, 5 Johns. 349, 4 Am. Dec. 368.

And in Hooser v. Hays, 10 B. Mon. 72, 50 Am. Dec. 540, it is said if a disseisor seize the ground and sever the corn, and the disseisee re-enter, he shall have the corn because he entereth in by a former title, and a severance or removing of the corn altereth not the case, for the regress is a continuation of the freehold in him in judgment of law from the beginning.

So, in Simpkins v. Rogers, 15 Ill. 397, it was held that trover might be maintained by the owner of real estate to recover crops which had been put upon his land without license or authority.

In Silsbury v. McCoon, 3 N. Y. 379, 381, 53 Am. Dec. 307, corn had been taken by a wilful trespasser and converted into whiskey, and the court stated that the property was not changed and that the whiskey belonged to the owner of the original material (corn), and further that such whiskey was liable to be taken on an execution against the owner of the corn, overruling the same case reported in 6 Hill, 425, 41 Am. Dec. 753, where it was held that if one wrongfully takes another's grain and manufactures it into whiskey the property is so far changed that the whiskey belongs to the manufacturer, the nature and species of the commodity being entirely changed and its identity destroyed.

In Chandler v. Edson, 9 Johns. 362, it was held that a person who, with the written consent of the peace-makers of the tribe of Stockbridge Indians, entered and cut down trees and carried away the timber, of which he made shingles, was a trespasser, notwithstanding such license, and acquired no property in the timber or shingles.

In Stearns v. Raymond, 26 Wis. 74, logs had been unlawfully cut and intermixed by the trespassers so that they could not be distinguished from their own. It was held, it being clearly proved that the

same thing, and in the same sense, and must not have left the matter open for future agreement. If you find from the evidence in this case that I. W. Peed and R. J. Spencer made and entered into a contract, by the terms of which Peed became the lessee of the land described in the petition, for the purpose of the hay and grass grown thereon in the year 1890, and thereafter Peed and the plaintiffs John and Elmer Carpenter made a contract by which the latter were to cut and bale the hay and grass growing on the said land for that year, and the parties to such agreement were to own the same jointly, and in pursuance to such last-named contract the plaintiffs John and Elmer Carpenter did cut and bale said hay and grass, then the plaintiffs would be the owners of the hay, and entitled to its possession, and you should so find by your verdict. If, however, Peed did not contract for the land for the year 1890, or the hay and grass grown thereon that year, with R. J. Spencer, or any other person having authority to contract with reference thereto, then any agreement that Peed may have made with John and Elmer Carpenter with reference to the hay and grass grown on said land for that year would not confer upon the plaintiffs any title to or right of possession

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intermixing was intentional so as to deprive the plaintiff of his property therein, that replevin would lie to recover the amount of logs belonging to him from the entire bulk.

If logs be fraudulently taken and made into boards, and intermixed with those belonging to the trespasser so as to become undistinguishable, with a fraudulent intent, the whole may be recovered by the owner of such logs in an action of replevin. Wingate v. Smith, 20 Me. 287.

And the difficulty of proving the identity is not a good reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of title from the true owner to the trespasser, where the article can be identified, as it relates merely to the convenience of the remedy, and not at all to the right. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, Overruling 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332.

The plaintiff, however innocent, can acquire no property in logs he has cut upon the lands of another, or even acquire a lien upon them for labor or expense, as the conversion of trees into saw-logs by a trespasser does not change the title to the property nor destroy the identity of the same, the owners of the land being the owners of the logs, the trespasser having no title. Gates v. Rifle Boom Co. 70 Mich. 309.

And in such a case the owner is entitled to the enhanced value, and is not confined to the value of the timber as it stood in the woods or at the place where it was sawed into planks or boards. Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66; Rice v. Hollenbeck, 19 Barb. 664.

He is entitled to the full value of the property at the time and place of demand or of suit brought, without any deduction for the wrongdoer's labor or expense. E. E. Bolles Wooden Ware Co. v. United States, 106 U. S. 432, 27 L. ed. 250.

When, as against a trespasser, the owner regains possession, he has converted no property of the trespasser to his own use, and if the owner takes possession of the property while upon his lands he will be entitled to the materials as they are and no claim can be made against him by the trespasser for labor and expense in cutting, as in such a case the identity of the property would not have been destroyed and the subsequent intermingling, although innocently done, could not change the rights of the owner. Gates v. Rifle Boom Co. 70 Mich. 309.

If the article was taken *mala fides*, by theft or with a wilful purpose to do wrong, the consequences are different from those which follow for an act done under an honest mistake. Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

The rule is limited to wilful wrongdoers. Clement v. Duffy, 54 Iowa, 635.

If a party intending to commit a trespass on public land through mistake cuts down trees on the land of another, he is liable to the penalty for such trespass, but if his intention is to cut down trees upon his own land, and by mistake he cuts those on another's land, he will not be liable to the penalty but only for the actual damage done. Perkins v. Hackleman, 26 Miss. 41, 46, 59 Am. Dec. 243.

An instruction to the jury as to the difference between a wilful and an intentional trespass, in substance, that if the trespass was a wilful one, if the plaintiff knew he was cutting the logs of others, and so, knowing them not to be his, intermingled them with his own so that they could not be distinguished, the owner had a right to take more than his own, and if, in order to get all that belonged to him and without intending to take more than belonged to him, he did take a better quality of logs than he had lost, if he did not make the selection with that view, the plaintiff could not recover for such excess in quality, was held to be correct. Gates v. Rifle Boom Co. 70 Mich. 309.

If a trespasser takes a chattel into his own possession and the owner sues and recovers damages for the specific chattel so taken and detained, the recovery and execution done thereon will change the property, by operation of law, on the principle that *solutio pretii emptionis loco habetur*. Curtis v Groat, 6 Johns. 168, 5 Am. Dec. 204, in which case timber had been cut and converted into coal.

If the owner of timber cut upon his land by a trespasser gains possession of it increased in value, he has the benefit of the increased value, as the law neither devests him of his property nor requires him to pay for improvements made without his authority. Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 153.

Labor and expense bestowed upon property by the trespasser, although they may have added to its value, are merely incidents which follow the right of property, and cannot be separated from it, and necessarily accrue to the owner. Mitchell v. Stetson, 7 Cush. 435, 439.

Yet the articles manufactured by another will not be confiscated to the owner of the original material, unless the facts justifying such confiscation are clearly established. Baker v. Meisch, 29 Neb. 227.

A wrongdoer is bound to account to the true owner for the value of the chattel in its changed or improved condition, and his recovery will not be limited to its value in the condition in which it was at the time of the conversion. Guckenheimer v. Angevine, 81 N. Y. 394, 397.

The reason for the rule is that if a wilful trespasser were able to protect himself by any change which he might communicate to the shape or form of the materials, an unbounded license would be given to plunder and the security of personal property would be exceedingly diminished. Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466.

There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs, as such trespasses are the result of negligence on the part of the trespasser and there is no good reason why he should be com-

of the hay, and your verdict should be for the defendants." (7) "If you find from the evidence that R. J. Spencer, having authority to do so, leased the land described in the petition, for the purpose of the hay and grass grown thereon in the year 1890, to the defendant Mary E. Lingenfelter, through her husband, as her agent, and that no lease of said premises had been previously made for said year to I. W. Peed, your verdict should be for the defendants." The following is the plaintiffs' request to charge, and which was refused by the court: (1) "If you shall find from the evidence that I. W. Peed claimed to be the owner of the grass which has been converted into the hay in controversy, and the plaintiffs, under the contract with said Peed, cut said grass, and converted the same into hay in the stack or bales, and, by the bestowal of such labor thereon, greatly increased the value of the grass, and that such work was done in good faith, believing that Peed was the owner of said grass when they made said contract with him, and while performing said labor and manufacturing said hay, then your verdict will be for the plaintiffs."

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pensated for labor and expenses incurred in the trespass when it might have been avoided by proper diligence. Gates v. Rifle Boom Co. 70 Mich. 309.

To give to wilful trespassers, or those to whom they may sell the benefit of any increased value put upon it by the original vendor, and confine the owner to a nominal value, would encourage the commission of trespass and make purchasers careless as to the title they acquire. Tuttle v. White, 46 Mich. 485, 487, 41 Am. Rep. 175.

The fact that the trespasser loses the labor and expense he has put upon the property he has wrongfully taken results as a punishment to him for his act, and on this ground the original owner recovers the increased value, not because of any right in him, but because the law gives this infliction as a terror to offenders. Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

In the case of a tortious or fraudulent taking of a chattel out of the possession of its owner, actual or constructive, the party injured may, at his election, have trespass *de bonis asportatis* or replevin. Ely v. Ehle, 3 N. Y. 506.

The true owner of land is entitled to maintain trover to recover the possession of wood cut by one in possession of the land without lawful title, such wood belonging to the owner of the fee. Kimball v. Lohmas, 31 Cal. 154.

But where the owner of timber sued for conversion of the same against the employer of the trespasser whose trespass was not wilful, it was held he was only entitled to recover the value of the timber at the time and place of cutting. Ayres v. Hubbard, 57 Mich. 322, 58 Am. Rep. 361.

In Single v. Schneider, 30 Wis. 570, the court held that if the owner was entirely indemnified for the injury he had sustained, it was quite immaterial whether the logs in question were cut by mistake or intentionally, unless in the latter case the trespass was of such a character as to make the doctrine of exemplary damages applicable, the court adopting the view expressed by Justice Paine in Weymouth v. Chicago & N. W. R. Co. 17 Wis. 550, 555, 84 Am. Dec. 763.

In Webster v. Moe, 35 Wis. 75, 78, it was shown that the decision in the case of Single v. Schneider, *supra*, to the effect that the usual measure of damages was the value of the property before it had been improved by the skill and labor of the wrongdoer, even where the property had been taken by him knowingly, except where such taking was accompanied by acts of insult or malice which would justify exemplary damages, had led to the passing of the act of the legislature of 1873 (Laws 1873, chap. 263) which prescribed the value of damages for the wrongful cutting of timber, and changed the rule laid down in that case.

But if the article is annexed to or made a part of some other thing which is the principal the rule is different. Ricketts v. Dorrell, 55 Ind. 470, 474, following Davis v. Easley, 13 Ill. 192.

The wrongful taker cannot, by any act of his own, acquire title against the owner, unless he destroys the identity of the thing, or annexes it to and makes it a part of, some other thing which is the principal. Davis v. Easley, 13 Ill. 192, 198.

And he cannot acquire title unless he changes the property from personalty to realty. Brown v. Sax, 7 Cow. 95.

The rule, however, applies only to the owner of the property taken, and not to a stranger. Wincher v. Shrewsbury, 3 Ill. 283, 284, 35 Am. Dec. 108.

But in Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239, the defendants had cut timber from the plaintiff's land and converted it to their own use, and it was held that the original owner upon regaining possession of such property with its accretions after the conversion was entitled to the value of the property together with the accretions after the conversion in case it were again converted, both as against the original converter and a stranger.

So there must be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

The right of the owner to retain the article does not exist where it has been so changed as to alter the title. Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66.

Where the owner and occupant was forcibly expelled from his premises, and the land was subsequently improved and a crop raised thereon by the trespassers, and the original owner was subsequently restored to possession under a process of forcible entry and detainer, and the crops raised by the labor of one of such trespassers were taken and converted by such original owner to his own use, it was held in an action brought against him in trover that he was under the circumstances legally entitled to the crops, and the action failed. Thomes v. Moody, 11 Me. 139.

Where a contract existed between the land owner and another person, whereby the latter was to cultivate the land and harvest the hay for a share thereof, it was held that the party seizing the whole crop, either before or after severance, and disposing of it in denial of the other party's rights, was liable for the share so disposed of in trover. Reed v. McRill, 41 Neb. 206.

In De Mott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443, it was held that, where a person enters and ousts the owner of land continuing in possession and occupying it, and cutting and removing off the crops, though sown by the owner, replevin would not lie by the owner to recover the crops so removed; that the only remedy was in trespass *quare clausum fregit*, after regaining possession by ejectment or by re-entry.

Under the Pennsylvania Statute of May 4, 1869 (Purdon's Digest, 1467, 1468), it is unlawful for any owner or owners of any undivided interest in timber lands to cut or remove, or to cause to be cut or removed, from the said land any timber trees, without first obtaining the written consent of all cotenants in the said premises; and by the 2d section of such act no sale of any such timber, cut or removed before or without such consent, passes any title thereto, and the parties injured may pro-

The vice imputed to the court's charge quoted above is that plaintiffs' right to recover was, by the rule announced by the court, made to depend wholly upon whether Spencer leased to Peed for the year 1890 the premises upon which the hay in question was made. Plaintiffs' right to the possession of the hay was not based alone upon the fact that a contract of lease had been made between Peed and the owner of the land, but as well upon the fact, established by the evidence, that they had entered upon the premises as the lessees of Peed, honestly believing that he had the right to make such lease, and in good faith cut the grass and made the same into hay, with the knowledge of the defendants, and without any objection or protest on their part until after the work was done. This feature of the case was entirely withdrawn from the consideration of the jury by the instructions given. An important inquiry, therefore, is whether the charge of the court was for that reason erroneous. Ordinarily a change in the form of property, by a person other than the owner, will not have the effect to change the title, but the original owner may sustain replevin if the property is

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ceed in law or in equity for the recovery of the said timber and the articles manufactured therefrom, and also for damages in like manner only as against an entire stranger; and it has been held under this statute that the parties injured by such removal may recover such value making no allowance for the trespasser's labor or expenses with regard to such timber. Duff v. Bindley, 16 Fed. Rep. 178.

The Pennsylvania Statute of 1871, May 15 (Pamph. Laws, 268), which gives the owner of realty power to bring action in replevin for timber cut, and also for lumber and coal severed from the property, even though the title may be in dispute, has been held not to include growing crops, such crops not being included in the words "other property" as used in the act, they being merely ephemeral. Renick v. Boyd, 99 Pa. 555, 44 Am. Rep. 124.

In Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384, it was held that a wife in charge of her husband's farm would have no implied authority to authorize or permit an attachment creditor of the husband to cut and remove and sell grass growing upon such farm, and that an action of trespass *quare clausum fregit* with account *de bonis asportatis* would lie.

IV. *Distinguishable though changed or mixed.*

The rule as to the right to property by accession, both in the civil and common law, would seem to be that no one by any operation upon or change of the materials of another, can make them his own, except the change is so great as to convert the materials themselves into a different species; thus the cloth of another which, without leave of the owner, is made into a coat or other garment, or his leather into shoes, or timber squared and fitted for use, does not vest in the operator; but all the owner has to do, to reclaim his property in its new shape, is to identify the materials. But if his corn be made into meal, his olives into oil, or his grapes into wine, the change is a new species, and is so great that the original materials cannot be reproduced out of the articles, and the new article belongs to the operator, who is only bound for the value of the original materials. Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

It is a settled principle, both in law and in equity, that the true owner of property cannot be deprived of his or her right to it by changing it into something else, as long as the identity can be ascertained and traced. Barry v. Brune, 8 Hun, 399.

Therefore so long as the owner of the article can identify it he can follow it into the manufactured article. Potter v. Mardre, 74 N. C. 36.

And this is so no matter what alteration or form any property may undergo, provided the owner can prove the identity of the original materials. Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466. To the same effect, Firmin v. Firmin, 9 Hun, 572; Brown v. Sax, 7 Cow. 95; Gallup v. Josselyn, 7 Vt. 334; Riddle v. Driver, 12 Ala. 590; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Davis v. Easley, 13 Ill. 192, 198; Millar v. Humphries, 2 A. K. Marsh. 447, 449; Eaton v. Munroe, 52 Me. 63.

And this is so, even though the original substance may have received an accession of value by natural or artificial means. Millar v. Humphries, *supra*.

The civil law required the thing to be changed into a different species and to be incapable of being restored to its ancient form, as grapes made into wine, before the original proprietor could lose his title, nor even then did the other party acquire any title by the accession, unless the materials had been taken away in ignorance of their being the property of another, the civil law in its usual wisdom giving no encouragement to trespassers. Betts v. Lee, 5 Johns. 349, 4 Am. Dec. 368.

And the same doctrine is laid down in the Year Books, 5 Hen. VII., 15, 12 Hen. VIII., 10, as, if leather be made into shoes, or cloth into a coat, or a tree be severed into timber.

So, in Firmin v. Firmin, 9 Hun, 572, the doctrine was applied even though the trespass was wrongful but not wilful, there not being such a change of material as to make the logs the property of the defendant.

According to the admitted principles of the common law, so long as property wrongfully taken retains it original form and substance, or may be reduced to its original materials, it belongs to the original owner without reference to the degree of improvement or the additional value given to it by the labor of the wrongdoer; and the rule holds good against an innocent purchaser from the wrongdoer, although its value be increased by the labor of such purchaser. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, Overruling 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332.

This rule was applied in this case to whiskey made from corn wrongfully taken.

The right of pursuit and reclamation only ceases when its identity is lost and further pursuit is hopeless, but the law protects the interest of the true owner by giving him an action, as for the conversion of the chattel, against anyone who has interfered with his dominion over it, although such interference may have been innocent in intention and under a claim of right and in reliance upon the title of the felonious taker. Newton v. Porter, 69 N. Y. 133, 136, 25 Am. Rep. 152, 5 Lans. 425.

Where the identity of the original article is susceptible of being traced, the ideal of a change in the property is never admitted unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent. Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520, 523.

The title to goods intermixed with others is not lost where they are distinguishable, even though so intermixed with the purpose of defeating and delaying creditors. Allen v. Kirk, 81 Iowa, 658.

susceptible of identification, unless the change has been wrought in good faith by an innocent party, who, by his labor and skill bestowed thereon, has greatly increased its value. But, where a chattel taken by a wilful trespasser is enhanced by his labor and skill, the manufactured article belongs to the owner of the original material, and he may recover possession by replevin. The rule stated above is in conflict with some adjudications which may be found, but is supported by the weight of authority in this country, and is in accordance with the principles of natural justice. The same doctrine was held and applied by this court in the case of *Baker* v. *Meisch*, 29 Neb. 227. That was an action for replevin to recover a quantity of brick manufactured by the defendant from clay belonging to the plaintiff. The defendant entered upon the land and manufactured the brick, in good faith, under a lease from one Palmer, who never owned the land, but who claimed to be such owner. There was judgment for the defendant in the trial court, which was affirmed by this court. We quote the third point in the syllabus: "The doctrine of the accession of property

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And in all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, Overruling 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332.

In Reid v. King, 89 Ky. 388, lumber headings had become merged with other headings of the same description and value, and it was held that they might be recovered without identification of the particular headings belonging to the plaintiff, even as against a bona fide purchaser, where the timber was cut by a trespasser.

In Bent v. Hoxie, 90 Wis. 625, replevin was brought to recover pine lumber manufactured from standing timber sold to the defendant by the plaintiff, the title to which was retained by the plaintiff until payment of the purchase price, which lumber was taken by defendant and intermixed with his own which was the same in quality and value. It was held that the plaintiff retained the title to the lumber cut from the logs, or so much thereof as remained unsold, in its possession until the whole purchase price was paid. And in answer to the argument that the plaintiff could not replevin out of the common mass but must find and identify the lumber made from her own logs, the court held that as the common mass was being made up of lumber of the same quality and value drawn from two lots of logs, and the plaintiff's logs contributed to make up such common mass, she had a right to replevin from it a quantity considerably less than her contribution, the court relying upon the cases of Young v. Miles, 20 Wis. 615, and Mowry v. White, 21 Wis. 418.

Where the action was for the conversion of logs which had been manufactured into lumber, it was held that although the owner of the land from which they were taken might have treated the removal as a conversion, yet he was not compellable to do so, but might follow and retain such logs. Final v. Backus, 18 Mich. 218, 232.

So, where the defendant had cut down plaintiff's trees and made them into logs, it was held that the plaintiff was still the owner. Betts v. Lee, 5 Johns. 349, 4 Am. Dec. 368; Firmin v. Firmin, 9 Hun, 572.

And where a party took trees and sawed them into boards and plank, the owner of the trees was held entitled to take the boards or plank, or to bring trover for them. Brown v. Sax, 7 Cow. 95; Davis v. Easley, 13 Ill. 192.

And the same principles were applied in Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466, where trees were converted into rails and posts; in Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204; Riddle v. Driver, 12 Ala. 590, where timber was converted into coal; and also in Chandler v. Edson, 9 Johns. 362, where timber was made into shingles.

In Gallup v. Josselyn, 7 Vt. 334, timber had been cut and drawn on the plaintiff's land for the purpose of building a barn upon his premises under a contract, and it was held that the title to such timber remained in him as against the creditors of the contractor.

In such cases the inherent and distinctive qualities of the material remain the same, although there has been a "specific" but not an essential change, and although the identity of the thing has been lost, yet the essence of the material has undergone no change, the essential and constituent particles of each being the same. Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

In Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653, a tenant in common of timber land conveyed his interest to a creditor upon the understanding that such interest was to be reconveyed to him upon payment of the debt, and afterwards his cotenant, pursuant to a previous consent, sold a quantity of the timber to a third person who cut and manufactured the same into hoops. Upon replevin being brought by the owners of the land to recover the hoops, the value of which greatly exceeded that of the timber, it was held that the defendant might show that he purchased and manufactured in good faith and was entitled to show that the title to the timber was changed by the substantial change of identity, therefore the plaintiff's action was in trespass and not replevin.

V. *When article changed by process.*

In the civil law it is said: "He that made the new species shall be master of the whole, if it cannot be easily reduced to its first state and condition; as when one shall press wine from your grapes, or build a ship from your timber, you cannot claim the wine or the ship." Wood, Civil Law, 111, bk. II.

But this doctrine only takes place in favor of the workman, where the work was designed for his own use, and where he erroneously and by mistake thought the matter was his own; for, if it was intended for the use of any other, it is his upon the same terms for whose use it was working; and if it is known that the grapes and timber are another's, and yet thereof he proceeds to make his wine or ship, he shall lose his labor and workmanship. The whole shall accrue to the owner and an action may be maintained against him. *Ibid.*

In Molloy, de Jure Mar., lib. 2, chap. 1, § 7, it is laid down as a settled principle of law that if a man cuts down the trees of another, or takes timber or plank prepared for the erection or repairing of a dwelling house, nay, though some of them be for shipping, and builds a ship, the property follows not the owners but the builders. Peirce v. Goddard, 22 Pick. 561, 33 Am. Dec. 764.

In Justinian it is stated "that if the species or manufactured article can be reduced to its former rude materials, then the owner of such materials is to be reckoned the owner of the species; but if the species cannot be so reduced, then he who made it is understood to be the owner of it; for example, a vessel can easily be reduced to the rude mass of brass, silver, or gold of which it is made; but wine, oil, or flour cannot be converted into grapes, olives, or corn, neither can mulse be separated into wine and honey. But if a man makes any species,

applies where one has wilfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus expended his labor, the original owner to recover the value of the original article." Mr. Cobbey, in his book on the Law of Replevin, at § 393, says: "If a person bestows his labor upon the property of another, thereby changing it into another species of article, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. It is not essential that it remain in its original form so long as it can be identified. But if the change has been wrought in good faith by an innocent party, and it has been materially increased in value or has become incorporated

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partly with his own, and partly with the materials of another, as if he should make mulse with his own wine and another's honey, or should make a garment with an intermixture of his own wool with that of another, it is not to be doubted in such cases but that he who made the species is master of it." Lib. 2, tit. 1, p. 75; Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

It was an established doctrine of the common law as early as the Year Books, that no change of mere form could devest the right of the owner of the materials, as leather made into shoes, cloth into coats, timber into planks, blocks, or shingles, in all of which cases the material is not altered in its qualities or kind and could be easily identified. *Ibid.*

The general rule of the common law in regard to title by accession, is that, whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to, and made part of, some other thing which is the principal, or its nature has been changed from personal to real property; but if the thing itself, by such operation, was changed into a different species, it belongs to the new operator who has only to make satisfaction to the former proprietor for the materials which he has so converted. Aborn v. Mason, 14 Blatchf. 405, 409.

The common law and civil law agree that if the chattel wrongfully taken comes into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is wrought when wheat is made into bread, olives into oil, or grapes into wine, and in a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner, and it is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace the identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place. Silsbury v. McCoon, 3 N. Y. 379, 385, 53 Am. Dec. 307; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

If the manufacturer takes the material fraudulently as to the owner by converting it into another species, he acquires no title to the article in its new form, and the original owner may recover the manufactured article, but if he takes it by mistake believing it to belong to him, the article belongs to him and he is answerable only for the materials used. Reader v. Moody, 3 Jones, L. 372.

Even if things have been tortiously taken and have not lost their identity, the owner may recover them in their changed form unless they have been annexed to and made part of something which is the principal, or changed its form from personal to real estate; and where the nature of the thing is not changed they may be reclaimed by the original owner in their new and improved state. Worth v. Northam, 4 Ired. L. 102; Ricketts v. Dorrell, 55 Ind. 470, 474; Peirce v. Goddard, 22 Pick. 561, 33 Am. Dec. 764.

In Rockwell v. Saunders, 19 Barb. 484, it was stated that since the case of Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, where the form is changed and the value is materially enhanced by the labor of the possessor, the criterion is whether it was done in good faith, rather than whether the property can be identified.

Where the defendant had wrongfully cut and trimmed the plaintiff's trees, and it was impossible to separate the original property in them from the value subsequently added, the court stated that it was unnecessary to cite authorities to show that the plaintiff, after they were cut and trimmed, remained the owner of the timber made from them free from any lien or claim of the defendant for his labor, and that he might therefore lawfully take it peaceably into his possession. Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 153.

In Chapin v. Freeland, 142 Mass. 383, 50 Am. Rep. 701, it is stated that the rule that the title of personal property is lost by wrongful conversion of it into some other species of property, or by making it a part of real estate, has its foundation in the impossibility or impracticability of tracing the property, or of severing it from the real estate, and when personal chattels are, without the consent of the owner and without right, taken by another and affixed to real property, the title of the owner is not lost unless the identity of the chattels has been destroyed, or they have been so affixed to the real property that it is impracticable to sever them.

If the thing itself be changed by the operation of the trespasser into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belongs to the new operator, who is to make satisfaction to the former owner for the materials he has so converted. Millar v. Humphries, 2 A. K. Marsh. 447, 449.

And the original owner must content himself with the value of the article in the shape it was taken from him. Potter v. Mardre, 74 N. C. 36.

The rule as laid down in the books is indefinite, and in some of the cases it seems to be twofold, (1) that there must be a changed form of the species; (2) that the thing changed must be insusceptible of reduction to the original quality and kind. Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

The reason why the material of one which has been changed into a different species by another is not to be restored to the original owner is that it cannot be returned in kind, as it is not the specific thing which belonged to him, and therefore is not his and cannot be his unless the original material can be restored without any intrinsic change, and therefore as long as it remains a new and essentially different species it cannot be recovered by suit from the person who effected the change in it. *Ibid.*

Some authorities hold that the proper test of the

with another thing, which is the principal and it is only a part, replevin would not be allowed." The author cites numerous cases which sustain the text. The same doctrine is laid down in Wells on Replevin, in § 216; and, at § 217, Mr. Wells, in discussing the duty of the owner to reclaim his property before its value has been greatly enhanced by the labor of another, says: "The rule in Wisconsin seems to commend itself as well for its plainness as for the manifest justice which it seems to deal out to all parties. It is there held that the owner of chattels does not lose his property by mere change of form at the hands

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right of the first owner is the identity of the thing or material; while others hold the test to be its capacity for being converted into the original species; while another class hold that the nonaccession of adventitious value exceeding that of the original material is to be the test; and in others the retention by the material of its specific character or kind or quality is said to be the test. *Ibid.*

The property is changed by a change made in its species or substantial form, if made by one who is acting in good faith and under an honest belief that the title is in him. Potter v. Mardre, *supra.*

And if the elements of the material have not been changed, but the specific thing which they constitute cannot be reproduced identically by individual operation, the owner of the material does not own the new species. Lampton v. Preston, *supra.*

In Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289, it was held that when the materials of one are united with the material of another by the latter's labor, or by the labor of another, and the latter owns the principal materials, and those of the first person are only accessory, the latter acquires the right of property in the whole by right of accession.

In Wells v. Batts, 112 N. C. 283, it was held that a wife neglecting to see that crops raised upon her lands were not intermixed with those raised upon the land of her husband, could not claim them as against her husband's mortgagee where it could not be determined how much was raised upon the respective properties, and the crops could not be distinguished.

In Faulcon v. Johnston, 102 N. C. 264, the question was whether the owner of land in the adverse possession of another could assert a title to the crops grown thereon during such adverse occupancy, and in its assertion by waiving the tort pursue and recover the specific articles thus raised or their value in the hands of a stranger who might have received them and converted them to his own use, or the rent paid him by the tenants; and the court held that the crops, the product of the labor of the trespassing possessor and his agent, belong to him and are not the property of the owner of the soil.

In Potter v. Mardre, 74 N. C. 36, the plaintiff, a tenant for life, cut timber from the land, and used part of it in the repair of property and part for the purpose of making a canoe. It was held in an action brought by the reversioners that they could not recover the article in its altered condition, but were only entitled to its value in the shape in which it was taken from them, the court following its prior decision in Bennett v. Thompson, 13 Ired. L. 146, and Albea v. Griffin, 2 Dev. & B. Eq. 9, upon the same point.

But a mere change in the external shape or in the bulk is immaterial. Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

The accession of mere value by the application of labor or skill alone is generally not sufficient to transfer the proprietorship to the operator; there must in general be the addition of some other material belonging to the possessor or operator before the product can vest in him. *Ibid.*

There may be such a modification of a material of one man by the operations of another as to change its name and its specific identity, or individuality, without a mutilation of its original qualities and ingredients, as the change effected by the conversion of timber into planks or shingles, although the shingles are not the trees but they are still the wood. *Ibid.*

Shingles, tables, or boards, etc., made out of the timber of another, contain, so far as they contain anything, the same particles which constitute the timber; the specific qualities of wood are the same, precisely; therefore the material is exactly the same, and the new species must still belong to the owner of the wood, when the accessory value has not been so great as on the ground, to change the title. *Ibid.*

In the case of Strubbee v. Trustees Cincinnati Railway, 78 Ky. 481, 39 Am. Rep. 251, 253, the action was for the identical property sold to the railroad company by the trespasser, without any change having been made in its condition, except such as had been caused by the labor of the wrongdoer, and the court stated that the rule was well established, with scarcely an exception, that where the identity of the original article could be traced, the right of property in the original owner continued to exist.

If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, yet if a division can be made of equal value, each may claim his aliquot part, where it does not appear there was any fraudulent intent in the mixing. Stone v. Quaal, 36 Minn. 46.

It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it, or to which it has been annexed, that the law is otherwise. Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 153.

VI. *Position of purchaser.*

With respect to the position of a purchaser of such articles, it has been held that a person purchasing personal property runs his risk as to the title he is acquiring, and if he purchases from a trespasser, or one who has no title and can give none, he must suffer the loss or look to his vendor. Tuttle v. White, 46 Mich. 485, 487, 41 Am. Rep. 175.

The purchaser from a thief, however honest and bona fide the purchase may have been, cannot hold the stolen chattels against the true proprietor, but the latter may follow and reclaim wherever and in whosesoever hands they may be found. Newton v. Porter, 69 N. Y. 133, 136, 25 Am. Rep. 152, 5 Lans. 425.

Every purchaser of property must know at his peril of whom he is purchasing, and if his vendor has acquired the property as a trespasser; a purchase from him, although in good faith, cannot be relied on as a defense to the claim of the real owner, and no demand is required to be made of the innocent purchaser in such a case, because having obtained the property from a wrongdoer his possession is tortious. Strubbee v. Trustees Cincinnati Railway, 78 Ky. 481, 39 Am. Rep. 251, 253.

In Joslin v. Cowee, 60 Barb. 49, 55, it is stated that it is only innocent purchasers who purchase property converted into a different species that can be protected, and even an innocent purchaser

of another, but he should reclaim it before the new possessor has greatly increased its value by the bestowal of his skill and labor, and in the event of his failure to do so he should be restricted in his recovery to the amount of damages he has actually sustained, unless the taking was accompanied with some circumstances of malice or insult that might make it proper to inflict exemplary damages. This rule, while it protects the owner fully, will be easy of application, and do justice to both parties, when such a result is attainable. In Michigan a somewhat similar doctrine prevails. When timber worth $25 had, by one in the ex-

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cannot be so protected where he takes the title from a trespasser or wrongdoer, for the reason that the trespasser has no title to give; and in such a case the owner of the original material may retake it in its improved state, or recover the improved value. To the same effect, Silsbury v. McCoon, 3 N. Y. 379, 381, 53 Am. Dec. 307.

And this is so for the reason that the right to the improved value in damages is the consequence of the continuing ownership. Nesbitt v. St. Paul Lumber Co. 21 Minn. 491, following Silsbury v. McCoon, *supra*.

In Strubbee v. Trustees Cincinnati Railway, *supra*, it was held that the true owner of trees which had been cut upon his land by a wilful trespasser and converted into railroad ties, could sustain an action against the railroad company, an innocent purchaser, for the recovery of such ties, as it is well settled that a trespasser acquires no title to property that he has taken and converted to his own use.

One of the grounds upon which the court based its decision in the case of Strubbee v. Trustees Cincinnati Railway, *supra*, was that the innocent purchaser had not converted the chattel into a different species, nor made any change in the timber since purchasing it from the trespasser, but held the property in the same condition it was in when purchased from the trespasser, the court stating that if the timber had been worked into the depot buildings of the company, or made part of the roadbed by laying it down as ties, this annexation to the principal improvements would have devested the owner of his title.

If, however, the chattel be converted by an innocent purchaser or holder into an article of a different species, it cannot be reclaimed by the original owner. Silsbury v. McCoon, *supra*.

In such cases the identity of the article is destroyed, the rights of the innocent purchaser are protected. Strubbee v. Trustees Cincinnati Railway, *supra*.

Therefore, as against an innocent purchaser from the thief the original owner has a title to his timber, but the estoppel which works in the case of a thief, being created by fraud or wrong, exists only as against the guilty party, which the purchaser is not; and while it is effectual against the wrongdoer, the reason of it does not exist as against the innocent man, as to whom it therefore fails; and as against such innocent purchasers, if the owner of the timber or other articles is compensated for what he has lost he is fully paid. Lake Shore & M. S. R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629.

In all cases where the rights of the innocent purchaser have been upheld, there has been such a mechanical transformation of the article as to destroy its identity, and the mere fact that timber can be traced into a building or corn to the distillery in which the whiskey was made out of it, is not such an identification of the property as would authorize its recovery. Strubbee v. Trustees Cincinnati Railway, *supra*.

Where lumber was cut from adjoining lands by a trespasser and intermixed so as not to be distinguishable, and the owner of one tract seized and took possession of the whole, it was held that a party claiming under such trespasser could not maintain an action of trespass for such taking. Bryant v. Ware, 30 Me. 295.

In Fryatt v. Sullivan Co. 7 Hill, 529, one who had the use of certain personal property wrongfully converted it by annexation to and made it a part of his real estate, and then sold such estate to a purchaser who had no notice of the facts. It was held that the original owner could not reclaim the property from the purchaser, for his only remedy was against the wrongdoer.

In Lake Shore & M. S. R. Co. v. Hutchins, *supra*, a large amount of wood cut down upon plaintiff's lands was stolen and worked up by the thieves into cordwood and ties which increased its value three fold, and then sold to the company who were innocent purchasers for value. It was held, in an action of trespass by the original owner, that he could not recover the value of the timber as enhanced by the labor of the wrongdoers after it was severed from the realty.

But in Freeman v. Underwood, 66 Me. 229, where wild berries had been purchased by the defendants from trespassers who picked them from the plaintiff's land, it was held that they thereby assumed an ownership which rendered them liable in trover to the rightful owners, even though the purchase was made in good faith and without notice of the want of title, and that, even though there had been no demand made.

In Rockwell v. Saunders, 19 Barb. 473, 483, it was held that no title was acquired by a purchaser of logs from one in possession of land as assignee of a vendee, under a contract prohibiting the latter from cutting timber until certain payments had been made, even though the purchaser of the logs did not know what title the occupant had; but it was questioned whether, if such purchaser sawed the logs into lumber in good faith and without notice, he would acquire title to the lumber, and it has been stated that although altered in form, if what remains is the principal part of the substance the title is not changed, and the property will not be devested by a purchaser from one having no title.

In Nichols v. Dewey, and Nichols v. Cole, 4 Allen, 386, the actions were in replevin for hay, and the facts showed that the land from which the hay was cut was formerly owned in part by the defendants as tenants in common, and in part by the other defendant in severalty, and that the plaintiff purchased at sheriff's sale the equity of redemption and took open and peaceable possession and forbade the defendants from taking or interfering with the grass or growing crops, but defendants subsequently cut the grass and severed it. It was held that replevin would lie by the purchaser to recover such crops, as, by cutting and storing the grass after notice the defendants committed a trespass.

VII. *When title in or derived from the states or the United States.*

Where timber has been cut into logs upon the public land by one who knows that the land belongs to the government, or who has no reasonable ground to believe that it belongs to him, or to some one under whom he claims, and such logs are by him hauled to the water course and taken to a distant boom, by means of which labor of the wrongdoer their value is enhanced beyond their value when first severed, the government may replevy such logs in the boom, and may maintain an action in the nature of trover for their value, and in either

ercise of a supposed right, in good faith, been converted into hoops worth $700, it was held that the title passed to the party who had, in good faith, expended his labor, and the owner of the timber in such case could not sustain replevin for the hoops. In Pennsylvania the plaintiff sought to recover, in trover, the value of coal dug out of his mine by mistake, and was allowed only the value of the coal before it was mined. The court says: 'It is apparent

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case may recover without deduction for the enhanced value which may have been given to the logs after the severance by the labor of the wrongdoer. Bly v. United States, 4 Dill. 464, 466.

In such a case the title of the government continues as against the wrongdoer and all persons, until, at least, there has been some greater transformation of the original property than exists while it remains in the shape of logs, and if the wrongdoer sells the logs to a person who has no actual notice that they were cut on the public land, still the government may maintain replevin against such vendee for the logs if they are in existence, or if he has sawed them into lumber, the government may recover from him the value of such logs when so manufactured into lumber, and is not confined to the "stumpage" value. *Ibid.*

In Brown v. Throckmorton, 11 Ill. 529, the evidence showed that the defendant made the rails in question from timber cut by him on a section of lands belonging to the United States, and that the plaintiff took and carried them away; and it also appeared that the plaintiff resided upon the land from a given date up to the time of the trial, and claimed a pre-emption on the land in question. The court held that the timber out of which such rails were made belonged to the United States, and, even admitting that the plaintiff had at the time a valid pre-emption, that did not confer on him any title to the land or the timber standing thereon, he having a mere license from the government to occupy the land, the timber in that case having been severed before he acquired the right of pre-emption.

In the above case the court followed its prior decision in Wincher v. Shrewsbury, 3 Ill. 283, 35 Am. Dec. 108, which was a similar case.

And in Boyer v. Williams, 5 Mo. 335, 32 Am. Dec. 324, it was held that the purchaser of lands from the United States acquired by the purchase the same title to the land, and to everything growing upon it, which the United States had before the sale, and was therefore entitled to the crops planted thereon by other parties, the doctrine of emblements not applying to a case where the party planting such crops had not the legal title.

One settling upon public lands belonging to the United States and planting a crop thereon cannot, as against a subsequent purchaser of the land, maintain an action of *quare clausum fregit* for the gathering and converting of such crop by such purchaser to his own use, as the sale in such a case carried the land with the improvements thereon. Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374.

In Brock v. Smith, 14 Ark. 431, the defendant, without license, felled and split timber into cordwood upon vacant lands belonging to the United States, and before he removed such timber the plaintiff purchased the land, obtained a receiver's certificate, and gave notice to the defendant not to remove the wood, which notice the defendant disregarded. It was held in trespass that the defendant acquired no title, either in the timber or in the cordwood manufactured thereout by his labor, the character of the materials not being altered, the title remaining in the owner of the soil who could maintain either trover or trespass to recover the same, the title in question being in that case in the United States.

Where, however, the plaintiff had made rails out of timber growing upon government land, which land was subsequently purchased by the defendant who converted the rails to his own use, it was held that trespass would lie against the defendant for such rails, as they did not pass with the lands. Wincher v. Shrewsbury, 3 Ill. 283, 284, 35 Am. Dec. 108.

So, in Carpenter v. Lewis, 6 Ala. 682, where boards, rails, and bricks had been cut and made from the timber and soil on lands belonging to the government and appropriated by the maker, it was held that such did not pass to a subsequent purchaser of the land from the United States, even though the chattels remained on it, and therefore trover would lie by the maker against such purchaser who showed no title as between himself and the United States to the chattels in question.

Again, where a quantity of wood was cut and corded upon public lands subsequently purchased from the government, of which the purchaser took possession, it was held that the parties cutting such wood might maintain trover for its value. James v. Snelson, 3 Mo. 278.

The above case would, however, appear to be overruled by the later case of Turley v. Tucker, 6 Mo. 583, 35 Am. Dec. 449, in which case it was held that a person cutting timber from public lands did not acquire any property, either general or special, in such timber, as such parties were merely trespassers and not actual settlers, and occupied only the same position that a trespasser would occupy in the case of a trespass upon private lands.

But in the still later case of Keeton v. Audsley, 19 Mo. 362, 61 Am. Dec. 560, where action was brought for wrongfully entering upon plaintiff's land and cutting and carrying away timber, and the evidence showed that the timber was cut prior to the plaintiff's title, and was upon property belonging to the United States, the court inclined to the doctrine announced in James v. Snelson, *supra*, and held that the action would not lie, the plaintiff's title not covering the property previously cut and lying upon the premises, as the logs had been severed from the freehold and no longer formed a part of it, and therefore did not pass under a conveyance of the land.

Where the title to land remains in the state, timber cut thereon belongs to the state, and while the timber is standing it constitutes a part of the realty; being severed from the soil its character is changed and it becomes personalty; but its title is not affected, and it continues as previously the property of the owner of the land, and can be pursued wherever it is carried, all the remedies being open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property. Schulenberg v. Harriman, 88 U. S. 21 Wall. 44, 22 L. ed. 551.

Where logs cut from the lands of the state without license have been intermixed with logs cut from other lands so as not to be distinguishable, the state is entitled, under the laws of Minnesota, to replevy an equal amount from the whole mass, the remedy afforded by the law of Minnesota in such a case being held to be just in its operation and less severe than that which the common law authorizes. *Ibid.*

In United States v. Cook, 86 U. S. 19 Wall. 591, 22 L. ed. 210, it was held that the United States might bring action in replevin to recover possession of logs sold by Indians from their reservation to a third person, where the logs were not cut for the improvement of the land, the Indians having only a right of occupancy of the land; the presumption therefore is against their authority to cut and sell the timber, and every purchaser from them is charged with notice of such presumption. E. W.

that any other rule would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her much more than compensation for the injury done.'" There is ample evidence in the record before us tending to establish that the Carpenters entered upon the land under claim of right, and in good faith cut the grass thereon, and made the same into hay, believing they had a right to do so, and that the defendants made no effort to stop them, or to reclaim the hay before it was all made. In view of this evidence, we think it clear, under the authorities, that the instructions given by the court were erroneous, and prejudicial to the rights of the plaintiffs. Plaintiffs' request to charge was applicable to the evidence, and should have been given.

Upon the subject of the measure of damages, the court instructed the jury, substantially, that inasmuch as the hay had been taken and delivered to the plaintiffs under the order of replevin, and had since been sold and disposed of by them, the measure of the defendants' damage, in case a verdict should be returned in their favor, would be the highest market value of the hay which the evidence disclosed it possessed between the time it was replevied and the date of the trial. There is a conflict in the adjudicated cases as to the rule of damages where one's property has been changed in form by another. There is one line of cases which holds that, where the value of property has been increased by another, the owner may recover the value of the property in its improved and more valuable form. There is another line of decisions which states the rule broadly that the measure of the recovery is the value of the article before the same was improved by the other's labor and skill, and this whether the value was increased by a wilful wrongdoer, or by a person acting in good faith. The last rule seems to us the better one. It gives the owner full compensation, and to the other party the increase of value for his labor bestowed on the property. *Single* v. *Schneider*, 24 Wis. 299, 30 Wis. 570; *Hungerford* v. *Redford*, 29 Wis. 345; *Herdic* v. *Young*, 55 Pa. 176, 93 Am. Dec. 739; Cobbey, Replevin, § 913; *Wetherbee* v. *Green*, 22 Mich. 311, 7 Am. Rep. 653.

For the errors already pointed out *the judgment is reversed and cause remanded.*

MICHIGAN SUPREME COURT.

Sehfanja PETAJA, *Plff. in Err.*,
v.
AURORA IRON MINING COMPANY.

(.....Mich.....)

1. **Failure of miners or a shift boss to notify the timber men that a newly opened space in the mine is ready to be timbered** is the negligence of fellow servants of a trammer who is injured by the fall of ore from the roof because of absence of the timber.
2. **A temporary room in a mine,** formed by excavating ore and used as a working place to get out ore lying around its sides, is not within the rule requiring the master to furnish a safe place for his servants to work in.

(September 27, 1895.)

ERROR to the Circuit Court for Gogebic County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Clark & Pearl,** for plaintiff in error:

It was the duty of the defendant to make a careful and thorough examination of the roof of the stope so as to prevent rock and ore from caving upon its employees. This duty was neglected. The plaintiff was assured that it was safe for him to return to the work. Plaintiff relied upon the assurance of safety and has a complete right of action which the proof sustained.

Lake Superior Iron Co. v. *Erickson*, 39 Mich 502, 33 Am. Rep. 423; *Chicago & N. W. R Co.* v. *Bayfield*, 37 Mich. 211; *James* v. *Emmet Min. Co.* 55 Mich. 346; *Schlacker* v. *Ashland Iron Min. Co.* 89 Mich. 253; *Smith* v. *Peninsular Car Works*, 60 Mich. 501; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co.* v. *McDaniel*, 107 U. S. 454, 27 L. ed. 605; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 34 L. ed. 235; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 36 L. ed. 829; *Cregg* v. *Chicago & W. M. R. Co.* 91 Mich. 625; *Hunn* v. *Michigan C. R. Co.* 78 Mich. 515, 7 L. R. A. 500; *Mather* v. *Rillston*, 156 U. S. 391, 39 L. ed. 464.

There was negligence because of neglect to notify the plaintiff of the special danger, and because of assurance of safety without making proper examinations as to the matter.

Mather v. *Rillston, supra; Swoboda* v. *Ward*, 40 Mich. 424; Cooley, Torts, 661; *Chicago & N. W. R. Co.* v. *Bayfield*, 37 Mich. 210; *Marshal* v. *Stewart*, 2 Macq. H. L. Cas. 20, 33 Eng. L. & Eq. 1; *Mellors* v. *Shaw*, 1 Best & S. 437; *Ryan* v. *Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Chicago & N. W. R. Co.* v. *Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Schooner Norway* v. *Jensen*, 52 Ill. 373; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Walsh* v. *Peet Valve Co.* 110 Mass. 23; *Perry* v. *Marsh*. 25 Ala. 659; *Strahlendorf* v. *Rosenthal*, 30 Wis. 674; *Grizzle* v. *Frost*, 3 Fost. & F. 622; *Bartonshill Coal Co.* v. *Macguire*, 3 Macq. H. L. Cas. 300; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 387, 37 L. ed. 772, 781; *Atchison, T. & S. F. R. Co.* v. *Moore*, 29 Kan. 632; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 29 L. ed. 755; *Union*

NOTE.—As to regulations for protection of workmen in mines, made by statute, see *note* to Consolidated Coal & M. Co. v. Clay (Ohio) 25 L. R. A. 848.

P. R. Co. v. *Fort*, 84 U. S. 17 Wall. 552, 21 L. ed. 739.

The master must furnish the servant with a reasonably safe place in which to perform his work.

Dewey v. *Detroit, G. H. & M. R. Co.* 97 Mich. 332, and 342, 22 L. R. A. 292, and 16 L. R. A. 343; *VanDusen* v. *Letellier*, 78 Mich. 492; *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Roux* v. *Blodgett & D. Lumber Co.* 85 Mich. 519, 13 L. R. A. 728; *Hammond* v. *Chicago & G. T. R. Co.* 83 Mich. 334; *Ford* v. *Lake Shore & M. S. R. Co.* 117 N. Y. 638; *Mather* v. *Rillston*, 156 U. S. 391, 39 L. ed. 464; *Swoboda* v. *Ward*, 40 Mich. 420; *Parkhurst* v. *Johnson*, 50 Mich. 70, 45 Am. Rep. 28; *Huizega* v. *Cutler & S. Lumber Co.* 51 Mich. 272; *James* v. *Emmet Min. Co.* 55 Mich. 335; *Smith* v. *Peninsular Car Works*, 60 Mich. 501; *Adams* v. *Iron Cliffs Co.* 78 Mich. 271; *Brown* v. *Gilchrist*, 80 Mich. 56; *Sadowski* v. *Michigan Car Co.* 84 Mich. 100; *Palmer* v. *Michigan C. R. Co.* 87 Mich. 281, 93 Mich. 363, 17 L. R. A. 636; *Tangney* v. *J. B. Wilson & Co.* 87 Mich. 453; *Ragon* v. *Toledo, A. A. & N. M. R. Co.* 91 Mich. 379; *Cregg* v. *Chicago & W. M. R. Co.* Id. 624.

A case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts that the evidence tends to establish.

Gardner v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 36 L. ed. 829; *Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274; *Sadowski* v. *Michigan Car Co. supra.*

The shift boss was not a fellow servant; he represented the master and was one of the controlling agents in hiring, directing, and discharging the trammers of whom the plaintiff was one, and in the controlling the work to be done by them and the place where they were to work.

Fox v. *Spring Lake Iron Co.* 89 Mich. 387; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; McKinney, Fellow Servants, p. 54; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107; *Ryan* v. *Fowler*, 24 N. Y. 416, 82 Am. Dec. 315; *Hunn* v. *Michigan C. R. Co.* 78 Mich. 515, 7 L. R. A. 500; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 39; *Lyttle* v. *Chicago & W. M. R. Co.* 84 Mich. 289; *James* v. *Emmet Min. Co.* 55 Mich. 336; *Harrison* v. *Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623.

An instruction to the jury that a servant cannot recover from a master for personal injuries if the master has a standing rule requiring someone to give a warning which if given would have prevented the injury unless the master was guilty of gross negligence in selecting the person whose duty it was to give the warning, is erroneous as ignoring the master's duty and raising an issue outside the pleadings.

Alaska Treadwell Gold Min. Co. v. *Whelan*, 64 Fed. Rep. 462; *Denman* v. *Johnston*, 85 Mich. 387.

The jury, and not the judge, are the exclusive judges of the credibility of the witnesses.

Fritz v. *Jenner*, 166 Pa. 292.

32 L. R. A.

Mr. **Julius J. Patek,** also for plaintiff in error:

It will be presumed that plaintiff was free from contributory negligence where none is shown.

Rowe v. *New York C. & H. R. R. Co.* 82 Hun, 153; *Guichard* v. *New*, 84 Hun, 54; *Hunn* v. *Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 500; *Woods* v. *Southern Pac. Co.* 9 Utah, 146; *Chicago, B. & Q. R. Co.* v. *Wymore*, 40 Neb. 645; *Carver* v. *Detroit & S. Pl. Road Co.* 61 Mich. 585, 69 Mich. 616; *Flater* v. *Fey*, 70 Mich. 644; *Luke* v. *Wheat Min. Co.* 71 Mich. 364; *Schroeder* v. *Flint & P. M. R. Co.* 103 Mich. 213, 29 L. R. A. 321; *Linton Coal & Min. Co.* v. *Persons*, 11 Ind. App. 264.

Messrs. **Clark & Pearl** and **Cahill & Ostrander,** with *Mr.* **J. J. Patek,** for plaintiff in error in support of petition for rehearing:

As between the master and the common laborer who pushes a car into the room or mine for the purpose of loading it with ore and running it out again, it must be the master's duty to personally or by some agent upon whom the master's duty devolves see to it that the ceiling or roof of the stope or chamber is supported.

Palmer v. *Michigan C. R. Co.* 87 Mich. 290; *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Union P. R. Co.* v. *Jarvi*, 53 Fed. Rep. 65, 10 U. S. App. 439; *Consolidated Coal Co.* v. *Wombacher*, 134 Ill. 57; *Sampson Min. & M. Co.* v. *Schaad*, 15 Colo. 197; *James* v. *Emmet Min. Co.* 55 Mich. 335.

An employee assumes only such risks as are incident to his employment, and do not arise from the negligence of his employer or his deputies in authority over him and his work.

Norfolk & W. R. Co. v. *Ward*, 90 Va. 687, 24 L. R. A. 717; *Davis* v. *New York, N. H. & H. R. Co.* 159 Mass. 532; *Schulz* v. *Chicago, M. & St. P. R. Co.* 57 Minn. 271; *Louisville & N. R. Co.* v. *Shivell*, 13 Ky. L. Rep. 902; *Schlereth* v. *Missouri P. R. Co.* 115 Mo. 87; *Murphy* v. *Wabash R. Co.* Id. 111; *Elledge* v. *National City & O. R. Co.* 100 Cal. 282.

An employee has a right to assume that it is safe to do what he is hired to do unless his knowledge warns him that it is not.

James v. *Emmet Min. Co.* 55 Mich. 335; *Delude* v. *St. Paul City R. Co.* 55 Minn. 63; *Evans* v. *Chamberlain*, 40 S. C. 104; *Louisville & N. R. Co.* v. *Foley*, 94 Ky. 220.

It is not contributory negligence not to look out for danger where there is no reason to apprehend any. Beach, Contrib. Neg. 41; *Grand Rapids & I. R. Co.* v. *Martin*, 41 Mich. 667; *Engel* v. *Smith*, 82 Mich. 1.

It is not contributory negligence for an employee who is in doubt about the safety of the place where he has to work to defer to the opinions and assurances of those who are supposed to know and from their position are bound to have special knowledge as to whether it is safe or not.

Lake Superior Iron Co. v. *Erickson*, 39 Mich. 492, 33 Am. Rep. 423.

Where it appears that plaintiff in an action for negligent injury was thrown off his guard by defendant's own act, and was led to believe that vigilance was not needed, his lack

of care thereafter (if there was such) would not bar recovery.

Kinney v. *Folkerts*, 78 Mich. 687.

The servant does not assume by his contract the risks of the personal negligence of the master, and they are not in the line of or incident to the business.

Missouri, K. & T. R. Co. v. *Hamilton* (Tex.) 30 S. W. 679; *Promer* v. *Milwaukee, L. S. & W. R. Co.* 90 Wis. 215.

Plaintiff was a common laborer, not a miner.

Smith v. *Peninsular Car Works*, 60 Mich. 504; *Grizzle* v. *Frost*, 3 Fost. & F. 662; *Bartonshill Coal Co.* v. *Macguire*, 3 Macq. H. L. Cas. 300; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Craven* v. *Smith*, 89 Wis. 119; *Illingsworth* v. *Boston Electric Light Co.* 161 Mass. 583.

Plaintiff was entitled to as safe a place to work in as due care on the part of the master would permit, and this duty of the master to furnish a safe place could not be delegated to others so as to relieve him from responsibility for their want of care.

Kelley v. *Fourth of July Min. Co.* 16 Mont. 484; *Western Coal & M. Co.* v. *Ingram*, 70 Fed. Rep. 219; *Balhoff* v. *Michigan C. R. Co.* (Mich.) 2 Det. L. N. 723.

Mr. **Charles E. Miller,** for defendant in error:

The doctrine of "safe place" does not apply to the facts in this case at all.

Beesley v. *F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266; *Hoar* v. *Merritt*, 62 Mich. 386; *Butler* v. *Townsend*, 126 N. Y. 110; *Killea* v. *Faxon*, 125 Mass. 485 *Peschel* v. *Chicago, M. & St. P. R. Co.* 62 Wis. 338; *Manning* v. *Chicago & W. M. R. Co.* (Mich.) 2 Det. L. N. 109.

The fact that a fellow servant is charged by the master with special duties, and has special authority with respect to a particular part of the work, in whom is vested supervision over it and whose duty it is to see that it is done, does not change the relation to the other employees as a fellow servant, nor does it place him in respect to the master in the position of superintendent or manager in the sense to make the master responsible for injury to a servant resulting from negligence.

Bailey, Master's Liability, 270; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 39.

All who serve the same master work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants.

Adams v. *Iron Cliffs Co.* 78 Mich. 288; *Dewey* v. *Detroit, G. H. & M. R. Co.* 97 Mich. 332, 22 L. R. A. 292; *Beesley* v. *F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Jenkins* v. *Mahopac Iron Ore Co.* 32 N. Y. S. R. 866; *Geoghehan* v. *Atlas S. S. Co.* 3 Misc. 224.

Where a servant knows of the defective character of the place in which he is put to work and still enters into employment at that place, he assumes the risks incident thereto and the servant is bound to take notice of natural laws.

We know of no rule of law whereby the plaintiff can recover in such a case unless the defect was a latent defect or one as to which the law presumes the principal to have a better means of knowledge than the servant.

Kean v. *Detroit Copper & B. Rolling Mills*, 66 Mich. 277; *Gibson* v. *Erie R. Co.* 63 N. Y. 449, 20 Am. Rep. 552; *Patterson* v. *Pittsburg & C. R. Co.* 76 Pa. 393, 18 Am. Rep. 412; *Smith* v. *Peninsular Car Works*. 60 Mich. 501.

On Rehearing.

The room in which these men were working was not in any sense such a place as is contemplated by the rule involved in the doctrine of "safe place."

Fraser v. *Red River Lumber Co.* 45 Minn. 235; *Consolidated Coal & M. Co.* v. *Clay*, 51 Ohio St. 542, 25 L. R. A. 848; *Schroeder* v. *Flint & P. M. R. Co.* 103 Mich. 213, 29 L. R. A. 321; *Beesley* v. *F. W. Wheeler & Co.*, and *Butler* v. *Townsend, supra; McGinty* v. *Athol Reservoir Co.* 155 Mass. 183; *Consolidated Coal Co.* v. *Scheller*, 42 Ill. App. 619; *Waddell* v. *Simoson*, 112 Pa. 567.

Hooker, J., delivered the opinion of the court:

Plaintiff, a trammer in defendant's iron mine, was injured by the fall of ore from the roof of the room in which he was at work loading ore into a car. The work was conducted as follows: The miners loosened and brought down the ore to the floor of the stope or room made by taking out the ore, which room was constantly being enlarged by the process. This ore was loaded upon cars, and removed by common laborers, called "trammers." As fast as the ore was removed, it was the practice to support the roof by timbers and posts set a few feet apart. These were called "sets," and were put in place by a force or gang of men who were called from place to place, as wanted, upon notice from the miners themselves, or through the shift boss or foreman, who had charge of the work of the mine. Above the shift boss was a captain, who had general supervision of the work in the mine. The posts were placed about 8 feet apart, a set being 8 feet square. The post, being 2 feet in diameter, was capped and braced, and covered with lagging to support the roof, which had a tendency to crumble. Sometimes large masses of ore would fall, as in this instance. The drift or vein was twelve sets wide, and the room in question was being mined across the vein, about 40 feet of the vein being its length, while it would be about 100 feet wide across the vein when completed. The miners had taken out sufficient ore to make room for five sets into the vein, and so much appears to have been properly timbered up. At the time of the accident they had mined a space in advance of the last set, which the plaintiff claims was wider than should have been taken without support. The testimony differs about its width, but there is evidence that it was not sufficiently cleaned out to permit of timbering at the time of the accident, and this does not seem to have been disputed. Some indications of danger were noticed by the trammers, who called the attention of the shift boss to it, but, after looking at it, he told them it was all right, and to "quit monkeying," and resume work, which they did. The accident occurred about thirty

minutes later. The court directed a verdict for the defendant.

The claim of the plaintiff is that the master did not furnish a safe place to work. In our opinion, this place where the men were at work was an incident of mining. It was a result of the common work of the miner and the trammer, both of whose labor combined to make it. After the miner had loosened the ore, and the trammer had removed it, it was ready for the timber men, who followed up when notified, putting in sets, which enabled the process of mining to be carried further. The undisputed evidence shows that the trammers and miners had not put the newly opened space in condition for the timber men, and that the miners had not caused them to be notified that their services were required. If there can be said to have been culpable negligence, it was either in mining too large a space before cutting out the corners preparatory for the sets, or in failing to notify the timber men if sets could have been put in before the ore was still further removed. In either case, if the fault of the miner, it was the negligence of a fellow servant under the plainest rules. And the same is true if it was through a failure upon the part of the shift boss to cause timbering to be done earlier. He was a foreman, who directed when and where blasts should be put in, and where the men should work, and who was appealed to to settle questions arising as the work progressed. His relation to the men under him was similar to that of a foreman of a section gang upon a railroad to his men, or one in charge of workmen upon a train. *Schroeder* v. *Flint & P. M. R. Co.* 103 Mich. 213, 29 L. R. A. 321. Unless it can be said that the duty to furnish a safe place to work is involved, the court was right in directing a verdict for defendant. There are duties which a master owes to employees, which he must perform; and, while he may confide the performance of such to another, the obligation is still the master's, and he cannot avoid it by authorizing another to perform the act. In such cases it is not an answer to say that he has provided a competent agent, although such agent may be a fellow servant, and in many things a fellow servant of the injured person. This question has been discussed of late, and authorities cited, in the opinion of Mr. Justice Montgomery in the case of *Schroeder* v. *Flint & P. M. R. Co. supra.* Also *Beesley* v. *F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266. In the latter case the distinction between temporary places built to assist in construction, as stagings and permanent places, within which men are expected to perform labor, is pointed out. The only difference between the *Beesley Case* and this is that in the former the staging was preliminary to the work of construction, in this it was an incident of the work being done; and we see no difference in principle. The same distinction was made in the case of *Consolidated Coal & M. Co.* v. *Clay*, recently decided by the supreme court of Ohio, reported in 51 Ohio St. 542, 25 L. R. A. 848. See also *Butler* v. *Townsend*, 126 N. Y. 110; *Benzing* v. *Steinway & Sons*, 101 N. Y. 547; *Stringham* v. *Hilton*, 111 N. Y. 188, 1 L. R. A. 483.

This was a case of injury resulting from a failure to support the roof of a mine, and the court says: "We need not discuss this proposition, for we have not that case. Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing and instead of being a place furnished by the master for the employees, within the spirit of the decisions referred to, was a place, the furnishing and preparation of which was in itself part of the work which they were employed to perform. The distinction is shown in a number of cases" (which are cited in the opinion).

It follows that *the judgment should be affirmed.*

The other Justices concur.

A petition for rehearing was subsequently filed, after which, on April 21, 1896, **Hooker,** J., handed down the following opinion:

The substance of the question which we are disposed to consider upon the rehearing of this cause is whether the fact that mining operations have proceeded beyond a given point in the stope, and the stope has been "timbered up" to that point, changes the portion so timbered so that it is to be treated as a place to work, within the decisions requiring a master to furnish the servant a reasonably safe place to work. The alleged inaccuracy of the court in stating that the testimony showed that the miners had not put the newly opened space in condition for the timber men, has no bearing upon this question; and we are satisfied with the proposition enunciated,—that the failure of the miners or boss to notify the timber men that the place was in readiness was the negligence of fellow servants of the plaintiff. But it was urged by counsel that in the discussion of the question the court neglected to consider the fact that, at the time of the accident, the last timbers set did not support the roof of the mine, the lagging being some distance below the roof, by reason of the caving or dropping of ore from the roof, above the lagging, until it left a space between the lagging and the roof of the mine, and that, as this increased the area of roof unsupported, it caused the ore to fall and injure the plaintiff. It is apparent that if we are to adhere to the holding that miners and trammers are fellow servants, and that the shift boss, like the foreman of a section gang, is not an exception, there can be no theory upon which the plaintiff can recover, except that, immediately the room was in readiness for timbers, it was the duty of the master to see that they were properly set and maintained. And it is obvious that this claim must be, as it is, planted upon the rule that, in appropriate cases, requires the master to provide a safe place. The operation of mining, in this and similar mines, is to sink a shaft, and from the shaft start a drift, from which stopes or rooms are excavated across the vein, from the lower to the upper or hanging wall. It is accomplished by caving down and removing the ore. It is manifest that this cannot proceed unless the roof is supported behind the miners, and this is done by putting up timbers to support the roof until the ore shall be excavated beyond. It is said that, when the room has been excavated sufficiently large, it is the practice to cave the room down into the min-

ing sets, and place more timbers on top of the first. Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but, if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care, or furnishing suitable material, and employing capable and efficient men to do the work. In view of the cases of *Schroeder* v. *Flint & P. M. R. Co.* 103 Mich. 213, 29 L. R. A. 321, and *Beesley* v. *F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266, cited in the former opinion, there is no doubt that a master must furnish a reasonably safe place for a servant to work, if a structure is required for the carrying on of his business; and the briefs furnished in this case upon the part of the plaintiff would render us more assistance, had they called our attention to cases establishing the claim that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an incident of the work, although it necessitates his presence in a place, to a greater or less degree, unsafe. In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured? There are many cases which draw the distinction pointed out. Such a case is *Beesley* v. *F. W. Wheeler & Co. supra.* Several other cases are cited in the former opinion. In *Fraser* v. *Red River Lumber Co.* 45 Minn. 237, it is said, "An important consideration, often overlooked, is whether the structure, appliance or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform." As we understand from the brief of counsel and the record,—and we do not discover a denial of it,—this stope or room starts from a drift at or near what is called the "foot wall," which is the bottom, as distinguished from the overlying stratum of the vein of ore. Both foot wall and top wall depart from the level, and dip sharply, so that, in running the stope on a level, it can go but a short distance until the top or overhanging wall is reached; and then the operation is repeated above the lagging, removing the lagging and caving down the roof,—supporting the new roof thus formed by new sets placed upon the first. Thus, so far as the lagging is concerned, it has a temporary use merely to enable the miners to push the breast through to the overhanging wall, by supporting the roof. It is a part of the operation of mining, as much as a blast or a staging, and is not a part of the permanent structure. The following cases confirm us in our opinion that, as an incident or means of excavating the ore, the master has only the duty of furnishing competent men, and furnishing suitable materials for the use of those engaged in the common employment: *Hall* v. *Johnson*, 3 Hurlst. & C. 589, where it was held that "an underlooker in a mine, whose duty it was to examine the roof, and prop it up if dangerous, was a fellow laborer with a workman." *Waddell* v. *Simoson*, 112 Pa. 567, where it was decided that "the operator of a coal mine fulfils the measure of his duty to his employees, if he commits his work to careful and skillful bosses and superintendents." And in *Consolidated Coal Co.* v. *Scheller*, 42 Ill. App. 619, the court held that if a master exercises reasonable or ordinary care in selecting men and materials, a mine owner is not liable if the roof falls. In *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34, a workman was injured by a fall occasioned by the breaking of a bridge across a permanent opening, consisting of a winze or perpendicular shaft for ventilation in a mine. The timber man was held to be a fellow servant, which excludes the theory contended for in this case. A case substantially like the one before us is *Consolidated Coal & M. Co.* v. *Clay* (cited in the former opinion), 51 Ohio St. 542, 25 L. R. A. 848. We see no occasion to change or modify the opinion heretofore filed in this cause, which disposed of all questions necessary to a decision of the case.

Judgment affirmed.

Long, Ch. J., took no part in the decision. The other justices concurred.

City of DETROIT
v.
Alexander LEWIS *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. **A tax on credits in the hands of resident trustees** holding the absolute legal title thereto in trust for nonresidents of the state is within the power of the legislature to impose.
2. **"Inhabitants" of a state** whose credits of every kind are taxed by Pub. Acts 1893, No. 206, include resident trustees holding the absolute legal title to choses in action for the benefit of nonresidents.
3. **Trustees against whom judgment is rendered for taxes** upon trust estates are entitled to pay it from the trust fund and be credited with the amount so paid.

(April 21, 1896.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to collect a personal property tax. *Affirmed.*

Statement by **Grant,** J.:

On the 5th of July, 1892, the Detroit Gaslight Company and Camille Weidenfeld, of the city of New York, executed a contract, the material parts of which are as follows:

"Whereas, said second party is desirous of purchasing so much of the property of said first party as is used for the purpose of making and distributing gas, and is also desirous of acquiring all of the capital stock of said first party, and has offered the said first party the price and terms therefor hereinafter named, and the directors of said first party deem it wise, and best for the interests of the stock-

NOTE.—As to place of taxation of trust property, see *note* to Richmond County Academy v. Augusta (Ga.) 20 L. R. A. 151.

32 L. R. A.

holders of said first party, that such sale be made; and whereas, in order to consummate such transaction, it will be necessary to obtain the assent of all the stockholders of said first party: Now, therefore, said first party agrees that it will, as soon as practicable, present the said proposition to its stockholders, and use reasonable efforts to obtain the authority of all of them to the sale of said property and stock, and, if successful in such efforts, to notify the said second party, within ninety days from the date hereof, of its readiness to carry out the sale aforesaid. And, upon receiving such power and authority from its stockholders, said first party agrees to sell, by good and sufficient conveyance, to said second party and his associates, or to such person or corporation as he may designate: provided, that if such assent, ratification, and authority from such stockholders be not obtained within ninety days from the date hereof, then this agreement becomes void and of no effect, at the option of the party of the second part, to be declared within thirty days after the expiration of said period of ninety days, and he shall have the right to purchase the holding of the stockholders so assenting, for a *pro rata* proportion of said purchase money; and in any event the party of the second part shall have no cause of action against the party of the first part for its failure to obtain the assent, ratification, and authority of all of said stockholders. And in consideration of the premises the said second party agrees to purchase the said property and stock, and to pay therefor the sum of $1,450,000, in manner following: $450,000 within nine months after receipt of notice of the authority given by said stockholders as aforesaid, $500,000 on or before one year from the date of such first payment, and $500,000 on or before two years from the date of such first payment, such deferred payments to bear interest at the rate of 6 per cent per annum, payable semi-annually, until paid, and to be secured by a purchase-money mortgage upon the property so transferred, executed by said second party to such persons as said first party shall designate to hold the same as trustees for the stockholders of said first party. Such mortgage shall contain the usual interest clause contained in the long-form real-estate mortgage in common use in this state. Concurrently with the payment by the party of the second part of said first payment of $450,000, and the execution and delivery of said purchase-money mortgage, the said party of the second part shall be entitled to, and shall be put into, the possession of said property and stock; and the board of directors of said party of the first part shall at once hold a meeting of said board of directors, and severally resign as such directors, and, as each resignation shall be accepted, the remaining members of said board shall elect such person to fill the vacancy as shall be named by the party of the second part, and continue to do so until all of said directors shall be persons designated by said party of the second part. All money on hand and accounts due to said first party at the time of the transfer shall be retained by the said first party, and transferred by it to the trustees, for the benefit of its stockholders. It is intended and understood that the property of said first party not expressly transferred hereby, and the purchase money aforesaid, shall be, by said first party, prior to the transfer of its capital stock to said second party, transferred to certain persons, to be designated by said first party (presumably, the persons named in said mortgage as trustees), to hold the same for division and distribution among the stockholders of said first party authorizing the sale of such stock; and wherever the word 'stockholder' is used herein, the stockholders authorizing such sale of stock to said second party are the ones meant, and not such as may be stockholders after such transfer." This contract, it appears, was carried out, the stock secured, transferred to the new corporation, and on February 1, 1893, Mr. Weidenfeld executed to the defendants and Charles B. Lothrop, all of Detroit, a mortgage for $1,000,000. The description of the property, and the terms of payment, are immaterial. The mortgage was in the usual form, but does not appear to have been accompanied by any note or bond. It specified that the parties of the second part held as trustees and as joint tenants, and not as tenants in common. It does not contain the provisions of the trust. On February 20, 1893, the Detroit Gaslight Company assigned and transferred to said trustees all their rights under the above contract, "particularly the covenant of said Weidenfeld for the payment of the within purchase price; the same being secured by mortgage executed and delivered at the date hereof, but dated Feb. 1st, 1893, to the trustees aforesaid."

The defendants are the surviving trustees. In 1894 the assessors of Detroit assessed this mortgage and two others to the same trustees amounting to $7,500, to the defendants, as trustees, at their face value; the total amount of the tax being $15,888.52. The defendants appeared before the assessor, and denied their liability, and appealed to the board of review, which decided against them. Upon their refusal to pay, the city instituted this suit, and recovered the full amount of the tax. The case was tried before the court without a jury, upon an agreed state of facts, of which, except as above stated, the material ones are these: There were 11,397 nonresident shares of the stock of the gaslight company, at $50 per share, $569,850; 8,603 resident shares, at $50 per share, $430,150. The statute under which this tax was assessed is subdivision 6, § 8, Act No. 206, Pub. Acts 1893, which provides that "for the purpose of taxation personal property shall include all credits of every kind belonging to inhabitants of this state, over and above the amounts respectively owed by them, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state."

Messrs. **Cutcheon, Stellwagen, & Fleming,** for plaintiffs in error:

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business.

State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 319, 21 L. ed. 186.

A personal tax cannot be assessed against a nonresident; neither can the property of a nonresident be taxed unless it have an actual *situs* within the state.

Graham v. *St. Joseph Twp.* 67 Mich. 655.

The *situs* of credit is the domicil of the owner.

Kirtland v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *State Tax on Foreign-held Bonds*, 82 U. S. 15 Wall. 324, 21 L. ed. 188; *Graham* v. *St. Joseph Twp. supra; Davenport* v. *Mississippi & M. R. Co.* 12 Iowa, 539; *People* v. *Eastman*, 25 Cal. 603; *Arapahoe County Comrs.* v. *Cutter*, 3 Colo. 349.

A mortgage in this state is only security for a credit.

Kirtland v. *Hotchkiss*, *supra*.

Possession by an agent for collection and to remit proceeds, or the fact that a note or bonds is secured by a mortgage, does not warrant an assessment against a nonresident.

Goldgart v. *People*, *Goar*, 106 Ill. 25; *Grant* v. *Jones*, 39 Ohio St. 506; *Territory* v. *Delinquent Tax List* (Ariz.) 24 Pac. 182; *Arapahoe County Comrs.* v. *Cutter*, *supra; Herron* v. *Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

Mr. **John J. Speed,** for defendant in error:

The legal relation of the trustees made them the legal owners of the mortgage and its proceeds, and they and their assignees were the only ones who could foreclose at law, and in equity they were the proper complainants to a bill of foreclosure.

Still v. *Ketchum*, Harr. Ch. (Mich.) 423; *Martin* v. *McReynolds*, 6 Mich. 70.

For the purposes of taxation the law looks only to the legal owner.

Latrobe v. *Baltimore*, 19 Md. 13; Perry, Tr. §§ 602*i*, 602*k*, 602*l*.

It is the duty of trustees to pay taxes upon the trust property at the place of their domicil, and this is particularly true in the case of mortgages to trustees.

Perry, Tr. §§ 331, 527; Lewin, Tr. 236; Cooley, Taxn. 375; *Latrobe* v. *Baltimore*, *supra; Gatlin* v. *Hull*, 21 Vt. 152; *Greene* v. *Mumford*, 4 R. I. 313; *State, Harkness*, v. *Matthews*, 10 Ohio, 431.

Grant, J., delivered the opinion of the court:

It is important first to determine the exact status of the credit which is the subject of this litigation. At the time this mortgage was given the stockholders of the Detroit Gaslight Company, resident and nonresident, had assigned all their shares, under the agreement above referred to. Upon the giving of this mortgage they were not the owners, therefore, of any of the stock of that corporation, but had parted with their title to it. All their interests were then represented by this mortgage, which, when collected by the trustees, was evidently to be divided among the *cestuis que trust*, the former stockholders, in proportion to the amount of stock formerly held by each. There is no presumption that the interest of either the resident or nonresident parties had been assessed to them at their domicils in 1894. By their voluntary act the legal title was vested in three citizens of Michigan, as trustees, and remained so vested at the time the assessment was made. Under these facts the principal questions are: (1) Was it competent for the legislature to impose a tax on credits in the hands of resident trustees in trust for nonresidents of the state? and (2) Does the act of 1893 impose a tax on credits so held?

The learned council for the defendants contend that the legislature has no power to impose such tax, and cite and rely upon the following cases: *State Tax on Foreign-held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186; *Graham* v. *St. Joseph Twp.* 67 Mich. 655; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Davenport* v. *Mississippi & M. R. Co.* 12 Iowa, 539; *People* v. *Eastman*, 25 Cal. 603; *Arapahoe County Comrs.* v. *Cutter*, 3 Colo. 349. These authorities, and many others, have established the rule that the *situs* of a credit is the domicil of the owner, and that a credit due from a citizen of this state to a citizen of another state is not subject to taxation at the domicil of the debtor. In none of these cases, however, was the legal title to the credit invested in trustees resident in the domicil of the debtor. So, too, the fact that the credit is secured by a mortgage upon the land of the debtor, or that it is in the hands of an agent for collection merely, does not authorize an assessment against the nonresident creditor. *Goldgart* v. *People*, *Goar*, 106 Ill. 25; *Grant* v. *Jones*, 39 Ohio St. 506; *Territory* v. *Delinquent Tax List* (Ariz.) 24 Pac. 182; *Arapahoe County Comrs.* v. *Cutter*, *supra; Herron* v. *Keeran*, 59 Ind. 472, 26 Am. Rep. 87. In *Goldgart* v. *People*, *Goar*, however, it is said: "If the owner is absent, but the creditors are in fact here, in the hands of an agent, for renewal or collection, with the view of reloaning the money by the agent as a permanent business, they have a *situs* here for the purpose of taxation, and there is jurisdiction over the thing." See Burroughs, Taxn. 44. In *Grant* v. *Jones* it is said: "Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee, or agent. If they are held within the state in either capacity, they are within the jurisdiction of the state for purposes of taxation. If they are not so held, but are owned and held by a nonresident, they are not subject to taxation." Similar language is also found in *Herron* v. *Keeran*. We must not be understood to indorse the doctrine of the three cases last cited, in so far as they appear to hold that credits owned by a nonresident, and placed in the hands of an agent for collection and reinvestment, obtained such a *situs* in this state as will subject them to taxation. We are not dealing with such a case, but with one where the absolute legal title is in persons residents of this state. It is clear that these authorities, which are cited by the defendants, recognize a distinction between cases where the legal title is in the nonresident, and where it is in trustees, guardians, or agents at the domicil of the debtor. The question is little discussed by the text writers. Perry says: "In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicil." 1 Perry, Tr. § 331. Lewin says: "Trustees are liable to be rated for the property vested in them." Lewin, Tr. p. 214. Cooley says: "In general, personal estate in the hands of a

See also 37 L. R. A. 442.

trustee is to be assessed to him at the place of his domicil." Cooley, Taxn. p. 275. "Property in trust is, in the absence of a special provision of statute, taxed at the same place as though the trustee were the absolute owner." 25 Am. & Eng. Enc. Law, p. 153. Where trustees holding credits secured by mortgages resided in one county of a state, and the *cestuis que trust* resided in another county, an assessment upon the *cestuis que trust* at their domicil was held void, and the credits held assessable at the domicil of the trustees. *Latrobe* v. *Baltimore*, 19 Md. 13; *Baltimore* v. *Stirling*, 29 Md. 48. A *cestui que trust* residing in Massachusetts was held not taxable there for shares in corporations held in trust for her by trustees residing in another state. *Dorr* v. *Boston*, 6 Gray, 131. Funds in the hands of trustees were held assessable at their domicil, though they belonged to nonresident beneficiaries. *Davis* v. *Macy*, 124 Mass. 193. Where a judgment was rendered against trustees for maladministration, and they were directed to pay the amount into the hands of a receiver, to be turned over to a new trustee, it was held that the beneficiaries were not liable for taxes. *Smith* v. *Byers*, 43 Ga. 191. In *Price* v. *Hunter*, 34 Fed. Rep. 355, trustees in Pennsylvania were held liable for taxes upon a mortgage upon property in that state held in trust for a nonresident beneficiary. The same doctrine is held in the following cases: *People* v. *Albany Assessors*, 40 N. Y. 154; *Lewis* v. *Chester County*, 60 Pa. 325. See also *Greene Foundation* v. *Boston*, 12 Cush. 54; *Greene* v. *Mumford*, 4 R. I. 313; *Catlin* v. *Hull*, 21 Vt. 152. We are cited to no authorities, nor have I been able to find any, which hold that where the legal title and ownership of personal property, tangible or intangible, is vested in trustees, the beneficiaries or *cestuis que trust* are taxable, or that the funds in the hands of the trustees are exempt from taxation at their domicil in the absence of a statute making the property assessable to the *cestuis que trust*. It is, however, contended that the terms of the statute, "all credits of every kind belonging to inhabitants of this state," do not include trustees holding credits for the benefit of nonresidents. It follows from the authorities above cited—and we think the holding based upon sound reason—that the term "inhabitants" includes resident trustees, in whom is vested the absolute legal title to choses in action. Our statute, however, appears to control the question. It provides: "Personal property under the control of a trustee or agent, whether a corporation or a natural person, may be assessed to such trustee or agent in the township where he resides, except as otherwise provided." Pub. Acts 1893, Act No. 206, § 14, subd. 6.

It appears by the stipulated facts that the trustees have commenced foreclosure proceedings, and that one of the defendants in that suit has answered, denying all indebtedness upon the mortgage, and has interposed a cross bill charging fraud and deception on the part of the Detroit Gaslight Company in the sale of the property, and praying a cancelation of the mortgage. That suit is pending and undetermined. Counsel, in their brief, say: "If the pending foreclosure suit is decided in favor of the defendants in that case, can it be possible that the law will compel the defendants in this case to pay not only the large judgment in this case, but also like taxes assessed before the determination of the foreclosure suit, out of their individual property, when they have been remiss in no way?" That question may arise when the defendant trustees shall be called upon to account for the trust funds, provided the mortgage is declared void. It is not now before us. It is not claimed that they have not in their hands moneys sufficient to pay these taxes. In their appeal from the action of the assessor to the board of review, they set up this pending suit, and state that they have in their hands moneys paid to them as interest on this mortgage; and it is also a fair inference from the record that the $450,000 of the purchase price has been paid to them, and for which an accounting is asked in that suit. Several of the cases above cited appear to have been brought and decided upon the theory that the trustees, having legal title to the property, were obligated to pay the tax. In *Latrobe* v. *Baltimore* it is said: "That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title, we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligations of an absolute title, subject only to the claims in equity of the *cestui que trust*." Such suits must, of necessity, be brought against the trustees; and, when judgment is rendered against them, they are entitled to pay the judgment from the trust fund, and credit themselves with the amount so paid. Where a court has adjudged the tax to be valid, it would seem to logically follow that the trustees will be protected in its payment from the trust fund.

The judgment is affirmed.

Long, Ch. J., did not sit; the other Justices concurred.

James B. VINING *et al.*
v.
Charles MILLAR *et al.*, *Plffs. in Err.*

(.....Mich..... ..)

A chattel mortgage on horses, given in Canada by the owner of a half interest in them, and filed by the mortgagee, who takes possession of the horses and puts them in the care of the keeper of a hotel at a race track to hold possession for him, gives such mortgagee a better right to such interest in the horses after they have been taken without his consent from the custodian and shipped to Michigan by the owners of the other half interest in the horses, who did not know of his mortgage, than the latter can assert under another chattel mortgage from the same mortgagor, which they took in Michigan before the horses went to Canada, and recorded after their return.

(May 12, 1896.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of

NOTE.—As to the extraterritorial effect of a chattel mortgage, see *note* to Ord Nat. Bank v. Massey (Kan.) 17 L. R. A. 127.

plaintiffs in an action to enforce a chattel mortgage against certain horses which were claimed by defendants under another chattel mortgage. *Reversed.*

The facts are stated in the opinions.

Messrs. **Moore & Moore** for appellants.

Messrs. **Brooke & Spalding** for appellees.

Montgomery, J., delivered the opinion of the court:

Under the statement of facts by Mr. Justice Grant, it appears that defendant Millar had taken possession of the property, and placed it with a custodian (Biggs), and this with the assent of the mortgagor. The property was not detained by the custodian, but, as his agency was a special one, it is clear that he exceeded his authority in delivering it over to, or permitting it to be taken by, plaintiffs. We have, then, a case in which the mortgagee in Canada has taken possession of mortgaged property, and in which the mortgagor has, without his assent, regained possession, transported the property to Michigan, and a prior lien holder has asserted a lien which, while the property was so in the possession of the Canadian mortgagee, was inferior to the Canadian lien. To give the Michigan lien priority under these circumstances is certainly to go a step further than this court has yet gone. In the cases of *Montgomery* v. *Wight*, 8 Mich. 143; *Boydson* v. *Goodrich*, 49 Mich. 65, and *Corbett* v. *Littlefield*, 84 Mich. 30, 11 L. R. A. 95, it appears that the foreign mortgagee permitted the mortgagor to retain possession. In *Corbett* v. *Littlefield* it was said distinctly that the mortgagee had it in his power to protect himself by taking possession of the mortgaged property. It can hardly be said that it was intended to imply that he must, in addition to taking possession, stand guard over the property constantly, to see that the mortgagors do not take it out of his possession and to another jurisdiction. If, in fact, Millar was invested with possession, it is difficult to see how he could do more to protect himself, unless an absolute duty does rest upon him to see that no person with or without right shall take it beyond the jurisdiction; and I cannot understand why this duty should be imposed upon a mortgagee in possession any more than it is upon an absolute owner. Without regard to the record of the mortgage in Canada, it was good as against any but creditors who became such after the mortgage was made and before possession was taken, or prior creditors who had acquired a lien before possession was taken by the mortgagee. *Waite* v. *Mathews*, 50 Mich. 392.

Certainly, plaintiffs, as mortgagees, under a mortgage executed in Michigan, upon property which was, by their direct assent, taken to Ontario, were not entitled to priority over a mortgage given in Ontario, and under which possession was given to the mortgagee. Can it be said, then, that because Biggs, the custodian, did not withhold the property from them, and because they did not in fact know of the title acquired by Millar from Leroy, they are to be given priority for this reason? I cannot understand how they could occupy any better position then a purchaser from Leroy could occupy; and if the mortgage to Millar was taken by him in good faith, and the possession was actually transferred as testified to by him, I think the mortgage as to Leroy's half interest in the horses was good, and entitled to priority over plaintiffs.

Judgment is reversed, and a new trial ordered.

Long, Ch. J., and **Hooker** and **Moore**, JJ., concurred with **Montgomery, J.**

Grant, J., dissenting:

The following statement of facts is taken from the brief in behalf of the plaintiffs, and is correct. "On October 11, the plaintiffs, who were residents of Canada, advanced to one George Leroy, a resident of Illinois, at Detroit, Michigan, $1,600, and took from him a chattel mortgage covering a one-half interest in three trotting horses, which interest was then owned by Leroy. The other one-half interest in two of the horses was owned by the plaintiffs, and in the third horse by another person, not a party to this suit. The plaintiffs and Leroy, at or about the execution of the mortgage, agreed that these horses should be raced on joint account during the winter of 1892 and the racing season of 1893, the winter racing to be in the Southern United States; the plaintiff Vining to manage the horses, making all contracts and entries, collecting the moneys, and doing all the business, Leroy to do the driving, and the money for expenses to be furnished by the plaintiffs, the profits and losses of the racing to be equally shared among the three. This arrangement was not to affect the property rights of the several parties in the horses. At the time of the execution of the mortgage, it was contemplated by the parties that the horses should be taken out of the state, and they were then on board the cars in Detroit for shipment South, and went out of the state in the afternoon of the same day. After racing the horses in the Southern states through the winter and spring, they were shipped back from the South to London, Canada, on May 4, 1893, and passed through Detroit in transit for London, where they arrived on May 8. In order to get them into Canada, the plaintiff Vining gave a bond in the sum of $10,000, conditioned to return them to the United States within seventy days. The racing of the horses was continued in Canada under the same arrangement; but Vining fell sick, and was unable to remain with the horses personally. The horses were raced at various places in Canada, and finally at Toronto, at a race meeting beginning about the 3d of July. The plaintiff Ferguson attended at these races, and instructed Leroy to ship the horses on July 10 to Detroit, where they were next to race, and left him to do so. Instead of shipping the horses, Leroy disappeared; and, the plaintiffs learning from one Stilson, the assistant driver, who was in their employ, that Leroy had gone, Ferguson again went to Toronto, and on Saturday, July 15 (the period within which the horses were to be returned according to the condition of the bond being nearly up), shipped them back to Detroit, where Vining took charge of them. It appears that the horses, before coming to Toronto, were in Tilsonburg, which is about 100 miles distant, and in another

county. Leroy had gone ahead to Toronto, and there met the defendant Millar on June 30, and represented to him that he had these horses at Tilsonburg, and wanted to get them down to Toronto for the races and wanted to borrow of Millar money to pay to bring and to keep them in Toronto during the races. Millar gave him some money then, and agreed to make further advances, taking a mortgage on the horses as security. This mortgage Millar filed in the county clerk's office in Toronto on July 5, 1893. Defendant testifies that on July 8, with Leroy's consent, he put the horses in the care of one Biggs, the keeper of an hotel at the race track, to hold possession for him. At the time when Ferguson returned to Toronto, after Leroy's disappearance, he found the horses in the possession of Stilson, the plaintiffs' assistant driver, at the stable of Biggs; saw Biggs, and paid him all his charges for feeding the men and horses, and told him he was going to ship the horses. Biggs made no claim of possession, and Ferguson learned nothing about Millar or his mortgage. On Monday, the 17th of July, when the horses arrived in Detroit, where they were to race, the plaintiffs recorded their mortgage; and, on the following day, the defendant Millar came to Detroit, and had the defendant Fox, who is a constable, seize the horses under his chattel mortgage. The plaintiffs, to whom this act was the first notice of Millar's mortgage, demanded the return of the property, and, on its being refused, brought this action of replevin, upon the trial of which a verdict was directed in their favor."

The principal question in the case is whether the defendant Millar's mortgage has preference over that of the plaintiffs, which was prior in date. The question is not new in this court. The principle governing it has been discussed and determined in the following cases: *Montgomery* v. *Wight*, 8 Mich. 143; *Boydson* v. *Goodrich*, 49 Mich. 65; *Corbett* v. *Littlefield*, 84 Mich. 30, 11 L. R. A. 95. In all these cases it was held that chattel mortgage laws have no force beyond the jurisdiction of the sovereignty enacting them, and that the notices, which the record of them is designed to give, have no extraterritorial force. The reasoning of Justice Campbell in *Montgomery* v. *Wight* is exhaustive and conclusive. It was followed in the other opinions. It may be conceded that the defendant Millar has a lien valid in Canada, and that plaintiffs have a lien valid in Michigan. The parties, therefore, have no other or different rights than they would have if there was no law in either country providing for recording mortgages, and declaring the effect of such record. It is sought to distinguish this case from the above, upon the claim that Millar had reduced the property to possession in Canada, and that it was illegally and surreptitiously taken from him. In the cases above cited, the property was left in the control of the mortgagor; and in *Corbett* v. *Littlefield* it was held that the attachment lien in this state prevailed, although the property was removed from the state of Kansas without the knowledge or consent of the mortgagee. The difficulty with the defendant's contention is that the facts do not support it. There was no actual or visible change of possession. The horses were at Mr. Bigg's hotel, and in his possession, at the time defendant claims possession was given to Mr. Biggs for him. This possession was only that of an hotel keeper in charge of the property of his guest. Millar testifies: "I went to the hotel man in whose possession these horses were, and I said to the hotel man, 'These horses remain as between you and me, . . . and you are to keep them for me.'" Plaintiffs were under a heavy bond to return the horses to the United States within a specified time, which had nearly expired. Leroy had been instructed to ship them to Detroit. He failed to do so. By telegram, plaintiffs ascertained that Leroy had left. Plaintiff Ferguson then went to Toronto, and found the horses in the care and control of their employee, Stilson, at the public stable of Mr. Biggs. He paid Mr. Biggs all he claimed for their care and keeping, and told him he was going to ship them. Biggs made no claim to their possession, nor informed him that Millar had, or claimed to have, a lien. Neither Stilson nor any other of the plaintiffs' employees are shown to have had any knowledge of the arrangement between defendant and Mr. Leroy. Neither was there anything to indicate any change of possession or the existence of any lien. Under such circumstances, the plaintiffs were rightfully in the possession of their property, and their rights must be determined without regard to any arrangement between defendant, Biggs, and Leroy. The horses were therefore lawfully in Michigan, and in the possession of the plaintiffs, as mortgagees and part owners, with their chattel mortgage on file in the city, where the property was then located, and without any knowledge of the defendant's mortgage. The question presented by the briefs is one exclusively of the priority of liens. The case, therefore, comes directly within those above cited, and the instruction of the court was correct. In view of this disposal of the case, the other questions raised become immaterial. Judgment should be affirmed.

ILLINOIS SUPREME COURT.

William HARDING *et al., Plffs. in Err.*,
v.
PEOPLE of the State of Illinois.

(160 Ill. 459.)

1. **A statute requiring the weighing of coal** hoisted from mines, which is made applicable to those mines only whose product shall be shipped by rail or water, violates a constitutional prohibition against depriving persons of liberty or property without due process of law.

2. **A law which deprives men engaged in the business of mining** from the privilege of contracting with each other for the purpose of ascertaining the weight of the coal mined or the amount due them in any manner mutually satisfactory cannot be sustained.

(March 30, 1896.)

ERROR to the Circuit Court for Vermillion County to review a judgment convicting defendants for violating the statute requiring the weighing of coal at mines. *Reversed.*

The facts are stated in the opinion.

Messrs. **W. J. Calhoun** and **H. M. Steely,** for plaintiffs in error:

The constitutionality of a statute is a judicial question to be determined by reference to the subject-matter of the legislation and its results.

Lake View v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185.

This statute is not justified under the police power.

Potter's Dwarr. Stat. 458; *Austin* v. *Murray*, 16 Pick. 121; *Watertown* v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Godcharles* v. *Wigeman*, 113 Pa. 431; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Yeazel* v. *Alexander*, 58 Ill. 254; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 40, 16 Am. Rep. 611; *Jones* v. *People*, 110 Ill. 590; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492.

It deprives persons of liberty and property without due process of law.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 389; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *State, Corwin*, v. *Indiana & O. Oil, Gas, & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758; *State* v. *Addington*, 77 Mo. 110; *Powell* v. *Com.* 114 Pa. 265, 60 Am. Rep. 350; *Millett* v. *People*, and *Frorer* v. *People, supra; Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340; Cooley, Const. Lim. 1st ed. 352, 353, 391; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482; *Ragio* v. *State*, 86 Tenn. 272; *State* v. *Divine*, 98 N. C. 778.

It is special or class legislation within the meaning of Const. art. 4, § 22, in that it applies only to persons engaged in mining and only to those mines whose product is shipped by rail or water.

Thomas v. *Wabash, St. L. & P. R. Co.* 40 Fed. Rep. 126, 7 L. R. A. 145; *People* v. *Wright*, 70 Ill. 398; *Welker* v. *Potter*, 18 Ohio St. 85; Sedgw. Stat. & Const. L. p. 30; Cooley, Const. Lim. 6th ed. 483, 484; *Wynehamer* v. *People*, 13 N. Y. 433.

It is not authorized by Const. art. 4, § 29, as that only contemplates legislation for the personal safety of miners, and relates only to the enactment of police regulations to promote that end. And the legislature has no right, under the pretense of exercising the police power, to pass laws not necessary to the preservation of health or that will impair the obligation of contracts or to take or impair private property for public use.

Millett v. *People*, 117 Ill. 303, 57 Am. Rep. 869; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 40, 16 Am. Rep. 611; *King* v. *Davenport*, 98 Ill. 314, 38 Am. Rep. 89; *Com.* v. *Pennsylvania Canal Co.* 66 Pa. 50, 5 Am. Rep. 329; *Crenshaw* v. *Slate River Co.* 6 Rand. (Va.) 264; *Miller* v. *New York & E. R. Co.* 21 Barb. 518; *People* v. *Jackson & M. Pl. Road Co.* 9 Mich. 307.

Messrs. **G. T. Buckingham, T. J. Scofield,** and **M. L. Newell,** with *Messrs.* **Maurice T. Moloney,** Attorney General, and **S. G. Wilson,** for defendant in error:

All presumptions and intendments are in favor of the validity of a statute.

3 Am. & Eng. Enc. Law, p. 364; Cooley, Const. Lim. 173; Endlich, Interpretation of Statutes, 738; *People, Bussey*, v. *Gaulter*, 149 Ill. 39; *Wunderle* v. *Wunderle*, 144 Ill. 43, 19 L. R. A. 84; *Harmon* v. *Chicago*, 140 Ill. 376.

Police power of the state includes not only public health and safety (which are of necessity the principal subjects of its exercise) but also the public welfare, protection against impositions, financial and otherwise, and generally the public best interest. It is so extensive and all pervading that the courts refuse to lay down a general rule defining it, but decide each specific case on its own merits.

Endlich, Interpretation of Statutes, 535; Cooley, Const. Lim. 573; 3 Parker & W. Public Health & Safety, 286, 535; Dill. Mun. Corp. 141; 18 Am. & Eng. Enc. Law, p. 752; *American Exp. Co.* v. *People*, 133 Ill. 649, 9 L. R. A. 138; *McPherson* v. *Chebanse*, 114 Ill. 47, 55 Am. Rep. 857; *Harmon* v. *Chicago*, 110 Ill. 408, 51 Am. Rep. 698; *Munn* v. *People*, 69 Ill. 89; *Peel Splint Coal Co.* v. *State*, 36 W. Va. 802, 17 L. R. A. 385.

NOTE.—As to the constitutionality of restrictions by statute on contracts between master and servant, see in general *notes* to Com. v. Perry (Mass.) 14 L. R. A. 325; State v. Loomis (Mo.) 21 L. R. A. 789; also the recent case of Ritchie v. People (Ill.) 29 L. R. A. 79.

As to the validity and effect of statutes regulating the time of payment of wages, see *note* to *Re* House Bill No. 1230 (Mass.) 28 L. R. A. 344.

As to the validity and effect of statutes requiring wages to be paid in lawful money, see *note* to Avent-Beattyville Coal Co. v. Com. (Ky.) 28 L. R. A. 273.

See also 47 L. R. A. 71.

With the wisdom, propriety, and expediency of a statute the court is not concerned; that belongs to another branch of the state government.

Cooley, Const. Lim. 186; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 194, 22 Am. Rep. 71; *People* v. *Harper*, 91 Ill. 367.

Statutes regulating and controlling business interests and protecting the public, or some portion of the public, from imposition of a financial nature purely, have been held within the police power and valid.

Munn v. *People*, 69 Ill. 89; *People* v. *Harper*, *supra*; *Cole* v. *Hall*, 103 Ill. 32; *Wabash, St. L. & P. R. Co.* v. *People*, 105 Ill. 236; *Harmon* v. *Chicago*, 110 Ill. 408, 51 Am. Rep. 698; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610.

The state Constitution is to receive a liberal interpretation.

Endlich, Interpretation of Statutes, §§ 523, 524, 526; *People, Dunham*, v. *Dunham*, 90 Ill. 558.

When a law is found on the book of statutes every presumption is that it is in compliance with the Constitution.

Hawthorn v. *People*, *supra*; Cooley, Const. Lim. 87-89; *People, Longenecker*, v. *Nelson*, 133 Ill. 565; *Gaines* v. *Williams*, 146 Ill. 450.

All doubts resolve themselves in favor of a law, and he who doubts the unconstitutionality of a law by so doubting resolves the law in favor of its validity.

Gaines v. *Williams*, and *People, Longenecker*, v. *Nelson*, *supra*.

A statute which reaches and affects alike all persons similarly situated is not obnoxious to the Constitution on the ground of "class" legislation, although it may, in fact, affect a relatively small portion of the entire community.

Hawthorn v. *People*, *supra*.

Cartwright, J., delivered the opinion of the court:

Plaintiffs in error were indicted and convicted for a violation of the act requiring the weighing of coal at the mines, in force July 1, 1887, as amended by act in force July 1, 1891. Some of the counts upon which they were found guilty charged them with a failure to weigh all the coal delivered from the mine, and others charged them with not keeping a correct record of the weight of each miner's car. The portion of the act under which the prosecution was had, material to the same, is as follows:

"Sec. 1. That the owner, agent, or operator of every coal mine in this state at which the miners are paid by weight, shall provide at such mines suitable and accurate scales of standard manufacture for the weighing of all coal which shall be hoisted or delivered from such mines.

"Sec. 2. All coal so delivered from such mines shall be carefully weighed upon the scales as above provided, and a correct record shall be kept of the weight of each miner's car, which record shall be kept open at all reasonable hours for the inspection of all miners or others pecuniarily interested in the product of such mine. The person designated and authorized to weigh the coal and keep such record shall, before entering upon such duties, make and subscribe to an oath before some magistrate, or other officer authorized to administer oaths, that he will accurately weigh and carefully keep a true record of all coal delivered from such mine, and such oath shall be kept conspicuously posted at the place of weighing."

"Sec. 5. Any person, owner, or agent, operating a coal mine in this state, who shall fail to comply with the provisions of this act, or who shall obstruct or hinder the carrying out of its requirements, shall be fined for the first offense not less than fifty dollars ($50) nor more than two hundred dollars ($200); for the second offense not less than two hundred dollars ($200) nor more than five hundred dollars ($500); and for a third offense not less than five hundred dollars ($500), or be imprisoned in the county jail not less than six months nor more than one year: provided that the provisions of this act shall apply only to coal mines whose product is shipped by rail or water."

The constitutionality of this act is challenged by plaintiffs in error, and this is the only question that will be considered, although the application of the statute to this case is disputed, and questions of variance, and of error in the giving and refusing of instructions, are also raised. It is objected that the act is in violation of art. 2, § 2, of our Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, because it singles out operators of one class of coal mines and imposes restrictions upon them not required to be borne by operators of other mines, or by persons engaged in other business, and also, by interfering with the right of employer and laborer to contract with each other. The Consolidated Coal Company had owned and operated the mine where plaintiffs in error were employed for six or seven years. The greater part of its product was shipped from the mine by rail, on the Wabash Railroad, and sold in other markets. All the coal so shipped was correctly weighed on scales of standard manufacture by the company, at the mine, before being dumped into the railroad cars, and a correct record was made of the weight of each miner's car, and that record was posted and kept open at all reasonable hours for the inspection of the miners or any person interested. During this time the company had also furnished the Wabash Railroad Company with coal for its locomotives, which was delivered at the mine, into the tenders of the locomotives, as they stopped there for coal. There were about 250 miners employed, and the average output of the mine was from 700 to 950 tons of screened coal per day. The miners were paid 55 cents per ton for screened coal. About the last 100 miners' cars that came up in the evening of each day would be placed on the storage tracks, for the purpose of coaling the locomotives during the night and the next day. This last coal was not weighed, but each miner was given the average weight of the cars sent up by him and weighed during the day as the weight of his last car, crediting him with the average weight of the cars mined by him that day that had been actually weighed. By the act under consideration its provisions are applied only to coal mines whose product is shipped by rail or water, and the learned attorney general and counsel for the people construe the provi-

sion as making the law applicable to each mine where the major portion of its product is so shipped. However that may be, it is plain that the act not only singles out the operator of a mine, and imposes restrictions and burdens upon him, as to the use and enjoyment of his property, that are not imposed upon other branches of business similarly situated and conducted, but it divides the operators of mines, and only applies its provisions to those whose product is shipped in a certain manner. In the various Constitutions the phrases "due process of law" and "the law of the land" are used interchangeably, sometimes one being employed and sometimes the other; but they are synonymous, and the meaning is the same in every case. Cooley, Const. Lim. 353. In *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869, it was said of this phrase, p. 301: "And this means general public law, binding upon the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals,"—citing *Janes* v. *Reynolds*, 2 Tex. 251; *Wynehamer* v. *People*, 13 N. Y. 378; *Vanzant* v. *Waddel*, 2 Yerg. 269. And the same declaration was made in *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492, where the statute prohibiting engaging in keeping a truck store was held unconstitutional, and in *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340, where the same conclusion was reached as to an act to provide for the weekly payment of wages by a corporation.

The right to enact such a statute does not arise out of the police power, where much latitude is allowed in determining what may tend to insure the comfort, safety, or welfare of society; and it is not authorized by § 29 of article 4 of the Constitution, providing for laws to secure safety to coal miners. *Millett* v. *People*, *supra*. Each person subject to the laws has a right that he shall be governed by general public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others. In *Braceville Coal Co.* v. *People*, *supra*, it is said (p. 72): "And it is only when such distinctions exist that differentiate in important particulars persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments." No possible reason or distinction, affecting any interest, justifying the division of mines made by the act, has been suggested, except that it might be intended to reach mines in which the larger number of miners were employed. But this is not the division or distinction made, and does not in any manner follow from such division. It is not the language or purport of the act, and, if such had been the intention of the legislature, it would certainly have been made manifest by basing the division or distinction upon the number of miners employed. The act applies equally to the owner of a small mine, where the product may not exceed a car load per day, and the owner of a mine such as that of the Consolidated Coal Company. The distinction is based solely upon the fact of the product being shipped by rail or water, and counsel have been able to suggest no reason why the legislature should require the product of such a mine to be weighed in the manner specified, and not that of another mine where the product is sold on the spot. The distinction between operators who sell their product at the mine to some shipper, who ships it away to the market, and those who themselves ship their coal by rail or water, is purely arbitrary. Any reason that would apply to one, calling for a restriction upon the manner of doing business, would be equally applicable to the other; and special burdens and restrictions upon one class, not imposed upon the other, constitute an arbitrary deprivation of rights. As the act makes that an offense, if committed by a person engaged in one branch of mining, which, if done by persons in another branch of the same business, is lawful, without any reason for distinction between the two, we must regard it as unconstitutional.

In *Millett* v. *People*, *supra*, and *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853, where provisions similar to those of the act now under consideration were held to be unconstitutional and void, the general right of the laborer and employer to contract in regard to the price of labor, and the method of ascertaining the price, was asserted; and the rule was laid down that any restriction upon that right is a deprivation of both liberty and property within the meaning of the constitutional provision. In view of the discussion of the principles involved in those cases, no extended statement of them will be necessary here. This act makes it an offense against the law for the employer and laborer, at any coal mine at which the miners are paid by weight, to determine upon the weight of any miner's car, or any lot of coal, by any other method than that pointed out by the statute. A failure to weigh a car, and to keep a correct record of the weight, renders the operator liable to the penalties prescribed by the act, although he and the laborer may have agreed upon the weight of the car, or contracted for other methods of determining the weight. This is well illustrated by the facts of this case. The last cars that came up in the evening of each day, designed for coaling the locomotives, would not be weighed until the coal was dumped into the tenders, so that the miners could not obtain the weights until the next day, and they wanted them the same evening. For this reason, and at the instance of the miners, it had been the custom for six years to give each miner the weight according to the system above stated. When the company attempted to change this system and weigh the coal, the miners objected, and insisted upon the custom of averaging weights. No objection was ever made by any miner to this manner of arriving at the weight, instead of weighing the cars on the scales. Here was an arrangement, amounting to a contract between the parties, with which all the contracting parties were satisfied, and the testimony upon which plaintiffs in error were convicted came from miners who left during the miners' strike of 1894, and were not again employed by the company. It seems that a law which deprives men engaged in the business of

mining from contracting with each other for the purpose of ascertaining the weight of the coal mined, or the amount due them, in any manner mutually satisfactory, cannot be sustained. That such is the effect of this law is the contention of counsel for the people, and it is only upon the assumption that the law does so control the power to contract, that a conviction could have been had in this case; for, as already seen, the parties had contracted otherwise. The act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method; and, in our opinion, it is unconstitutional.

The judgment will be reversed, and the cause remanded, with directions to the circuit court to discharge the defendants.

MINNESOTA SUPREME COURT.

P. M. HILARY, Admr., etc., of John Kennedy, Deceased, *Respt.*,
v.
GREAT NORTHERN RAILWAY COMPANY, *Appt.*

(.....Minn.....)

***Held, upon the facts,** that the ticket agent at the Union Depot in Minneapolis was "an acting ticket agent" of the defendant, within the meaning of Gen. Stat. 1894, § 5202, providing for the service of process in civil actions upon railroad companies.

(May 11, 1896.)

APPEAL by defendant from an order of the District Court for Hennepin County overruling a motion to set aside a service of process. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **W. E. Dodge, B. D. Townsend,** and **C. F. Alderson,** for appellant:

One who acts ostensibly and in fact as the sole agent of another who is in turn the sole agent of another and first principal is not the acting agent of such principal but the agent of the agent of such principal.

Since the relation of principal and agent did not exist between the defendant and Jones he was not an acting ticket agent of the defendant within the meaning of the statute.

Union P. R. Co. v. *Miller*, 87 Ill. 45; *United States* v. *American Bell Teleph. Co.* 29 Fed. Rep. 17; *Union P. R. Co.* v. *Novak*, 61 Fed. Rep. 578, 15 U. S. App. 400.

Messrs. **Wilkinson & Traxler,** with *Messrs.* **Frank H. Morrill** and **William Kennedy,** for respondent:

This provision being remedial in its nature, its construction should be such as to give to it the force and effect intended, and like all similar statutes should be liberally construed.

Peoria Ins. Co. v. *Warner*, 28 Ill. 429.

Fairly construed it means that when a person is lawfully engaged in the business of selling tickets or managing freight for a railroad company within this state, in the lawful and usual manner, at a regular place of business of such railroad company or at a place where such company lawfully and habitually transacts business, whence it derives the proceeds in the usual and customary manner, such person is an acting ticket or freight agent for the purposes of its provisions.

Van Dresser v. *Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Norton* v. *Atchison, T. & S. F. R. Co.* 61 Fed. Rep. 618; *Union P. R. Co.* v. *Novak*, 61 Fed. Rep. 573, 15 U. S. App. 400; *Georgia Southern R. Co.* v. *Bigelow*, 68 Ga. 219.

Where one performed the duties of an agent of a corporation summons may be served upon the corporation under a statute similar to the one under consideration by delivery of a copy to such person whether such person receives compensation for his services or not.

State v. *Northwestern Endowment & L. Asso* 62 Wis. 174.

Mitchell, J., delivered the opinion of the court:

The only question in this case is whether the ticket agent in what is known as the "Union Depot" at Minneapolis was "an acting ticket agent" of the defendant, within the meaning of Gen. Stat. 1894, § 5202, providing for the service of process in civil actions upon railroad companies. The facts, as distinguished from mere legal inferences, are practically undisputed, and are quite fairly and fully stated in the memorandum of the trial judge. They may be summarized as follows: The Union Depot is owned and operated by the Minneapolis Union Railway Company. A number of lines of railway, including that of the defendant, use this depot for general depot purposes, and as a regular station on their respective roads, under contracts with the Union Railway Company, whereby, for a specified compensation to be paid to it by each of the other railroad companies, it is to furnish each of them trackage facilities into and through the Union Depot, transfer its cars, transfer and deliver baggage, furnish accommodations for passengers arriving or departing, and also sell tickets for each company; maintaining for that purpose a ticket office in the depot, where tickets are regularly sold at all hours of the day. The Union Railway Company employs the agents selling tickets at this ticket office, and such agents are responsible, and under bonds, to that company for the faithful performance of their duties. The different railroad companies furnish their tickets to these ticket agents, who report the sales thereof daily to the respective companies, and account to them at regular intervals for the proceeds of such sales.

*Headnote by MITCHELL, J.

NOTE.—The question, What constitutes an acting agent of a corporation on whom process may be served?—has many illustrations in the *note* to Foster v. Charles Betcher Lumber Co. (S. D.) 23 L. R. A. 490, on the question, Who may be served with process in suit against a foreign corporation?

32 L. R. A.

See also 32 L. R. A. 154, 535.

It also appears from the affidavits used on the motion that the defendant, in its folders and otherwise, holds out and represents to the public the ticket office in this depot as one of its ticket offices, and the ticket agent in that office as its ticket agent. We are of opinion that under these facts the ticket agent in the Union Depot was "an acting ticket agent" of the defendant, within the meaning of the statute. The contention of defendant is that the word "agent" means "an agent in the eye of the law arising from a contract of employment; one responsible to his principal, and subject to be discharged by it,"—and that within this definition the "ticket agent" at this depot is not its agent, but the agent of the Union Railway Company. We do not concur in this view. While the ticket agent is hired by, and under the control of, the Union Railway Company, yet he is performing all the duties of a ticket agent of the defendant, and the defendant is availing itself of his services for that purpose. The word "acting" must have been used in the statute for a purpose, and it seems to us that the essential thing, under the statute, is not the existence of a contract of service, but the actual performance of the duties of ticket agent for the railroad company. As bearing more or less on this question, see *Van Dresser* v. *Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Norton* v. *Atchison, T. & S. F. R. Co.* 61 Fed. Rep. 618; *Union P. R. Co.* v. *Novak*, 9 C. C. A. 629, 61 Fed. Rep. 573, 15 U. S. App. 400; *Georgia Southern R. Co.* v. *Bigelow*, 68 Ga. 219; *State* v. *Northwestern Endowment & L. Asso.* 62 Wis. 174.

We do not wish to be understood as intimating that scalpers or ticket brokers to whom a railroad company may furnish its tickets for sale would be its "acting ticket agents," within the meaning of the statute. The service in this case was made on the assistant ticket agent in the office, while performing its duties during the temporary absence of the head ticket agent, to whom, on his return, he delivered the copy of the summons. We think this service was regular, and, even if irregular, there was, under the facts, no ground for setting it aside on motion. *Union P. R. Co.* v. *Novak*, *supra*.

Order affirmed.

MARYLAND COURT OF APPEALS.

John HALL, an Infant, by Next Friend, *Appt.*,
v.
COUNTY COMMISSIONERS OF SOMERSET COUNTY.

(.....Md.....)

1. **A witness who can but will not give security** for his appearance, and is committed for his refusal, will not be entitled to a *per diem* fee during any part of the time he may be detained to secure his attendance.
2. **A witness unable to find security** because of his own misconduct or bad character will not be entitled to a *per diem* fee when detained to secure his attendance.
3. **A witness will be entitled to per diem fees** for the term of his detention to secure his attendance in default of a recognizance, when his inability to give security arises from his misfortune, and not his fault.
4. **Assumpsit will not lie to recover per diem fees** of a witness for the time of his detention to secure his attendance, but the appropriate proceeding is by mandamus, if anything is due him.

(March 24, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Somerset County denying his claim to compensation for the time he had been detained as a witness in a murder trial. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Charles O. Melvin** and **Thomas S. Hodson,** for appellant:

The law requires the county commissioners to pay claims like that of the plaintiff.

Higginson's Case, 1 Cranch, C. C. 73; Desty, Fed. Proc. § 848; *Robinson* v. *Chambers*, 94 Mich. 471, 20 L. R. A. 57; *Hutchins* v. *State*, 8 Mo. 288; *State* v. *Stewart*, N. C. Law Repos. 524.

Messrs. **Joshua M. Tull, Joshua W. Miles,** and **Harry L. D. Stanford,** for appellees:

It was not the duty of the appellees to levy or pay to either of the appellants the sum set forth in the declaration.

Pub. Gen. Laws, § 13, art. 35; Somerset County, Pub. Local Laws, § 250; Acts 1892, chap. 346; *Davis* v. *Batty*, 1 Harr. & J. 270, note *a*.

McSherry, Ch. J., delivered the opinion of the court:

The question presented by this appeal arises on a demurrer to the sixth count of the plaintiff's declaration; the other counts having been withdrawn. The action is in assumpsit, and was instituted by the appellant against the county commissioners of Somerset county.

It appears by the record that the plaintiff, who is an infant under the age of twenty-one years, was on the 8th day of June, 1894, required by a justice of the peace to give security for his appearance as a witness for the state against one Isaac Kemp, charged with the murder of a certain Edward Carver; that being unable to furnish a bond for his appearance to give testimony, he was committed to the custody of the sheriff of Somerset county, there to be detained and kept as a witness for the prosecution; that the record of the case was removed from Somerset county to the criminal court of Baltimore city, and upon its transmission the plaintiff was taken by the sheriff of the county and delivered to the sheriff of Baltimore city, and was held in custody as a witness by the latter, until the trial of the accused, when, on the 4th of February,

NOTE.—In connection with this case, see *note* to Robinson v. Chambers (Mich.) 20 L. R. A. 57.

1895, he was, after testifying for the state, released and discharged.

In July following, he, by his mother as next friend, brought suit against the county commissioners to recover his *per diem* of $1 for each of the 242 days he was so detained as a witness. The court below held upon demurrer that that he could not recover, and from the judgment entered against him this appeal was taken. The inquiry presented is whether the plaintiff is entitled to the compensation which he claims.

The provision of the Code relating to the compensation of witnesses is in these words: "There shall be allowed to each witness attending the circuit court for the counties the sum of $1 for each day such witness shall attend for the discharge of his duty." . . . Code, art. 35, § 10. By § 7 of art. 25 of Code, which defines some of the duties of the county commissioners, it is declared that "they," the county commissioners, "shall provide for the support of the courts, compensate jurors and county or state witnesses, . . . and pay and discharge all claims on or against county which have been expressly or impliedly authorized by law." And by § 13 of art. 35 of the Code, which is almost a literal transcript of the act of 1752, chap. 13, it is enacted: "Where a witness against any person accused of crime cannot find security for his appearance to testify against the person so accused, and for want of such security shall be committed to prison, the county where the prosecution shall be carried on shall be chargeable with and pay the imprisonment fees of such witness; and the county commissioners or the mayor and city council of Baltimore shall levy the same from time to time, as the case may require."

Lord Hale (2 Hale, P. C. 282) states that there are two compulsory means to bring in witnesses, which are (first) by process of subpœna issued in the King's name by the justices of the peace, oyer and terminer, gaol delivery, or King's bench, where the plea of not guilty is to be tried; and (secondly) which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt on such refusal.

Now, whilst § 13 of art. 35 of the Code clearly recognizes the power of a magistrate to commit a witness in order that his attendance to testify against a person accused of crime may be secured, it is a power which can only be exerted after the witness fails to give such reasonable security for his appearance as may be demanded of him. He may fail to enter into a recognizance for his appearance, either because, though able to furnish it, he becomes contumacious, or because, though willing to give it, he is unable to do so. This inability may arise from his poverty or other like innocent cause, or from his bad character and ill repute. If he belongs to the first category and is imprisoned, his imprisonment is obviously the consequence of his voluntary choice, and, under such circumstances, he would have no claim to be compensated out of the public treasury for a detention resulting solely from his own deliberate election. Not being a witness who could not find security for his appearance to testify, he would not have been entitled under the act of 1752 to have even his imprisonment fees paid by the county. If, on the other hand, his imprisonment has grown out of his nonculpable inability to find security for his appearance as a witness, quite a different condition is presented. His inability to enter into a recognizance is, or may be, his misfortune rather than his fault, and his subsequent commitment, in such an event, would in no sense be the result of his own misconduct or fault.

If he be poor, a stranger without acquaintances in the community where by accident he happens to witness a violation of the law, and because of being so circumstanced he finds himself unable to furnish the security required of him, and is thereupon detained in custody as a witness for the state, the gravest injury might be inflicted upon him and upon those who are dependent on his toil and labor for their sustenance, if he were denied compensation for the period whilst involuntarily restrained of his liberty for the benefit of the public, but for no crime or misprision of his own. For an honest, law-abiding but poor and friendless individual to be confined in a common jail, and there forcibly made the companion of criminals and of the depraved, merely because he is unable, through no fault of his own, to find security for his appearance as a witness in behalf of the commonwealth, is bad enough; but when, in addition to this, by that very confinement he is deprived of pursuing his avocation, and then is refused compensation as a witness except for the few days he may be actually within the court room whilst the trial is in progress, his situation is made immeasurably worse. He is subjected to the same treatment that a criminal is, though confessedly not guilty, or even accused of crime; and he is deprived of his liberty and his means of livelihood, and denied compensation as a witness, though charged with no transgression of the law.

To warrant such a result, even if it ever could be justified, there ought to be the most unequivocal statutory sanction. The plaintiff was committed and held distinctively and exclusively as a witness for and in behalf of the state. It was in his capacity as a witness for the prosecution, and solely because he was such a witness, that he was or could have been detained at all; and this detention must be treated as a constructive attendance upon the court, unless the flagrant injustice and great hardship which the contrary view will inevitably entail be deliberately inflicted and sanctioned. As, then, the plaintiff was held in custody only because he was a witness for the state, and as it is the duty of county commissioners to compensate state witnesses and to pay all claims against the county which have been expressly or impliedly authorized by law, and as he must be considered while in custody as constructively in attendance upon the court, he is entitled to the *per diem* fee allowed by law for each day he was thus in at-

tendance "for the discharge of his duty," as well as for the days he was actually in the court-room during the trial, if he was, through no fault of his own, unable to furnish the bail required.

A direct precedent for this conclusion is found in *Higginson's Case*, 1 Cranch, C. C. 73, where the court allowed compensation to such a witness for the whole period of her detention. The attorney for the United States relied upon the Maryland statute of 1752, chap. 13, heretofore alluded to, and contended that its provisions only embraced the payment of prison fees and did not include an allowance for the time of the witness; but the court, in deciding in favor of the witness, made no reference to the statute, and treated her inability to enter into a recognizance as her misfortune rather than her fault. And so in *Robinson* v. *Chambers*, 94 Mich. 471, 20 L. R. A. 57, it was held that a witness detained by the court in default of bail to appear in a criminal case is to be deemed in attendance upon the court during the entire period of detention within the Michigan statute, which by §§ 9064, 9065, How. Stat., entitles witnesses attending in a court of record to the sum of $1 for each day. See also *Hutchins* v. *State*, 8 Mo. 288, where a Louisiana case directly in point is referred to and is thus stated, though the names of the parties are not given: "McFall was on a trading voyage from Kentucky, and recognized and detained till the trial, not having time to go home. His *per diem* fees were allowed from the date of his recognizance, but not mileage."

In *Markwell* v. *Warren County*, 53 Iowa, 422, it was held that a witness whilst detained in jail was not in attendance on court, but the decision is founded on the theory that the detention of the witness was due, not to his inability to find a surety, but to the fact that he could not be trusted to perform his duty as a citizen voluntarily and without compulsion. The Iowa court conceded the hardship to the witness, but treated him as to some extent in fault, because it assumed that the magistrate must have found that the witness could not be trusted to appear without security. "But this," as justly observed in the *note* to *Robinson's Case*, 20 L. R. A. 57, "depended entirely on the impression which the witness made upon the magistrate, and it is easy to see that, in many cases, the magistrate might have a bad impression as to the trustworthiness of the witness without any fault of the latter."

If it should appear that a witness could not find security for his appearance because his character is so bad that those who know him refuse to become bound for him, he will have no claim to be compensated, if he should be detained as a witness. His inability to furnish security would then be the result of his own fault, and not of his misfortune, and the reason for treating him as entitled to a *per diem* whilst in custody would not exist. He will not be allowed to invoke and rely on his own bad character to secure for himself compensation as a witness when but for that bad character he would not have been compelled to undergo a detention.

We hold, then, first, that if a witness can, but will not, give security for his appearance and is committed for his refusal, he will not be entitled to a *per diem* fee during any part of the time he may be detained to secure his attendance. Secondly, that if his inability to find security results from his own misconduct or bad character he will equally not be entitled to a *per diem* fee. Thirdly, that if he be committed because of his inability to furnish a recognizance, and if this inability arises from his misfortune and not from his fault, he will be considered as in attendance on the court and entitled for the term of his detention.

We have said the pending action was in assumpsit, and in this respect we apprehend the form of the remedy has been misconceived. There is no element of assumpsit in the case. The appropriate proceeding was by mandamus to compel the county commissioners to make a levy for the amount due to the appellant, if anything was, in reality, due to him. If, upon such a proceeding, it should appear that the witness had refused, though able, to give the security, or that he was unable to give it by reason of his misconduct, he would not be entitled to compensation; but, if it should be shown that he failed to furnish a bond because he was unable, by reason of his misfortune and by reason of no fault of his own, then he would obviously be entitled to relief, provided he has brought himself within the provisions of § 10, art. 35, of the Code, by having procured from the clerk of the court, within thirty days after such attendance was rendered, a certificate or order, showing the amount due him for such attendance.

As in the present form of action a recovery cannot be had, the court below was right in sustaining the demurrer, and its judgment must therefore be affirmed, but without prejudice to the right of the appellant to invoke the appropriate remedy, if he sees fit to do so.

Judgment affirmed, with costs above and below, but without prejudice.

NEBRASKA SUPREME COURT.

William BARR, *Appt.*,
v.
Milton F. LAMASTER.

(.....Neb.....)

***1. The right of partition,** whether in equity or under the provisions of the Code, is confined to joint tenants and tenants in common of an estate in land.

2. Adjoining lot owners in a city may by grant impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the covenants in such case being a sufficient consideration for the respective grants.

*Headnotes by POST, Ch. J.

NOTE.—For some authorities on the subject of easements in hallways and stairways, see Hahn v. Baker Lodge No. 47, A. F. & A. M. (Or.) 13 L. R. A. 158, and *note*.

3. Mutual covenants imposing such rights or restrictions will be construed as the grant of reciprocal easements, which may, when the remedy at law is insufficient, be enforced and protected by a court of equity.

4. The plaintiff and defendant, owners in severalty of adjoining lots, pursuant to a mutual agreement, erected thereon buildings corresponding in size, having the stairs, hallways, skylight, and heating apparatus in common. *Held*, a grant to each of an easement in so much of the stairs, halls, and skylight as is situated upon the lot of the other; that the easement of each in the property of the other is owned in severalty, and the mere existence of such cross-easements does not authorize the partition of said lots at the suit of either party.

(April 21, 1896.)

APPEAL by plaintiff from a decree of the District Court for Lancaster County granting the relief demanded in a cross-petition in a suit for the partition of real estate which required the construction of a division wall through a building a part of which had been used in common by plaintiff and defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. **Pound & Burr,** for appellant:

There can be no partition of real property owned in severalty.

Anderson School Twp. v. *Milroy Lodge F. & A. M. No. 139*, 130 Ind. 108; *Johnson* v. *Moser*, 72 Iowa, 523.

Only joint tenants or tenants in common of an estate in the land can institute the proceeding.

Hurste v. *Hotaling*, 20 Neb. 178.

Not only is it impossible for Lamaster to build a wall and destroy the easement of Barr in his building, but he could not pull down his building during the existence of Barr's easement, and if he suffered his building to decay Barr could enter and repair it to preserve his easement though he might not be able to charge Lamaster with the repairs.

2 Washb. Real Prop. *79; *Loring* v. *Bacon*, 4 Mass. 575; *Pierce* v. *Dyer*, 109 Mass. 374, 12 Am. Rep. 716.

Lamaster cannot compel Barr to remodel his building and virtually ruin it after Barr has built on reliance upon his written agreement. Even a tenant in common may by contract estop himself from claiming partition.

Eberts v. *Fisher*, 54 Mich. 294; *Latshaw's Appeal*, 122 Pa. 142; *Baldwin* v. *Humphrey*, 44 N. Y. 609.

And the situation of the property may be such as to prevent even a joint owner from obtaining partition.

Anderson School Twp. v. *Milroy Lodge F. & A. M. No. 139*, *supra.*

Parties to a partition have a right to insist that the property be viewed in its "existing physical condition," and if the condition of it presents insurmountable obstacles to a partition in kind it cannot be compelled.

Soniat v. *Supple*, 48 La. Ann. 296.

Messrs. **R. D. Stearns, J. H. Broady, E. H. Wooley, Cobb & Harvey,** and **E. J. Murfin** for appellee.

Post, Ch. J., delivered the opinion of the court:

In the month of May, 1887, the plaintiff and defendant being the owners in severalty of adjoining inside lots in the city of Lincoln, and being desirous of improving the same, mutually agreed to so build thereon as to have the entrance, hallways, and skylight in common, thus saving valuable space to each. It was further agreed that the two buildings should be heated as one, and by means of a single furnace. Pursuant to such agreement, three-story brick buildings were erected on the lots mentioned, separated by a partition wall one story in height, the upper halls or courts being reached by a common stairway, and receiving light and ventilation from a common skylight, and each party paying one half of the cost of the heating plant subsequently owned and used by them in common. This controversy was instituted by the plaintiff, Barr, in the month of January, 1892, who alleged, in the petition filed by him, in addition to the facts above stated, that the defendant, taking advantage of the common hallway, was destroying the value of his (plaintiff's) property by maintaining a nuisance therein, and by encouraging and permitting his (defendant's) tenants to harbor therein lewd and disreputable characters, etc. The prayer of the petition was for the appointment of a receiver to take charge of and lease the premises and to manage the heating apparatus therein; also, for a decree permitting the plaintiff to erect a partition wall upon his own premises, from the cellar to the roof of his said building, and to set aside and cancel the written agreements, three in number, under and by virtue of which the said buildings were constructed. An answer was in due time filed, in which, after setting out one of the several agreements relating to the buildings in controversy, it is alleged that said agreement remains in full force and effect, and expressly denying the plaintiff's right to erect a wall as prayed by him, and denying the jurisdiction of the court to award the relief sought. Accompanying the answer is a cross-petition in the following language: "The defendant consents to the erection of a brick wall between the said lot of this defendant and the said lot of said plaintiff, and that the heating fixtures, including the smokestack, furnace, boiler, pipes, and utensils, owned jointly by and between plaintiff and defendant, be sold. Defendant insists that the court shall sell said joint property above mentioned and erect said brick wall on the true line between the said lots, through the medium of a receiver or master commissioner or the proper officer appointed by the court for that purpose, and that such officer, by the aid of the county surveyor or other proper person, locate the true line between the said two lots prior to putting the said partition wall thereon; and defendant asks that said partition wall be built through the entire length and height of said building. Defendant therefore prays for the sale of said joint heating fixtures, and the erection of said partition wall as aforesaid, and for judgment for damages as aforesaid, and for costs." The agreement to which reference is made in the answer is as follows:

This agreement, made and entered into this 7th day of November, 1890, by and between William Barr and Milton F. Lamaster, witnesseth: That whereas, Milton F. Lamaster is

owner of lot six (6), block fifty-eight (58), city of Lincoln, and William Barr is the owner of lot five (5), block fifty eight (58), city of Lincoln; and whereas, said parties have erected a three-story building upon each of said lots; and whereas, the stairway and hall of the second and third floors are joined for the purpose of use and occupancy: It is therefore stipulated and agreed that the said hall and stairway shall always, during the existence of said buildings, be used and occupied by said parties jointly and severally. And it is further stipulated and agreed that the title to each party's lot shall not in any way or manner be affected by the use of said joint occupancy by the said parties hereto, and that said halls and stairways, being located equally upon said lots, are to be used jointly by the said parties, for the convenience of both of them, to the end that they may get a wider and more commodious hallway and stairway in said buildings; it being stipulated and agreed that the occupancy by one party of a portion of the other's lot shall not in any way affect or becloud the title of the other party. And it is further stipulated and agreed that said buildings shall be heated jointly, and each of the parties to this agreement to pay one half of the expense for the same, whether the buildings or any portion of them are occupied or vacant; also, that each party is to pay one half of all expense for repairs to heating apparatus. It is further stipulated that all the heating apparatus in the halls of said building, and boiler and all heating apparatus in the boiler room, is owned jointly by the parties hereto. It is further stipulated that the halls and stairway of said building shall be lighted jointly, and that each of the parties to this agreement pay one half of the expense of lighting the same. Neither of said parties shall have the right to remove or appropriate to his own use any of the heating or lighting apparatus belonging to said building, or any other property or thing to said building belonging, or owned in common by the parties to this agreement. It is further stipulated that this agreement shall be and remain in force for the period of twenty years unless sooner canceled by the mutual consent of the parties hereto. Witness our hands this 7th day of November, A. D. 1890.

[Signed] Wm. Barr.
M. F. Lamaster.

Witness, A. D. Burr.

In an amended and supplemental reply to the defendant's answer and cross-bill, it is alleged that to erect a wall on the line between said buildings is wholly impracticable, since it would necessitate the remodeling of the interior of said building at great expense; that it would destroy the hallways, reduce the size of the rooms, and otherwise irreparably injure the plaintiff's property, to his damage, etc. Subsequently the plaintiff, by leave of court, dismissed his petition, and the cause proceeded to final decree upon the defendant's cross-bill and reply thereto.

The decree mentioned, and from which the plaintiff has prosecuted an appeal to this court, is as follows: "And now, on this 1st day of July, 1893, the court, being well and fully advised in the premises, doth find, from the testimony, that the plaintiff, William Barr, is the owner of lot five (5), and the defendant, Milton F. Lamaster, is the owner of lot six (6), in block fifty eight (58) in the city of Lincoln; that upon said lots a three story brick building is erected, and that said buildings contain a joint stairway and hallway on the second and third stories, said stairway and hallways being one half upon each of said lots; that each of the said parties own the building upon their respective lots, but that, in the construction of said building, it was intended to be lighted and heated jointly, and that the boiler pipes and chimney, etc., were paid for by the plaintiff and defendant jointly, and that the boiler was placed upon the lot line between the said lots, and that the other portion of the joint property was placed upon lot 5, except heating pipes and radiators, which the court finds were placed equally in each of the said buildings. The court further finds that it is impossible for the plaintiff and defendant to continue the joint use of said stairway and hallways, and that a partition wall should be erected between said buildings the entire length of said buildings, the center of said wall to be on the true lot line between said lots, and that the erection of said wall shall be commenced on the 15th day of August, 1893, or as soon thereafter as possible. The court further finds that a partition wall has been erected between the said buildings extending to the second story thereof, except where the stairways are, in front, and the boiler now stands. It is therefore ordered, adjudged, and decreed that a partition wall be built through said stairway, and extend through the hallways on the second and third stories, and from the basement in front for the entire length of the building, including the space where the boiler now stands, to the skylight in said building, on the lot line, and that each of said parties pay for one half of the expense of the same, and that James Tyler, architect, be and is hereby appointed special commissioner to erect said wall,— said special commissioner to advertise for bids for having said wall built for at least ten days in a newspaper of general circulation in Lincoln, and said work to be let to the lowest responsible bidder, with power reserved to reject any and all bids, and readvertise. It is therefore ordered, adjudged, and decreed that said James Tyler shall appraise the property owned in common by said plaintiff and defendant, and may call to his assistance, at his option, any persons acquainted with the value thereof, and notify each of said parties of said appraisement; and if either of said parties desire to take said property at said appraisement to pay James Tyler the one half of said appraised value, and shall have the privilege so to do, each party having first choice of taking joint property at appraised value situate on his lot; otherwise, said James Tyler shall advertise and sell said property as upon execution, except the chimney, which shall be taken down and used in the erection of said partition wall, if neither of said parties will pay the appraised value thereof, and except also the sewer, which was erected on lot five at the joint expense of the plaintiff and the defendant, which shall be taken at the appraised value of the same by the owner of lot five (5), William Barr, at his option, and also

other permanent water pipes and other fixtures that are the joint property of said Barr and Lamaster, and located upon said lot five (5), and said Lamaster shall take, at its appraised value, any such property located on lot six (6), at his option. Either party to have the right to appeal from the appraisement of property on his lot solely situated to the district court on giving bond in double the amount to prosecute the appeal and to pay the appraisement determined at the end of the litigation. It is further ordered, adjudged, and decreed that the said plaintiff, William Barr, and the said defendant, Milton F. Lamaster, each pay one half of the costs of this action; the costs of the plaintiff being taxed at $———, and the costs of the defendant being taxed at $———, and for all of which execution is hereby awarded."

The proceeding, as submitted to the district court, appears to have been regarded as an equitable partition, between the parties to the decree, of the property thereby affected, and in that light it must be viewed for the purpose of this appeal. It is first argued by the appellant that the cross-bill failed to state a cause of action, since there can be no partition of property owned in severalty. It may be stated, as a general proposition, that, where the parties are neither joint tenants, tenants in common, nor copartners, but each owning distinct and several parts of the property described, an action for partition thereof will not lie. Freem. Coten. §§ 87, 431, *et seq.*; *Russell* v. *Beasley*, 72 Ala. 190; *McConnel* v. *Kibbe*, 43 Ill. 12, 92 Am. Dec. 93; *Johnson* v. *Moser*, 72 Iowa, 523; *Anderson School Twp* v. *Milroy Lodge F. & A. M. No. 139*, 130 Ind. 108. The foregoing general rule is in strict accord with the provisions of our Code for the partition of real property, *viz.*: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property and the respective interests, and the estates of the several owners thereof, if known. All tenants in common or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." Code Civ. Proc. § 802. In *Hurste* v. *Hotaling*, 20 Neb. 178, the court, by Maxwell, Ch. J., after quoting the foregoing section, says: "The controlling principle in partition, therefore, without regard to the extent or quantity of the interest, is that the parties shall be joint tenants or tenants in common of an estate in the land. . . . Only joint tenants or tenants in common of an estate in land, however, can institute the proceeding." In *Johnson* v. *Moser*, *supra*, the plaintiff had, by purchase at sheriff's sale, acquired title to the first and fourth stories of a certain brick building; also, the cellar thereunder, except that portion used by the execution defendant for the storage of vegetables and provisions for the use of his family. It was held that an action for the partition of the cellar by metes and bounds could not be maintained, the parties being neither joint tenants nor tenants in common, but owners in severalty of distinct and separate portions thereof. In *Anderson School Twp.* v. *Milroy Lodge F. & A. M. No. 139*, *supra*, the parties had erected a building under an agreement whereby the plaintiff was to own and control the ground and first story, subject to the defendant's right of entrance to the third story, to be owned and occupied by it. Elliott, Ch. J., speaking for the court, after holding that partition should be denied on the ground that it would destroy the defendant's right of access to its lodge room, adds: "But this is not the only reason why the appellant is not entitled to partition, for there is this additional reason, namely, each party owns its part of the building in severalty. As each party owns its part of the property in severalty, it is legally impossible that partition can be awarded, for there is no community of interest."

By virtue of the agreements under which the buildings were erected, each party to this controversy has an easement in so much of the halls and skylight as is situated upon the lot of the other, and, in the language of plaintiff's counsel, such easements "are in no way inconsistent with entire several ownership of the two buildings, and the mere existence of cross easements does not authorize the court to make partition, because each party owns his easement in the property of the other in severalty." The defendant, it is shown, granted to the plaintiff the easement in the hallways and skylight voluntarily, and for a valuable consideration, *viz.*: the grant to him of a cross easement therein. Such easement is real property, an incorporeal hereditament, and as much a part of the plaintiff's estate as the building itself. The defendant is not merely prohibited from interfering with the access of the plaintiff and his tenants to the building of the latter by means of the common hallways, and their free enjoyment of the common skylight, but equity would interfere to prevent the tearing down or destroying by him of his own building during the existence of such easement. 2 Story, Eq. Jur. 12th ed. § 927; *Columbia College* v. *Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Henry* v. *Koch*, 80 Ky. 391, 44 Am. Rep. 484. And, should he suffer his building to decay, the plaintiff would have the right to enter for the purpose of repairing, in order to preserve his easement therein. 2 Washb. Real Prop. p. 79; Washb. Easem. 654; *Prescott* v. *White*, 21 Pick. 341, 32 Am. Dec. 266; *McMillan* v. *Cronin*, 75 N. Y. 474.

But the decree is defended upon the ground that the plaintiff, by the petition to which reference has been made, and by which he sought permission to erect a partition wall on his own premises, abandoned whatever easement he enjoyed in the defendant's property, and that he is accordingly now estopped to call in question the power of the court to grant the relief awarded. But to that contention there are two sufficient answers: First, the allegations of the petition, in so far as they relate to rights of the parties under the agreements mentioned, are in substantial accord with the statements of the answer, and the alleged estoppel is predicated, not upon any statement of fact, but upon the pleader's conclusion from the facts stated by him; second, the plaintiff, for reasons not disclosed, but presumably because he was not entitled to the relief prayed, dismissed his petition previous to the hearing of the cause in the district court. A party will not, it is true, be permitted to shift his position during the trial by pleading one cause of action

or defense and recovering upon another. But that doctrine can have no application to the case before us, where the alleged variance consists in the mere assertion of a legal proposition in a proceeding previously dismissed on the plaintiff's own motion.

The decree is reversed, and the action dismissed.

MARYLAND COURT OF APPEALS.

Noah Lee COLE, *Appt.*,
v.
Julius HINES.

(81 Md. 476.)

1. A party cannot take two inconsistent positions.

2. A promise to extend the time for payment of an instalment due on conditional sale or lease of goods, is a waiver of forfeiture for default thereon, which will preclude the assertion of such forfeiture before the expiration of the extended time.

(June 20, 1895.)

APPEAL by plaintiff from a judgment of the Baltimore Court of Common Pleas

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NOTE.—*Rights and liabilities of vendor and purchaser by conditional sale on default of payment.*

I. *Rights of vendor.*
- a. *To collect the balance after the vendor retakes possession.*
- b. *To recover purchase price where the property is destroyed after delivery.*
- c. *To recover on unpaid notes or contract where the vendor does not resume possession or accept a return of the property.*
- d. *To recover from the purchaser the possession or the value of the property on default.*
- e. *To assert vendor's lien.*

II. *Right of purchaser.*
- a. *To recover payments where the vendor took the property from his possession.*
- b. *To recover the property, or its value, or in trespass.*

III. *Forfeiture.*
- a. *By vendor, of money received.*
- b. *By purchaser, of money paid.*

IV. *Rescission.*

V. *Statutory provisions as to rights and remedies.*

VI. *Waiver.*

VII. *Election of remedy under contract.*

I. *Rights of vendor.*

a. *To collect the balance after the vendor retakes possession.*

In SEANOR v. MCLAUGHLIN it was held that a seller of chattels by conditional sale on a renting contract reserving the power to take possession upon default, who also receives a judgment bond as collateral security, cannot enforce such bond after he has rescinded the sale by taking possession of the chattels. The rescission of the contract by the vendor gave the vendee the right to the collateral.

There appears to be conflict of authority in regard to the right of the vendor to collect the purchase money after retaking the property under a contract of conditional sale, reserving title until payment in full. Where the retaking is construed to be a rescission, his right to enforce payment is gone, as held in SEANOR v. MCLAUGHLIN. Some cases hold that an election of one remedy precludes the other; some hold that the consideration has failed, and some deny the cumulative right by the terms of the contract. But other cases hold that the remedies are not inconsistent and that obtaining possession by a judgment, levy, and sale, or by a resale or notice after taking by replevin, or by retaking under a chattel mortgage, or by retaking under the contract, will not prevent the vendor from collecting the balance. This is a construction that the retaking is the enforcement of the security. If there is but a small part of the debt due, and the property is valuable, it seems that the inclination of the courts is to relieve the purchaser from the entire loss of his investment. The proceedings are now regulated by statute in some states.

Some of the cases deny a recovery to the vendor on the ground of rescission.

The vendor was refused a recovery of the balance of the purchase price, after retaking possession on default under a conditional sale, where he resold the chattel, as he was disabled from performing the contract. It was said that if the contract provided for retaking and resale and crediting of the proceeds, leaving the vendee expressly liable for the balance, there would not be a rescission by the exercise of the power, and if the property was destroyed without fault of the vendor, he might possibly recover. Sawyer v. Pringle, 18 Ont. App. Rep. 218.

And where the vendees refused on the trial of a machine to accept the same or give their note, and the vendor resumed possession and sold the chattels and brought suit to enforce a lien on land under the contract for the balance. There was no independent covenant to pay the price, and electing to take the machine was a rescission. The vendor may sue for a breach of the contract. Sawyer v. Baskerville, 10 Manitoba L. Rep. 652.

The vendor was refused a recovery on the contract where he had resumed possession on the failure of the purchaser to take the article from the express office, and the contract provided that on failure to pay any instalment, the vendor might take possession. The retaking by the vendor was a rescission. The delivery to the express office was a delivery to the purchaser. White v. Smith, 28 N. S. 50.

See White v. Solomon, 164 Mass. 516, 30 L. R. A. 537.

And so where the suit was upon a note given on a lease and was not given for hire, but the lease and notes were one transaction, and was rescinded by resuming possession, and there was no consideration for the notes, the lease not being for any definite time nor the price per month for hire fixed at any definite sum. Campbell Printing-Press & Mfg. Co. v. Hickok, 140 Pa. 290.

And where the contract was in the form of a lease and to secure the payment of said rentals a judgment bond was given as collateral, and on default the lessor might resume possession, the lessee having the right to purchase, rentals paid being allowed as a credit. Such remedies were distinct and not cumulative. If the bailor rescinded by repossessing himself of the property, the right of personal action against the bailee was at an end, and the omission of the word "rescind" in the contract

See also 33 L. R. A. 854; 39 L. R. A. 815; 44 L. R. A. 272.

sustaining a demurrer to the declaration in a a suit brought to recover damages for defendant's alleged trespass in taking goods out of the possession of plaintiff. *Reversed.*

The facts are stated in the opinion.

Mr. **H. H. Bowen** for appellant.

Mr. **W. B. Trundle,** for appellee:

The defendant had the plain and unequivocal right under the contract, after default by the vendee, to enter the premises of the plaintiff, without previous demand or notice, and remove the goods.

North v. *Williams*, 120 Pa. 109.

A promise to forbear, without legal consideration, is a nullity—is no more than mere forbearance; hence such promise has no effect whatever upon the right of the party not in default to proceeding against the other who has made default.

Planters' Bank v. *Sellman*, 2 Gill & J. 233; *Hoffman* v. *Coombs*, 9 Gill, 284; *Ives* v. *Bosley*, 35 Md. 272, 6 Am. Rep. 411; *Freaner* v. *Yingling*, 37 Md. 497; *Ecker* v. *McAllister*, 45 Md. 306; *Coleman* v. *Applegarth*, 68 Md. 21.

When a promissory note is payable on a given day, say three months after its date, January 1, 1895, it is due April 1, 1895. A promise to wait on the maker for thirty days gives the promisor the benefit of receiving the money on May 1, 1895. Is that promise bind-

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was not material. (This case was not referred to in the opinion in Durr v. Replogle, *infra*.) SEANOR v. MCLAUGHLIN, 165 Pa. 150.

In SEANOR v. MCLAUGHLIN, the case of Campbell Printing-Press & Mfg. Co. v. Hickok, *supra*, was distinguished, although the word "rescind" was used in that contract. The stipulation and the action of the lessor in this case were the same as a rescission.

And a recovery was refused the vendor upon purchase-money notes where they were given as security for an extension of time and he took possession and sold the goods on default under an executory contract of sale, providing that the title did not pass until paid for, and that on default the vendor might retake the same into his possession, and that as compensation for the depreciation in the value of the property all payments made were to be retained. The resale was an election to treat the contract of sale as broken. The remedy is by an action for breach of contract. Distinguishing Brewer v. Ford, 54 Hun, 116, *infra*, I., d, which was an action of trover, as that case only held that the vendor might retain possession of the property and at the same time enforce the agreement to pay the purchase price. It was said that if the vendor in this case had simply rested upon a possession, the failure to pay the notes entitled him to retake possession of the goods and hold them as trustee of the vendee, and then the notes and security given might have been enforced. Earle v. Robinson, 91 Hun, 363, Affirming 12 Misc. 536.

And where the purchaser in a conditional sale, in consideration of the vendor's promise to extend the time of payment, executed a note, and as security, a mortgage on other property, and the suit was to foreclose the mortgage, the vendor having taken possession of the property sold. But there was no finding in this case that the extension of time and the grant of the right to use the engines and appliances sold did not constitute a sufficient consideration for the notes and mortgage, and a new trial was granted. Sinker v. Green, 113 Ind. 264.

On a subsequent trial of the same case an additional answer was filed alleging that the only consideration was as an additional security for the original notes, which were surrendered and the debt canceled by the enforcement of the condition in the agreement of sale. The vendor, exercising the option to retake the property and surrender the notes representing the consideration, could proceed no farther. Green v. Sinker, 135 Ind. 434.

As to waiver by extension of time, see *infra*, V.

In Mott v. Havana Nat. Bank, 22 Hun, 354, it was said that the vendee would not be liable to pay the whole face of the note in a conditional sale while the vendor at the same time retained his title and resumed his possession of the property which formed the entire consideration of the note.

In Rodgers v. Bachman, 109 Cal. 552, it was said that the vendor in a contract reserving title and to give a bill of sale on full payment, with right of possession on default, could not maintain an action for the price where there was no agreement to pay; and that if the vendor had taken possession on default and resold the goods, he could not maintain an action for the price.

In Helby v. Matthews [1895] A. C. 471, it was said that the lessee was at liberty to determine the contract by returning the thing hired to its owner, and was under no obligation to purchase the thing or pay a price for it, where the piano was let on hire on monthly instalments, and providing that the hirer might terminate the hiring by delivering up the piano to the owner, remaining liable for all arrears, and until full payment of the piano to continue the sole property of the owner.

In Smith v. Gilmore, 23 Wash. L. Rep. 717, it was said that on default by the vendee in a conditional sale, the vendor could recover the balance unpaid from vendee, or recover the property, but that an election of the former would preclude the latter.

In Third Nat. Bank v. Armstrong, 25 Minn. 530, it was said that if prior to a default on a conditional sale note the vendor had retaken possession of the property and disposed of it, so that upon the maturity of the note a performance of the condition on the part of the vendor was impossible, no action could be maintained against the purchaser upon his promise.

In Dowdell v. Empire Furniture & L. Co. 84 Ala. 317, it was said that a continuing liability for the purchase price after the failure to perform the condition and after the vendor has reacquired possession of the property was inconsistent with a conditional sale, and the vendor's claiming both the furniture and the notes of the vendees and the notes of subpurchasers as security was a claim of antagonistic rights unless the agreement operated as a mortgage, and then to be valid it would have to be in writing.

Some cases deny a recovery on the ground of failure of consideration, and they might also be classed as coming under a rescission.

A recovery upon a purchase-money note under a conditional sale was denied after the chattel had been returned, where the contract was in the form of a lease, providing that if the lessee shall have paid all of said rent he should be entitled to a bill of sale, and on failure to pay any of said rent all his rights should terminate and the said H. might take possession. This was not a lease but a conditional sale; it was not signed by the lessor. The forfeiture of the money paid was ample compensation for its use, and H. obtained the organ and the forfeited payments, which was all that was contracted for, and the consideration of the note failed. Hine v. Roberts, 48 Conn. 267, 40 Am. Rep. 170. See Beach's Appeal, 58 Conn. 464, *infra*, I., c.

And where the action was upon a real-estate mortgage forming part of the consideration of the

ing? Does it suspend the payee's right to sue during the month of April? By all the authorities it does not. The payee has, by the contract, the right to the money on April 1. The benefit of receiving it on May 1 is no more than he was entitled to on April 1. The promise is a nullity.

Anson, Cont. ed. 1880, pp. 71 (C), 76; Brantly, Cont. pp. 50 (C), 69.

Neither the promise to do, nor the actual doing, of that which the promisor is by law or subsisting contract required to do, is a sufficient consideration to support a promise in his favor.

Esterly Harvesting Mach. Co. v. *Pringle* (1894) 41 Neb. 265; *Schuler* v. *Myton* (1892) 48 Kan. 282; *Widiman* v. *Brown* (1890) 83 Mich. 241; *Robinson* v. *Jewett* (1889) 116 N. Y. 40; *Dennis* v. *Piper* (1886) 21 Ill. App. 169; *Little* v. *Rees* (1885) 34 Minn. 277.

The contract shows that thereby the plaintiff gave the defendant, in case of default, "an irrevocable license, or rather a license coupled with an interest," to enter his premises and remove the goods.

Walsh v. *Taylor*, 39 Md. 598.

Briscoe, J., delivered the opinion of the court:

Noah Lee Cole brought suit against Julius

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purchase, and the vendor had taken the property by replevin for default of an instalment provided for in a lease, representing part of the consideration, as the mortgage being a part of the consideration fell with it, and there was no consideration for the same. Scott v. Hough, 151 Pa. 630.

And where the contract provided that the payments should be for rent, and the title was expressly retained by the plaintiff until the notes should all be paid. The right to exact rent ceased when "the lessor" repossessed himself of the property rented. This was not a sale but a lease. Campbell Printing Press & Mfg. Co. v. Henkle, 8 Mackey, 95.

And where he had taken the chattel from the purchaser and sold the same and applied the proceeds toward the payment of the note cost and expense. There was a total failure of consideration. Minneapolis Harvester Works v. Hally, 27 Minn. 495.

And where, after the property had been taken by the vendor, the purchaser promised to pay the note. The plaintiff having elected to take back the property and treat his title as unconditional, the purchaser would not be required to pay for it. Aultman v. Olson, 43 Minn. 409.

A recovery of damages for a breach of the contract, or the value of the use of the chattels, or the unpaid instalments, was refused to the vendor who had taken the property back on a conditional sale contract in the form of a lease and agreement to sell when payments should have been made, conditioned that upon default of any payment the plaintiff would have the right to rescind the contract, and take possession, and the sums paid were to become the property of the plaintiff. The sale was to be consummated when the purchase price should be paid. A subsequent oral agreement to pay after default gave no right of recovery. It was said that if, on a default, the purchaser prevented the vendor from asserting his right by a promise, a different case would have been presented. Loomis v. Bragg, 50 Conn. 228, 47 Am. Rep. 638.

See Beach's Appeal, 58 Conn. 464, *infra*, I., c.

But other cases hold that the pursuit of the property as a security only will not defeat an action on the notes.

In a suit on a conditional sale note by the vendor, the title to remain in the vendor until the note was paid, an answer that the vendor took possession and sold the property, at which time it was worth $600, and that by reason thereof the note was "paid off and discharged," was not a good answer, as the vendor had the right to take possession of the property, sell it, and apply the proceeds to the note, which he did, and there were no equities to adjust. Ascue v. Aultman, 2 Tex. App. Civ. Cas. (Willson) § 497.

In that case it was said that if property was sold for $1,000,—$500 down and a note for the balance payable in twelve months,—and the use of the property for five months was $100, and the vendor then retook possession and sued on the $500 note, he could only recover the $100, and the purchaser could recover back $400, the excess over the rental value of the property.

In Durr v. Replogle, 167 Pa. 347, where the contest was with another creditor and possession was taken by the vendor after judgment on confession in his favor was entered, it was held that the bailor may take judgment on confession or reclaim the property, and may do both where the agreement was in the alternative. The entry of the judgment was not a satisfaction nor an affirmance of title under an agreement providing that no title shall pass until the instalments are paid and a bill of sale delivered. The two remedies were not inconsistent, and the partial pursuit of one does not preclude the other. It was said that where the party had retaken the goods into his possession he could not then collect the judgment. The fact that it was left open amounts to little. But see SEANOR v. MCLAUGHLIN.

A vendor was allowed a recovery on a purchase-money note where he had made a levy, sale, and purchase under a prior note, although he afterwards sold the property at an advance, as his election to levy made the sale complete and passed the title to his vendee. Tanner & D. Engine Co. v. Hall, 89 Ala. 628.

And where he had previously taken the property by replevin and sold the same at public sale after notice to the vendee under a contract providing that the title was to remain in the seller, and on default of payment he could retake the chattel, and payments made should be for the use of said machinery, and nothing should constitute a defense or set-off, or delay prompt payment of the note. The enforcement of the contract was not a rescission. Dederick v. Wolfe, 68 Miss. 500.

And where the suit was on a renewal note, and a chattel mortgage was executed to secure the same, and the property was taken by the vendor on a chattel mortgage, and at the mortgage sale the vendee purchased part of the property. The execution of the chattel mortgage was an election by both parties to treat the same as absolute, but proper credit was required of the proceeds of the sale. McCormick Harvesting Mach. Co. v. Lewis, 52 Kan. 358.

In Mott v. Havana Nat. Bank, 22 Hun, 354, which was an action for damages against the holder of a conditional sale note against a bank for neglecting to notify an indorser, where the plaintiff had recovered a judgment on the note against the purchaser, had taken possession of the property, levied the execution on the property and purchased it for $68 when it was worth $600, this note was held to be the same as a chattel mortgage, and after forfeiture it was the satisfaction of the debt provided that the property was of sufficient value. If upon a fair sale the property realized less than the debt the mortgagee could sue for the balance; if there was no sale the mortgagor was entitled to have the

Hines in the court of common pleas of Baltimore city, and the declaration is in these words: That on the 4th day of April, 1893, the said Noah Lee Cole obtained from said Julius Hines merchandise, consisting of "one suit of furniture, 18¾ yards of carpet, and one mattress," upon the terms and conditions set forth in the paper hereto attached, for which he, the said Noah Lee Cole, agreed to pay $50.10 to be paid in monthly instalments of $4 each, in the manner and at the times stated therein. That said Noah Lee Cole accordingly paid, on account of said $50.10, the sum of $20, so that on the 15th day of October, 1893, being in arrear in his payments $8, he received from said Julius Hines a promise to wait two weeks for the payment of said sum of $8, namely, until the 29th of October, 1893, and an extension of the time specified in the contract for payment until said 29th October, 1893. That two days before the expiration of said two weeks, namely, on the 27th day of October, 1893, the said Julius Hines, by his agents, and knowing the said Noah Lee Cole to be away from home, and therefore unable to prevent the wrongful seizure, and make payment, forcibly entered

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whole property applied in satisfaction of the debt, and as the plaintiff became the purchaser at the sale the amount would still remain in his hands in the nature of a pledge, and the party sued for neglecting to protest a note, could show that the loss of plaintiff had been less than the obligation of the maker.

In Brewer v. Ford, 54 Hun, 116, it was said that the claim of a vendor that he might retain possession of the property and at the same time enforce the purchase price, where the contract provided that the chattel should remain the property of the vendor until paid for, was not inconsistent. See Earle v. Robinson, 91 Hun, 363, *supra*, I., a.

b. To recover purchase price where the property is destroyed after delivery.

The rule seems to be that the purchaser is liable on his contract notwithstanding the destruction or loss of the property after delivery without fault on his part, although there is some conflict of authority.

The vendor was allowed a recovery on the notes for the purchase price, although the property was destroyed after delivery without fault of the purchaser, where the note provided "that the title to the above-mentioned property does not pass to me, and that until all said notes are paid, the title to aforesaid property shall remain in" the vendor. Burnley v. Tufts, 66 Miss. 48; Tufts v. Griffin, 107 N. C. 47, 10 L. R. A. 526. But see Cobb v. Tufts, *infra*.

In Tufts v. Griffin, *supra*, the case of Swallow v. Emery, *infra*, was distinguished, as in that case upon payment of the price the vendor was to execute a bill of sale to the vendee.

In Cooper v. Chicago Cottage Organ Co. 58 Ill. App. 248, a recovery was allowed on a note having written on it "Title not to pass until this note is paid in full," where it was claimed by the defendant that it was given by him for a piano which was destroyed by fire, but this was not shown by the record.

In Hintermister v. Lane, 27 Hun, 497, it was said that the purchaser of an organ on a conditional sale in the form of a lease would be bound to pay to the assignee of an instalment note the purchase price whether the organ was destroyed or not, where the contract provided that on payment of said note at maturity the said note was to be a receipt in full against said instrument.

But in Cobb v. Tufts, 2 Tex. App. Civ. Cas. (Willson), § 153, in a suit on an instalment note for a chattel, the title to remain in the vendor and not to vest in the vendee until the notes were paid, the destruction of the property by fire after delivery, without fault of the purchaser, was held to be a good defense on a plea of failure of consideration, as the sale was incomplete and the right of property was not vested in the vendee.

In Swallow v. Emery, 111 Mass. 355, where there was an agreement to sell two horses, a wagon, and a pair of harnesses, and one horse died and part payment was made, and then the vendor took possession of the other horse, it was said that if the purchaser had paid full value of the remaining property he could hold the same, as acceptance of the payment operated as a severance.

For destruction of property, see Jones v. Pullen, 66 Ala. 310, *infra*, I., d; Sawyer v. Pringle, 18 Ont. App. Rep. 218, *supra*, I., a.

c. To recover on unpaid notes or contract where the vendor does not resume possession or accept a return of the property.

Generally the purchaser is liable on his purchase-money note or contract according to the terms in a conditional sale or lease, the title to vest in the purchaser on full payment, if the vendor does not exercise his option to retake the property. The exceptions appear to have been where the contract to sell was an executory contract, and where the purchaser had an option.

The vendor was allowed a recovery of the balance of the purchase price in a conditional sale, the title to remain in the vendor until payment in full, where the conditions were solely for the benefit of the vendor, as he could waive the forfeiture and treat the title of the purchaser as absolute. Bissell v. Bissell, 4 N. Y. Week. Dig. 338.

And where the right to take possession did not give the vendee the right to offer to return the possession and defeat a recovery on the purchase-money notes. Fleury v. Tufts, 25 Ill. App. 101.

And where the purchaser refused to accept the article after delivery under a contract that the vendor shall not relinquish the title, but shall remain the sole owner thereof until the sum is fully paid. Marvin Safe Co. v. Emanuel, 21 Abb. N. C. 181, Reversing 12 N. Y. S. R. 134.

A vendor was allowed a recovery for the whole purchase price of an article where the contract provided, payable in instalments of $10 on delivery at the express office, and on default of any payment the whole should become due, as the default of the first payment matured the whole debt, although the purchaser refused to receive the article and the express company left it at plaintiff's place of business without their assent. White v. Solomon, 164 Mass. 516, 30 L. R. A. 537.

And where an assignee for creditors of the purchaser on conditional sale had not the option to tender back the chattels, and rescind the contract, and the vendor had taken out an attachment and proved his claim against the estate, under a contract providing that A agrees to deliver and B shall be permitted to take possession and to hold the machinery as the property of the party of the first part until the notes or renewals thereof are fully paid, when the machinery shall be sold to and become the property of the party of the second part; and the party of the first part is hereby bound to sell and agrees to consider the same as sold, and deliver when said notes or renewals are paid. The party of the first part shall have the right to resume possession on default, and the amount paid shall be for the use of said machinery, and said notes shall then be canceled and delivered up. Beach's Appeal, 58 Conn. 464, distinguishing Hine v. Roberts, 48 Conn. 267, *supra*, I., a, and Loomis v.

the premises of said Noah Lee Cole, and removed the goods and merchandise purchased as aforesaid, to the great inconvenience, humiliation, and injury of the said Noah Lee Cole and his family.

To this declaration the following contract was attached and was made a part thereof:

This indenture witnesseth that I have this day rented from Julius Hines the articles hereinafter mentioned, upon the following conditions: That I shall pay to him the sum of $1 cash, the receipt whereof is hereby acknowledged, and $4 in monthly instalments, each and every 12th from day or date hereof, until the sum of $50.10 shall be fully paid. The said Julius Hines will, upon the final payment, sell to me the said property, and execute and deliver to me a receipted bill of sale thereof. And I also agree to retain them, as his goods, at 2017 Oak street, in the city of Baltimore and state of Maryland, for my own use, but nevertheless in trust for and as the property of Julius Hines, who neither parts with, nor do I acquire, any title thereto until the said sums are fully paid. I further agree

Bragg, 50 Conn. 228, 47 Am. Rep. 638, *supra*, I., a, for in both of these cases the acts of the vendees in returning the property after default were coupled with the corresponding acts of the vendors in accepting the property, and this constituted a failure of consideration.

And where the plaintiff had the option to take back books sold, and retain all instalments paid, as this did not give the defendant the right to return them. A tender of the books after default did not release the purchaser from the contract obligation. Appleton v. Norwalk Library Corp. 53 Conn. 4. But see White v. Smith, 28 N. S. 5, *supra*, I., a.

As to refusal of the purchaser to keep the property, see Root v. Lord, 23 Vt. 568, *infra*, II., b; Sawyer v. Baskerville, 10 Manitoba L. Rep. 652, *supra*, I., a; White v. Smith, *supra*, I., a.

And where the stipulation was that the notes were given as price for a business and if not paid or satisfactory arrangements made the business should belong to the vendor, as this gave to the vendor and not to the vendee the option in case the note was not paid. Geist v. Stier, 134 Pa. 216.

And where there was no tender back of the article purchased, or a showing that it was worthless, and the purchase-money note provided that the title, ownership, or possession did not pass from the vendor until this note and interest were paid. Fleetwood v. Dorsey Mach. Co. 95 Ind. 491.

And where the vendor sued on a rent note according to its terms, and the lease by which the renter might become an owner was a sale and was not repugnant and void. Singer Mfg. Co. v. Cole, 4 Lea, 439, 40 Am. Rep. 29. See Meagher v. Hollenberg, 9 Lea, 392, *infra*, I., d.

And where the vendor sued upon a contract in the form of a lease, and the purchaser was in default and was in possession. (The case of Hawley v. Kenoyer, *infra*, was cited in the argument, but the opinion does not discuss the right of the parties or the case, and only holds that the complaint stated a cause of action.) Singer Mfg. Co. v. Hatley, 3 Wash. Terr. 198.

In that case the complainant alleged that at the time of the execution of the note the plaintiff sold and delivered a sewing machine, and that the defendant took the machine and had retained possession ever since, and refused to pay the same, and that there was due $100. It was claimed that the plaintiff must allege and prove performance or tender of performance on his part; but the court does not discuss this question. (The difference in the contracts between this and Hawley v. Kenoyer, *infra*, was that in the latter case the vendors agreed that on performance by the vendee they would sell and transfer. And in the case of Singer Mfg. Co. the contract was simply that the title was to remain in the vendor until the note was paid.)

The vendor was allowed, on winding up a partnership in a printing outfit by a receiver, the value of the "goodwill" where a printing establishment was sold on conditional sale, "the party of the second part to have full ownership when the conditions and stipulations of this agreement are fully performed." Boon v. Moss, 70 N. Y. 465.

But a recovery was refused a vendor upon a contract where the vendor failed to show in his complaint either a sale or tender and the contract was in the form of a note, promising to pay B a certain sum of money. Conditioned that the above note is given for the consideration that B agrees and promises that upon the payment of said note and interest "they will sell and transfer to the undersigned at the price of said principal and interest" the engines which the said B has this day intrusted to the care of the undersigned. Said property is the property of B, the legal title is in B, and shall remain until they make the sale and transfer after the note is paid, and the vendee agrees to return the said engine to B if requested at any time before said sale and transfer, and such return shall not extinguish or alter the liability to pay the note. The promise to pay and the promise to transfer legal title, are independent promises. Hawley v. Kenoyer, 1 Wash. Terr. 609. See Singer Mfg. Co. v. Hatley, *supra*.

And the vendor was refused a recovery on a purchase-money note where the sale was in the form of a lease, providing on the part of the lessees, "but when said rent has all been paid at the times thereof, should we so elect, the title of said property shall be transferrod to us, or order, by a bill of sale, in consideration of the payment by us of the sum of 1 per cent, otherwise the same shall be returned to them at their expense." This contract was terminable by the lessees, and this resulted from their failure to pay any one of the obligations. It was said that the lessors then became entitled to the possession of the property and the defendants to the surrender of the unpaid notes, and their exoneration therefrom was effected. A. D. Puffer & Sons' Mfg. Co. v. Baker, 104 N. C. 148. See A. D. Puffer & Sons' Mfg. Co. v. Lucas, *infra*, II., a.

In Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236, it was said that an action on contract could not be maintained against an infant purchaser under a conditional sale.

d. *To recover from the purchaser the possession or the value of the property on default.*

The vendor may recover from the purchaser the possession or the value of the property sold on conditional sale with reservation of the title until payment in full, if the vendor has not waived his right and the purchaser is in default.

The vendor in a conditional sale was allowed a recovery in replevin where he obtained an order of sale of the property and to apply the proceeds to the payment of the debt, although this was not claimed in the complaint, and it was contended that such a judgment prevented a defense against the debt. But the vendor could not recover $100 damages for detention, as the interest allowed covered the damages. Keitt v. Counts, 15 S. C. 493.

And where the contract was for the sale of machinery, although such machinery may have been attached to a building by the purchaser. Ott v Specht (Del.) 11 Cent. Rep. 244.

And where the contract provided that the title in the property was to remain in the vendor until

not to remove the same from said premises, or sell or attempt to sell without the consent of Julius Hines; and in case of any default in any payments, or the falsity of my accompanying statements in any one particular, or in other violation of this contract, this agreement shall, at his option, be deemed annulled; and he is hereby authorized to enter my premises and remove said property; and be it distinctly understood that I have rented these goods from Julius Hines upon the truthfulness of these representations. Julius Hines reserves the right to refuse to send the articles mentioned in this contract, if not satisfactory to him. He also reserves the right to give more time than that agreed upon, if it suits his views, without vitiating this contract by such extension of time.

Signature: Noah Lee Cole.
Date: April 4, '93.
Occupation: Brakeman.
By whom employed: N. C. R. R.
Salesman: A. W. Hines.

Notice of removal must be sent to my store. No articles exchanged, and no money refunded if the articles are taken back.

The defendant demurred to the declaration, and, judgment upon the demurrer being for the defendant, the plaintiff has appealed. The appellee contends that his promise to grant an

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all the payments were fully paid, and default and demand were made, although the contract contained no express provision authorizing the vendor to retake possession on default. Wiggins v. Snow, 89 Mich. 476. Distinguishing Adams v. Wood, *infra*, as there no demand was made.

And where the contract provided that the title to a stock of goods was in the vendor until the whole purchase price was paid, and the right of possession in the purchaser, but this latter was limited to the period that he should not be in default. Ryan v. Wayson (Mich.) 2 Det. L. N. 916.

And where the vendor accepted part of an instalment after a default, and the contract provided that the purchaser had the right to the use and possession of the chattels until default in the payments of the instalments, but after default the vendor might at once resume possession. The rules of forfeiture were held not to apply to the question of the right of possession of the property. A tender of the payment after suit in replevin did not avail where it was not pleaded. Hegler v. Eddy, 53 Cal. 597.

And the vendor, in an action of detinue, was allowed a recovery and damages of the value of the hire from the time of refusal to deliver the property on demand till the trial, for property substituted by his consent, where the contract provided that on default of performing work at so much per month, the property was to be surrendered. The vendor could demand possession on the first default. The vendee could not abate damages by proving the amount paid. McGinnis v. Savage, 29 W. Va. 362.

And the vendor was allowed a recovery in trover after default, demand, and refusal, where the contract was in the name of the agent and the title was to remain in him as agent until paid for. Jowers v. Blandy, 58 Ga. 379.

And where the contract was an agreement to sell on payments, "time to be considered of the essence of the agreement," and if default occurred all moneys paid to be forfeited, and the vendor to have the right of possession. Sere v. McGovern, 65 Cal. 244.

The lessors were entitled to an order from the bankruptcy court for property let for hire on instalment to the bankrupt, upon payment in full to become the property of the lessee, but until payment in full to remain the property of the lessors, giving to the lessors the right to resume possession on default of lessee or on his becoming bankrupt, and providing that if possession was taken by the lessors the loss by nonperformance by the lessee might be proved against the estate in bankruptcy. McEntire v. Crossley Bros. [1895] A. C. 457.

The vendor was allowed to recover possession from the vendee where the purchase-money note was for "steam, saw, and grist mill, the title to vest in said P (the vendor) until said sum of money is paid with interest," where a deed of trust on land and said machinery was also given as security, and the house containing the machinery was burned and the remnants of the machinery rebuilt and refitted by the vendee, and the deed of trust had never been enforced. Jones v. Pullen, 66 Ala. 310.

The vendor was allowed a recovery in conversion, where a bicycle was sold on a conditional sale and after default the purchaser had left the rear wheel with the vendor, and on demand of payment the purchaser claimed the right to deduct the sums paid elsewhere for repairs, but defaulted on next payment. The offer by the vendor to return the wheel on condition that the payment in default and the payment not due be made, was not a waiver of the default. Equitable General Providing Co. v. Stein, 16 Misc. 582.

And where the suit was against a lessee and her husband after she was in default and demand was made of her for the machine in the presence of her husband and the surrender was refused, under a contract providing that A rented to B a sewing machine, that A agreed not to demand the return unless default was made, and B agreed to return the machine at the expiration of the time, B having the option to purchase the machine within ten days thereafter, if not in default, by paying $1 purchase money, and A to sell by bill of sale, on default B to have no equitable title on account of any payments made. This was a bailment and not a sale. Wheeler & W. Mfg. Co. v. Heil, 115 Pa. 487.

The vendor's assignee was allowed a recovery in assumpsit against an assignee for creditors of the purchaser of chattels on conditional sale, for the value of such goods sold by the assignee, where the contract provided that the vendor shall keep, hold, and retain its title and ownership of the property until the full and complete performance, and on full payment then the purchaser shall become the owner of all the right, property, and effects of the vendor. Edwards v. Symons, 65 Mich. 348.

That the vendor had not returned the consideration received or the unpaid notes will not defeat an action by him for the recovery of the possession or the value of the goods sold on conditional sale, the title to remain in the vendor until full payment, if the purchaser is in default.

And the vendor may recover in trover without tendering back the purchase money already paid, where the contract was in the form of a lease and on certain payments the plaintiffs were to make title. But the action may be defended by showing that full value was paid owing to the article having been defective. Guilford v. McKinley, 61 Ga. 230. See also Hamilton v. Singer Mfg. Co. 54 Ill. 370, *infra*.

And where the contract of conditional sale provided on default that the vendor might resume possession, but did not provide that the vendor should first return the money paid. The retaking was not a rescission. Fairbanks v. Malloy, 16 Ill. App. 277.

And where a return of the notes was not provided for in the contract for the use of a machine which was to remain the property of the vendor

extension of time for the payment of the two instalments being a voluntary promise, without consideration, was not binding, but that, notwithstanding such promise, he was at liberty to annul the contract, retake the goods, and forfeit the purchase money already paid by the appellant. It will be observed, however, that this is not like the cases cited by the appellee, where there is a debt absolutely due and payable, and the creditor gratuitously promises to grant an extension of time for the payment. By the express terms of this contract, the vendor, in the event of a default by the buyer, had a right either to declare a forfeiture and retake the goods or to waive the default and continue the contract in force. The declaration alleges conduct by the seller which, as will be subsequently seen, did amount to a waiver of the default, and the question is whether the defendant was bound by that waiver, or whether he could subsequently, and for the same defaults that were so waived, enforce the forfeiture. It is therefore not the case of a mere promise to give indulgence to a debtor or to waive a future default, but one involving the consideration of the effect of an actual waiver.

In all contracts where time is of the essence, a breach of the contract in that respect by one of the parties may be waived by the other

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and on default of payment was to be returned to the vendor with *pro rata* pay for its use of $3 per month, and the title was to remain in the vendor until paid for in full. When the answer admitted the right to recover and did not claim a return of the property, a judgment for the defendant of return was erroneous although the jury found that he was entitled to the possession. Kirby v. Tompkins, 48 Ark. 273.

The rights of the vendee in a conditional sale could not be tried in a replevin suit brought by the vendor after default and a refusal to surrender the property on demand, as the remedy must be sought elsewhere, if the title was in the vendor and the contract expressly gave him the right to retake upon condition broken, and the money paid was to be forfeited for the use, wear, and tear, etc. Thirlby v. Rainbow, 93 Mich. 164, Distinguishing Preston v. Whitney, 23 Mich. 260, *infra*, II., b, as there the contract contained no provision for a forfeiture, and in New Home Sewing Mach. Co. v. Bothane, 70 Mich. 443, subd. 2-a, the vendor attempted replevin without having declared the contract forfeited by proper demand.

A recovery in replevin in favor of the vendor was allowed on default of an instalment payment, without requiring a tender back of any part of the amount previously paid, where the contract provided that the title should remain in the vendor until paid for, and that on default of any payment he should be entitled to the possession. This was decided on an objection to evidence, that the vendee offered to deliver possession on being allowed credit. It was said, whether the vendor held the title and the right of possession merely as security for the amount of the balance, or whether the property became absolutely his, and the debt extinguished, and whether the vendor owed the vendee anything, was not necessary to determine. Fleck v. Warner, 25 Kan. 492.

In Duke v. Shackleford, 56 Miss. 552, which was an action of replevin against a subpurchaser, it was said that the vendor may recover a chattel in replevin from the vendee on default of a conditional sale note without offering to refund payments made where the contract reserves the title in the vendor until paid,—distinguishing Ketchum v. Brennan, 53 Miss. 596, which was a suit against a third party, as in that case there had been a tender to the vendee which was not necessary to be kept alive to a subvendee, and the question as to the necessity of a tender was conceded, and the court was misled by Story on Sales, that a vendor cannot recover property on failure of the vendee to perform the condition "until he had made demand of the performance of the condition and rescinded the contract." In order to rescind he must tender back what he has received; but this language only applies to sales on condition subsequent and not where the title does not pass until the performance of the condition.

The vendor was allowed a recovery in replevin against an infant after default, and a counterclaim of the amount paid was not a valid defense where the contract of conditional sale provided that the instalments actually paid were to be regarded as money paid for the use of the machine. Besides, the conditional bill of sale was regarded as an executed contract as to actual payments, and infants cannot recover on such contracts. Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236.

The vendor was allowed a recovery in trover without requiring a tender of the notes where the contract provided, "said machinery shall be the property of said" vendor until paid for, as the seller was confined in his remedies neither to a repossession of the property or to the notes, but could avail himself of both. In this case the vendor offered to place the notes in the hands of the court and to credit the purchaser with the proceeds of the verdict. Brewer v. Ford, 54 Hun, 116. After a new trial the same question arose on another appeal, but the former decision was held to be *res judicata*, and the court held that the former adjudication could not be reviewed "though the present majority of the court are committed against it." 59 Hun, 17, Affirmed without opinion, 126 N. Y. 643. See Earle v. Robinson, 91 Hun, 363, *supra*, I., a.

In Johnston v. Whittemore, 27 Mich. 463, a vendor was allowed a recovery against the vendee in trover for the value of the property only to the extent of the last unpaid instalment, although the contract provided that payments made should be retained as damages on nonperformance of the contract, but this provision was intended to apply only to the contingency of declaring the contract void and retaking the property. It was said that the law would not enforce such a provision as stipulated damages not based upon just compensation. In this case the purchaser gave the organ to his wife and the vendor in a replevin suit had to pay her the full value of the organ to regain it, and then sued the vendee in trover for its full value. In that case there was no showing that the vendors had declared void the agreement or offered to cancel it or to surrender the unpaid notes or had made a demand for the organ except after the judgment in a replevin suit and when plaintiffs had the property, but plaintiffs produced the unpaid note and the agreement on the trial, and before proofs were closed gave them to the court to be surrendered to the defendant, who refused them.

Some cases hold that the pursuit of other remedies by the vendor will not defeat a recovery.

And a recovery was allowed a vendor where the action was detinue notwithstanding he had foreclosed a mortgage given on land, as an additional security which brought him less than the balance of the debt due. The contract stipulated that all payments made before default in the payment of notes should be treated as payment for the use of the machinery and on default of any note the vendor might take possession or might sue on all of the notes and the title should remain in the vendor

party's subsequently treating the contract as still in force. *Pinckney* v. *Dambmann*, 72 Md. 178; *Webb* v. *Hughes*, L. R. 10 Eq. 281; *Black* v. *Woodrow*, 39 Md. 194. In these cases of conditional sales, the acceptance by the seller of an instalment of the purchase money, after default, is a recognition of the contract as still subsisting, and a waiver of the forfeiture. *Hutchings* v. *Munger*, 41 N. Y. 158; *Hurst* v. *Thompson*, 73 Ala. 158. And other acts than acceptance may have the same effect. A party cannot take two inconsistent positions. If he has a right either to rescind a contract on account of a breach by the other party or to continue it in force, and he elects to continue it in force, he thereby abandons the right to rescind, and is bound by the election so made. *Bollman* v. *Burt*, 61 Md. 422; *Maryland Fertilizing & Mfg. Co.* v. *Lorentz*, 44 Md. 233; *Lawrence* v. *Dale*, 3 Johns. Ch. 23. And so a vendor of chattels, where a fraud has been practiced, has a right either to affirm the contract and sue for the price or to rescind it and retake the goods, but he is bound by his first election. *Troup* v. *Appleman*, 52 Md. 456. In like manner a cause of forfeiture in a lease may be waived. In 1 Addison on Contracts, *260, it is laid down that "the right of entry for forfeiture of a lease is governed by the general law that where a man has got a right to elect to do a thing, to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If, therefore, a lease has been forfeited, and

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and not become vested until all of said notes were paid. Montgomery Iron Works v. Smith, 98 Ala. 644.

And where the action was in replevin and the vendor reserved the title in himself to secure the payment of notes which were in default although he had indorsed the notes and suit was pending on the same. On a recovery the vendor must apply the money realized from the security to the payment of the debt secured. It was said that the purchaser will be protected by a proper order against double payment, and that if he paid the note it would be a defense even now against the prosecution of the replevin suit. McPherson v. Acme Lumber Co. 70 Miss. 649.

In Aultman v. Mallory, 5 Neb. 178, 25 Am. Rep. 478, it was said that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed and on default the vendor has the right to repossess himself of the goods. See also Vaughn v. Hopson, 10 Bush, 337; Coggill v. Hartford & N. H. R. Co. 3 Gray, 545; Wentworth v. S. A. Woods Mach. Co. 163 Mass. 28; St. Paul Furniture Co. v. Sauer (Minn.) 63 N. W. 110.

In Sanders v. Keber, 28 Ohio St. 630, it was said that the vendor may reclaim the goods when the price has not been paid, or may maintain an action for their conversion against the vendee where the title is not to pass until the purchase money is paid.

In McRae v. Merrifield, 48 Ark. 160, it was said that under a contract of conditional sale reserving title in the vendor until fully paid for, when the condition is broken the seller may elect to reclaim the property or treat the transaction as a sale, and bring an action for the agreed price.

In Hunter v. Warner, 1 Wis. 141, it was said that where the right of possession is in the vendor until the whole price is paid, and the right of possession in the vendee to be taken away upon default, the vendee must make an actual tender unless dispensed with by the vendor, and unless made, the vendee's right of possession is gone.

In Heinbockle v. Zugbaum, 5 Mont. 344, 51 Am. Rep. 59, it was said that if negotiable notes were taken in a conditional sale, and transferred by the vendor for value, he could not recover the goods or the price, but if he has the notes in his possession and they can be delivered up, or canceled upon his recovery of the goods or a judgment for their value, the mere fact that notes were given for the purchase money would not defeat the right of the vendor to recover the goods if the title did not pass. The seller is bound to account for the notes before he can recover the goods or the price.

In Wheeler & W. Mfg. Co. v. Heil, 115 Pa. 487, it was said that if a lessor was bound by the terms of a lease with a privilege of purchase, a married woman was not bound by the terms of her contract as lessee, and on default the lessor could recover the chattel.

In Gerow v. Castello, 11 Colo. 560, it was said that the vendor may recover possession on default of payment on a contract for a lease of chattels, providing that on the default the chattels shall be returned to the lessor, and that no agreement of sale is implied, nor shall a sale or purchase be deemed valid without a written receipt from the lessor. This contract was a conditional sale.

In Haak v. Linderman, 64 Pa. 499, 3 Am. Rep. 612, where the contract was a conditional sale, the vendor reserving the title until fully paid but the vendee to have the use from this date, and on default the vendor to have the right to take the property and the vendee to forfeit the amount paid, it was said that no doubt this might be a valid lien or arrangement as between the parties.

The failure to make a demand after default will prevent a recovery in replevin.

And a vendor not having made a demand was refused a recovery in replevin where he claimed a mare obtained by his vendee, in exchange for a horse sold to him by the vendor, "to remain the property of the vendor until the purchase money was paid." The omission to pay the purchase money at maturity would not operate as a forfeiture of his rights under a contract, in the absence of a demand on the part of the seller of payment, or the property for nonpayment of the price. On demand after the purchase money was overdue, the purchaser can retain the property by paying the purchase price. Nattin v. Riley, 54 Ark. 30.

As to demand, see Heath v. Randall, 4 Cush. 198, *infra*, II., b.

And where neither demand for the money or the property was made, and the time of payment had been extended. Kimball v. Farnum, 61 N. H. 348. See Proctor v. Tilton, 65 N. H. 3, *infra*, II., b.

And where only a small part of the purchase money was unpaid. New Home Sewing Mach. Co. v. Bothane, 70 Mich. 443; Adams v. Wood, 51 Mich. 411. See Wiggins v. Snow, 89 Mich. 476, *supra*.

And where he did not refund the money already paid, and the purchaser refused to make further payments because the machine was not such a one as was contracted for. A demand is a condition precedent to an action of replevin. Hamilton v. Singer Mfg. Co. 54 Ill. 370. Distinguished Singer Mfg. Co. v. Treadway, 4 Ill. App. 57, *infra*, II., a.

See, as to warranty, Haviland v. Johnson, 7 Daly, 297, *infra*, II., a; Guilford v. McKinley, 61 Ga. 230, *infra*.

And where the chattel was purchased on condition of payment monthly of a royalty and on default to forfeit the machine, where the purchaser's check was taken after default, which was not paid; as there must be a new demand after the taking of the check. Smith v. Newland, 9 Hun, 553.

there is an election on the part of the landlord to enter and defeat the lease or not, as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterward annul the lease." Leake, Cont. 3d ed. p. 583, to the same effect. In such cases of a waiver of a forfeiture or of a right to rescind a contract, their is no necessity for a consideration, but the question turns rather upon the principle of election between two inconsistent rights. Bishop, Cont. § 805; *Johnston* v. *Whittemore*, 27 Mich. 466; *Wheeler & W. Mfg. Co.* v. *Teetzlaff*, 53 Wis. 220; *Deyoe* v. *Jamison*, 33 Mich. 94.

A case similar in some respects to the case at bar is that of *Albert* v. *Grosvenor Invest. Co.* L. R. 3 Q. B. 127, where Lord Cockburn said: "This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is, that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of £2, which he is bound to do on each successive Monday, till the loan is repaid. Now the facts are, that the plaintiff's wife went to Bayne (who must be taken to have had full authority . . .), and told him that her husband had difficulty in meeting the instalment due on the 28th of August, and Bayne extended the time for the payment of that and the next instalment

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And where the vendor sold horses on conditional sale and hired the purchaser and was to pay him one half of the value of his labor until the chattels were paid for by the amount unpaid, and on refusal of the vendee to labor, the horses were to be returned and he to "forfeit the balance of cash remaining" with the vendor as collateral security. Notice that work was wanted, given to a carter of the vendee, was not notice to his employer. The vendor might have recovered if the vendee refused without excuse to work, but could not recover if the vendee was not in default. A forfeiture of the vendee's rights to ownership of the horses would not be the result of default but he would only be liable to pay the vendor such damages as he had sustained. Huhn v. Long, 2 Whart. 200.

And where the contract provided that the purchaser did not acquire any title until fully paid, and on default the vendors were at liberty to take away the machine at their option, and any payment which had been made previous to such forfeiture was to be retained as liquidated damages. A notice given to the wife did not dispense with notice and demand on her husband who was the purchaser. Wheeler & W. Mfg. Co. v. Teetzlaff, 53 Wis. 211.

And where time was not fixed to complete the payment, the purchaser was entitled to a reasonable time before the vendor could demand the goods and replevy them. Adams v. Wood, 51 Mich. 411.

So, in trover the vendor was refused a recovery where he had not made any demand of the vendee before suit, although he had made a demand for the property of the defendant with whom the purchaser had left the same. A demand must be made and reasonable notice given to surrender the property or perfect the title. The contract provided that the chattel was to remain the property of the vendor until paid for, and then it became the property of the purchaser. Davis v. Emery, 11 N. H. 230. See Proctor v. Tilton, 65 N. H. 3, *infra*, II., b.

A vendor in an executory contract for the sale of chattels providing that the title shall not pass until the agreed price is fully paid, which is payable in instalments, cannot seize the property and terminate the contract for nonpayment until he has demanded payment of the vendee where he permitted him to remain in possession, and make other payments after the whole contract price was due. O'Rourke v. Hadcock, 114 N. Y. 541, *infra*, II., b.

In Gibbons v. Luke, 37 Hun, 576, it was said that accepting further payments after default rendered ineffectual a previous demand as a rescission of the agreement of sale or to support an action founded upon it. But the breach of the agreement by the removal of the piano to another place justifies the action by the vendor for possession without further demand.

In Ketchum v. Brennan, 53 Miss. 596, it was said that a rescission of a contract of conditional sale was a condition precedent to the vendor's right to sue for the property, and to rescind he must offer to return to his vendee what was paid, where the contract was a conditional sale on instalment, and that the title should remain in the vendor until fully paid for.

In Meagher v. Hollenberg, 9 Lea, 392, an injunction was granted to a purchaser against the prosecution of a replevin suit by the vendor in a lease contract on the ground that although the utter failure of the purchaser to comply with the terms of the contract entitled her to nothing more than her strict legal rights, she acquired by her payments an interest in the piano which the court must recognize. It was further held that being a married woman her contract to turn purchase money upon a future contingency into rent would be executory and not binding. And it was said that some courts have held that in cases of sale and delivery of chattels an agreement to pay for the use was repugnant to the contract, citing Singer Mfg. Co. v. Cole, 4 Lea, 439, 40 Am. Rep. 20, *supra*, I., c. (But that case holds that a lease contract, is a sale, and the fact that it is called a renting does not make it so; and the purchaser was liable on such contract; refusing to follow Domestic Sewing Mach. Co. v. Anderson, 23 Minn. 57, which it claimed held that an agreement to pay for the use was repugnant to a contract of sale, and void. But the Minnesota case was based on the proposition that there had been a previously absolute sale without condition, and therefore a subsequent receipt embodying a conditional contract was without consideration.)

But some cases refuse the vendor a recovery if he has elected to pursue other remedies, or waived his right.

A recovery of possession was refused where the vendor in a conditional sale, the title to remain in him until paid, had taken a judgment against his vendee on the purchase-money debt. Button v. Trader, 75 Mich. 295.

And where the sale was in the form of a lease and the vendor had foreclosed a real-estate mortgage given as security. The pursuit of one remedy excluded the other. Park & L. Co. v. White River Lumber Co. 101 Cal. 37.

And where the vendor had exercised an option to enforce the payment of the note by taking out an attachment, and afterwards presented his claim against the trustee in insolvency of the purchaser. Crompton v. Beach, 62 Conn. 25, 18 L. R. A. 189.

In Montgomery Iron Works v. Smith, 98 Ala. 644, it was said that if the vendor had sued on the notes, obtained a judgment, and levied an execution and sold the property, he would be held to have abandoned his claim to title and could not maintain an action of detinue.

to the 11th of September. Now, the bill of sale provides that if the mortgagor shall make 'default' in payment of the sum of £62 10s, or any part thereof, the whole amount shall be then immediately due and payable; and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now 'default' must be taken to mean a nonpayment by the party bound to pay, without the consent of the parties having a right to waive the payment. And I see nothing which goes to show that if, by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default." It is true that this case, so far as the meaning of the word "default" is concerned, was questioned by Lord Justice Bramwell in *Williams* v. *Stern*, L. R. 5 Q. B. Div. 412; but the bill of sale before the court in *Williams* v. *Stern* gave to the vendee a right to remove the property and sell it in the event of a failure to pay the instalments when due, and such failure made the whole debt due. Unlike the case at bar, it did not provide for an election between a right to declare a forfeiture and a right to continue the contract in force. In *Carpenter*

And the vendor was refused a recovery in trover, on a contract of conditional sale in the form of a lease, the property to become the vendee's when fully paid for, where the vendor allowed the vendee to retain possession for ten years after full payment without demanding payments of interest or claiming title, as the lapse of time constituted a waiver, on the part of the vendor, of title. Gorham v. Holden, 79 Me. 317.

In an action of replevin by the vendor on a contract of sale providing that the title was to remain in the vendor until paid for, an instruction that "if the plaintiff did not agree to extend the time of payment then the action could not be maintained until that time had expired and their verdict must be for the defendant," was erroneous in the case presented by the record, where the right of possession was in the vendor and it was claimed that a guaranty was made on the note in consideration of an extension of time. The true question was whether the plaintiff had made a valid agreement to forego his right of possession. Bunker v. McKenney, 63 Me. 529.

In Johnston v. Whittemore, 27 Mich. 463, it was said that if the vendors, in bringing an action for conversion against the vendee, had proceeded upon the ground of declaring the sale void, they could not recover on failure to show that they had taken the necessary steps to rescind and place the defendant *in statu quo*. And could not declare the contract void and take the property on that ground except for default in some of the conditions.

In Knox v. Perkins, 15 Gray, 529, the question whether the failure to take immediate possession of a building was evidence of a waiver, was not decided because the condition applied by its terms to each and every failure of payment.

A recovery in replevin was refused in favor of a party advancing money for the purchase of personal property under a parol reservation of property, where the vendor gave a written bill of sale without any reservation of title. Ferguson v. Hetherington, 39 Ark. 438.

And the lessor was refused a recovery against the trustee in bankruptcy of chattels hired, the hirer having for a certain time the option of purchase, the sums paid for hire to be taken as part of the price, where the custom of hiring was not sufficiently established. *Re* Hill, L. R. 1 Ch. Div. 503, *note*. See *Ex parte* Powell, L. R. 1 Ch. Div. 501, *infra*, II., b.; Crawcour v. Salter, L. R. 18 Ch. Div. 30.

And the vendor was refused a recovery in replevin of a sewing machine where he was in possession of the most valuable part of the machine before he made the affidavit, and delivered such part to the vendee after the affidavit was made and served, as Wis. Rev. Stat. § 3733, provided that before a warrant shall be issued an affidavit must be filed that the plaintiff is then lawfully entitled to the possession. Wheeler & W. Mfg. Co. v. Teetzlaff, 53 Wis. 211.

In replevin by the vendor, the purchaser recovered a judgment where the sale was oral and absolute on instalment, although two days after the sale the purchaser was prevailed upon to execute a written lease to the vendor for the same, payable monthly, and the property to be returned on demand, as the two contracts were repugnant and the lease void and without consideration. Domestic Sewing Mach. Co. v. Anderson, 23 Minn. 57. See Meagher v. Hollenberg, 9 Lea, 392, *supra*.

In an action of detinue brought by a vendor against the vendee, where the property was to be paid for in monthly instalments and the contract provided that if any payment was not made promptly the purchaser forfeited all former payments and bound himself "to give into his possession the mill with all the additions thereof in good running order, and all obtained from him," the vendor could not recover oxen, carts, and wagon as they were not additions to the mill. Hill v. Townsend, 69 Ala. 286.

The purchaser in a conditional sale may defend a replevin suit brought by the vendor, by showing that owing to the defects in the article more than its value had been paid and thus the title became fixed in the purchaser. Guilford v. McKinley, 61 Ga. 230.

As to breach of warranty, see Haviland v. Johnson, 7 Daly, 297, *infra*, II., a.; Hamilton v. Singer Mfg. Co. 54 Ill. 370, *supra*.

In Smith v. Newland, 9 Hun, 553, it was said that it is not clear that the proffer to pay the amount due, sent by a postal order, before an action of replevin was brought, should not bar the action where time was not of the essence of the contract.

e. *To assert vendor's liens.*

The vendor may enforce his lien against the property to secure the purchase money, where he has not waived his right, and treats the property only as a security, and attempts to exercise no control over it by assertion of title.

The vendor was allowed a mechanic's lien against the vendee, where machinery was sold on a contract that the title, ownership, and right of possession should remain in the vendor until the cash was paid, when the same should vest in the purchaser, and the same was attached to realty. The vendor having treated the title as vested in the purchaser by its annexation to the realty, the purchaser could not claim that the property had not become a fixture. Cooper v. Cleghorn, 50 Wis. 113.

In a suit to recover the purchase price of an electric-light plant and to foreclose a vendor's lien, under a contract providing that the title remained in the vendor until paid for, the plaintiff was entitled to a lien on the plant. Such reservation of

v. *Blandford*, 8 Barn. & C. 575, there was a waiver of a default in payment which was held to be binding. It appeared in this case that the defendant had agreed to sell to the plaintiff certain property at an appraisement to be made by appraisers to be appointed by the respective parties. The price was to be paid on or before March 25, and the buyer deposited a sum to be forfeited if he did not complete the agreement. The appraisers met on March 25, when plaintiff's appraiser said that he could not finish the work till the next day. No objection was then made, but on the next day the defendant refused to proceed. In deciding the question of his right to do so, Bayley, J., said: "The defendant in this case insists on a forfeiture, which is *strictissimi juris*. He ought, therefore, to show that he has done everything which he was bound to do to entitle him to insist on the forfeiture, and that he has not done anything to waive that right. . . . It was the duty of the defendant's agent to inform his principal that such a communication had been made by the plaintiff's agent; and it must be presumed that he did so. If that communication was made, and the defendant meant to insist on the forfeiture, it was his duty to inform the plaintiff that he should insist on the forfeiture unless the contract was completed on that day." The principles are conclusive of the present case. The failure of the appellant to pay the

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title was a mortgage under Tex. Civ. Stat. art. 3190*a*, and on a recovery the plaintiff would be entitled to a foreclosure. A. J. Anderson Electric Co. v. Cleburne Water, L. & L. Co. (Tex.) (1894) 27 S. W. 504.

In Tufts v. Stone, 70 Miss. 54, it was said that a vendor in a conditional sale could resort to the property as security only so far as might be necessary to satisfy the balance due.

But in Campbell Printing Press & Mfg. Co. v. Walker, 43 Hun, 449, the vendor was refused a recovery in a suit against the assignee for creditors of the vendee to foreclose all equities and to procure a sale under the order of the court, where he had previously taken the chattels from the assignee after default of a contract of conditional sale, and then brought an action of replevin and obtained judgment.

II. *Right of purchaser.*

a. *To recover payments where the vendor took the property from his possession.*

There appears to be some conflict of authority as to the purchaser's right to recover purchase money from the vendor where he has resumed possession. The cases affirming that right do so on the ground that there was no contract or forfeiture of money on the part of the purchaser, and some hold that there was a rescission, and some that there was a failure on the part of the vendor. The cases refusing the right to recover do so on the ground that the contract did not provide for such forfeiture. Some hold that the purchaser's right was forfeited by the contract.

The purchaser was allowed a recovery of an equitable proportion of money paid on a conditional sale, where the vendor had retaken the goods by replevin on default and terminated the contract of sale, and in the replevin suit the vendee reserved the right to claim an equitable proportion of the purchase money. The contract was in the form of a bailment for hire, the payments to be for the use, and on default the bailor to have the right of possession. (The contract as appearing in the case does not give the right of purchase or forfeiture, and was held to be a conditional sale.) Simon v. Edmondson, 10 Pa. Co. Ct. 315.

And where the vendor resumed possession and resold to this plaintiff and then rescinded by retaking, and sold the property. In order for the buyer to recover for money paid by the previous purchaser she would have to account for hire and damages on the part of such purchaser. Snook v. Raglan, 89 Ga. 251.

And where there was no stipulation for the forfeiture of payments the vendor must return such payments exceeding the value of the proper use of the property. The contract was payable in instalments for the use of a piano, and on default of payment the piano to be returned, and on payment of the note given for the use a bill of sale was to be given and the title to then pass to the lessee. This was a conditional sale and not a lease. Hays v. Jordan, 85 Ga. 741, 9 L. R. A. 373.

And where the vendor resumed possession and executed a note to the vendee for the difference between the instalments already paid and the use of a piano, sold on a contract of conditional sale which did not provide for forfeiture of money paid. The note provided that it might be used in the purchase of another piano, but this was at the option of the vendee. Preston v. Whitney, 23 Mich. 260, Distinguished in Thirlby v. Rainbow, 93 Mich. 164, *supra* L., d.

In Preston v. Whitney, *supra*, the contract was, A agrees to sell one pianoforte to B, the said B to pay so much cash and the value in monthly instalments. The pianoforte to remain the property of A until full payment. In case of default A shall be entitled to the possession and said agreement to sell shall become void.

A forfeiture of the payments made by the purchaser cannot be declared on retaking an article for default of further payment under a so-called lease which is in fact a conditional sale with retention of title as security, but the purchaser is entitled to pay the sum due or to have the article sold and the surplus paid to him after the debt and expenses of sale are discharged. A. D. Puffer & Sons' Mfg. Co. v. Lucas, 112 N. C. 377, 19 L. R. A. 682.

A. D. Puffer & Sons' Mfg. Co. v. Lucas, *supra*, distinguishes the case of A. D. Puffer & Sons' Mfg. Co. v. Baker, 104 N. C. 148, *supra*, L., c, which was a suit on a rent note holding that case may be further construed as meaning that upon failure to make any payment as it becomes due the vendor can resume possession of the property without any equitable right in the vendee to call for an account and the sale of the property. If that was intended the decision was not approved, distinguishing the case of Foreman v. Drake, 98 N. C. 311, where the contest was with a third party, as in the Foreman Case the lessor had an option and the title did not pass as in the present case *ipso facto* upon the performance of the conditions, *i. e.*, on payment of the last instalment of rent.

In Hill v. Townsend, 69 Ala. 286, in an action of detinue by the vendor, it was held that a forfeiture by which a vendee loses the benefit of the payments he had made upon the contract in the purchase of property and all interest in the property, is not favored at law, and to obtain a forfeiture upon failure to pay an instalment, it must be provided for by the contract.

In a replevin suit brought by the vendor without a demand the purchaser was allowed a judgment for the value of her interests in the chattel, as, until the contract was forfeited by a proper demand, the purchaser had the right to hold the chattel bought on conditional sale and also an interest in the chattel which if defeasible was good till defeated and she could waive a return and take a judgment for the value which was the amount

instalments when due was a default which did not render the contract void, or cause the entire purchase money to become due, but the contract was thereby made voidable at the option of the appellee. It was then necessary for the appellee to elect whether he would avoid the contract, retake the goods, and declare a forfeiture of the instalments already paid, or whether he would continue it in force and become entitled to the future payments. He made his election to continue the contract in force by his notification to the appellant, who had a right to rely upon it, and, having thus waived the forfeiture on account of this particular default, it follows that he could not subsequently insist upon it.

Judgment reversed, and new trial awarded, with costs in both courts.

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paid, there being no showing of any depreciation in the article. New Home Sewing Mach. Co. v. Bothane, 70 Mich. 443. See Thirlby v. Rainbow, 93 Mich. 164, *supra*, I., d.

In Howe Mach. Co. v. Willie, 85 Ill. 333, a purchaser recovered the amount paid for a machine which the vendor took back, where the contract in the form of a lease was in fact an absolute sale payable in instalments, and the instalments were unpaid because the machine was not the one purchased and did not give satisfaction, and the vendor, without offering another machine as he had agreed to do, replevied the old one because of a breach in the contract.

In Ryan v. Wayson (Mich.) 2 Det. L. N. 916, it was said that if a purchaser under a contract of conditional sale had the right to treat the contract as rescinded by a suit of the vendor in replevin, the purchaser would have no interest in the property, and at most might have a personal claim for the amount paid.

In Ross-Meehan B. S. Foundry Co. v. Pascagoula Ice Co. 72 Miss. 608, it was said that the reservation of title is but a security for the purchase price, and if the property is recovered by the seller he must deal with it as security and with reference to the equitable rights of the purchaser.

But some cases hold that the purchaser cannot recover the amount paid from the vendor on his retaking the property, and this on the ground that there was no agreement of forfeiture by the vendor, nor was there an agreement by the purchaser to forfeit payments.

A purchaser could not recover the amount paid on a conditional sale where on default of the first note it was agreed that the piano purchased and the notes therefor should be respectively surrendered, which was done, the last note providing that upon the payment of this and all prior notes given for the use of said piano it should become the property of the maker of this note. This was a sale and not a lease, and there was no agreement to refund the payments already made. If a recovery could be had the purchaser would have to pay the damages sustained for failure to perform her part of the agreement which would be the value of the use and depreciation of the piano. It was said that, in a suit by the purchaser to recover payments made, if the purchaser had refused to cancel the agreement and the vendor had taken the property, the question might have arisen as to the consequence of a rescission. Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79.

In an action of replevin by a vendor on a conditional sale on default, the purchaser was not entitled to a rescission of the contract, or to a recovery of the amount paid, or to a delivery to him of the unpaid notes, or a lien on the property for the amount paid by him, where the contract provided that until all the notes were paid the title should remain in the vendor, and on default he should have a right to retake possession. The contract did not provide for a rescission, or that the taking of possession should be a rescission or work a forfeiture of the amount paid. Tufts v. D'Arcambal, 85 Mich. 185, 12 L. R. A. 446.

In Tufts v. D'Arcambal, *supra*, the contract was an order to forward a soda-water apparatus, and provided that the title does not pass to B, and until all said notes are paid the title shall remain in A, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law to enter and take immediate possession of the said property wherever it may be and remove the same.

The purchaser cannot recover from the vendor for money paid on a conditional sale, on the vendor taking possession, where the contract was in the form of a lease, providing that the right of property shall remain in the vendor until fully paid, and the lessors may take possession on default, and the money paid on account shall be for the use and wear of the property. White v. Oakes, 88 Me. 367, 32 L. R. A. —.

And where the vendor had replevied the machine under a contract in the form of a lease payable monthly, and on full payment the vendor was to convey by bill of sale, but until then was to retain the title, and on default of payments the previous payments were to be forfeited, and the machine restored to the vendor. Singer Mfg. Co. v. Treadway, 4 Ill. App. 57, distinguishing Hamilton v. Singer Mfg. Co. 54 Ill. 370, *supra*, I., d., as in those cases the vendor was in fault on account of the kind of machines.

And where the purchaser did not show either that he had offered to perform his part in full, or that the vendor had put it out of his power to deliver the chattel upon receiving full payment. The contract was an agreement to sell chattels, the title to remain in the vendor notwithstanding their delivery. Humeston v. Cherry, 23 Hun, 141.

In Haynes v. Hart, 42 Barb. 59, it was said that "no case can be found where a purchaser has been allowed to recover back partial payments . . . when the vendor has merely kept the property agreed to be sold, or sold it to another, in consequence of such default. In order to entitle a purchaser to recover under such circumstances he must show that the other party has been guilty of some breach on his part, or of some act in hostility to the contract."

The purchaser was refused a recovery for the amount paid on a machine, taken from her by the vendors on default, where she claimed that the machine did not comply with the warranty. The contract wholly abnegated her right to claim a recovery for moneys paid either as purchase money or as rent. The contract was in the form of a lease providing that on default the vendors were authorized to enter wherever the machine may be, and retake the same, the purchaser waiving "my rights" and agreeing not to commence any action for damages done to person or property in the recovery of the machine. The vendors agreeing to sell on the payment of $75. The payments were receipted: "On account of lease the conditions of which are monthly payments of $5 or forfeiture of the machine." No proof was offered establishing any rate of damages for inferior condition of the machine. Haviland v. Johnson, 7 Daly, 297.

A purchaser cannot maintain an action upon a warranty where there has been a default in the contract of conditional sale and the chattels have been taken from the possession of the purchaser by the vendor. English v. Hanford, 75 Hun, 428.

PENNSYLVANIA SUPREME COURT.

SEANOR & BIERER, *Appts.*,
v.
Samuel McLAUGHLIN.

(165 Pa. 150.)

A seller of a chattel by conditional sale reserving the power to take possession upon default, who also receives a judgment bond as collateral security, cannot enforce such bond after he has rescinded the sale by taking possession of the chattel.

(January 7, 1895.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for West-

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As to remedy on breach of warranty, see Guilford v. McKinley, 61 Ga. 230, *supra*, I., d.

As to defective machine, see Howe Mach. Co. v. Willie, 85 Ill. 333, *supra*.

b. *To recover the property, or its value, or in trespass.*

The purchaser cannot recover from the vendor the property, or its value, or for trespass in seizing the property, where the vendor has proceeded under the contract giving him the right of possession on default, if the vendor has not waived the conditions, or if time was not of the essence of the contract, or unless the vendor has failed to make a proper demand. A recovery was allowed where the vendor had seized part of the property sufficient to pay the balance and then made another seizure.

The purchaser at a conditional sale, after the property was taken by the vendor on default, was refused a recovery in trespass where the action was against the servant of the vendor and proper demand had been made of the purchaser for the balance. As to whether the purchaser had an equitable right was said not to be the matter in dispute. West v. Bolton, 4 Vt. 558.

And where on default a renewal note was given which also defaulted, and the resumption of possession was a reasonable exercise of the right of rescission. But it was said that if it was not, the only interest the purchaser had was the amount which he had paid, and no more than that could have been recovered. Levan v. Wilten, 135 Pa. 61.

And where the vendor searched the purchaser's house against her objections after having been let in, and the contract provided that on default the vendor could take possession wherever the same might be found, and for retaking such possession should not be subject to any proceeding, civil or criminal. Walsh v. Taylor, 39 Md. 598.

And where the purchaser on instalment under a contract as a lease delivered the attachments of the machine to the agent, and permitted him to take the machine away. Jenks v. Howe Sewing Mach. Co. 34 La. Ann. 1241.

A purchaser was refused a recovery of damages for unlawful taking and conversion of property held on conditional sale, where the purchaser had defaulted by failing to insure and the vendor had taken possession under the contract. Palmer v. Kelly, 56 N. Y. 637.

And where the purchaser was in default, and the contract provided that the title, ownership, and possession should not pass until the note was paid, although this was qualified by the provision that the vendor deeming himself secure might take possession before maturity. McClelland v. Nichols, 24 Me. 176.

A purchaser was refused a recovery of the possession and damages for loss of the use of a machine taken from her by an agent of the lessor under a sewing machine lease, giving the privilege to purchase by paying the full amount of rent, reserving to the lessor all property and the right to seize it on default. Smith v. Lozo, 42 Mich. 6.

And the trustee of an insolvent or bankrupt was not entitled to the possession of chattels where the contract provided that the title remained in the lessor and the lessor might retake possession on default, and any payments made were to be forfeited, and on full payment the title to vest in the lessee, and after the furniture was delivered the lessee filed a liquidation petition and the trustee took possession of the furniture and the lessor thereupon seized the same. *Ex parte* Crawcour, L. R. 9 Ch. Div. 419.

And where under a similar contract on default of one payment the lessor took possession and the lessees also assigned to him all their property which constituted the act of bankruptcy. Judicial notice was taken that hotel keepers hold their furniture on hire. Crawcour v. Salter, L. R. 18 Ch. Div. 30. See *Re* Hill, L. R. 1 Ch. Div. 503, note, *supra*, I., d.

And where the lessor took possession under a similar contract, judicial notice was not taken of custom in hiring, but, the evidence of the custom being uncontradicted, and the trustees in bankruptcy refusing to go to the expense of a jury on the question, it was held sufficient. *Ex parte* Powell, L. R. 1 Ch. Div. 501.

And the assignee for creditors of the vendee was refused a recovery in conversion against the vendor, where after the purchaser had made an assignment the vendor had taken possession of property under a contract providing that the title was to remain in the vendor until paid for, and this applied to goods furnished on the same terms after the expiration of the contract. Dutton v. Gale Mfg. Co. 43 Hun, 198.

The purchaser cannot recover the value of the goods taken by the vendor on default, if the vendor has also attempted to collect the purchase price, where such election by the vendor does not amount to a waiver of his rights.

The vendee's assignee for creditors could not recover in conversion from the vendor the value of the chattels taken back by the vendor on default under a contract of conditional sale the title to remain in the vendor until full payment, where there was demand of payment and the forfeiture of the purchaser's rights had not been waived. The exercise of the right of possession extinguished the right of the vendee. A tender of sufficient amount before request of vendor would have been good. Sparling v. Divine, 12 N. Y. Week. Dig. 327.

And where the vendor took the chattels from the purchaser with his consent on a default before the assignment, and the vendor had also proved the amount unpaid and received a dividend from the assignee. A proof of all the notes against the estate was not a waiver of the conditions because the vendor was entitled to the whole price agreed on. Knox v. Perkins, 15 Gray, 529.

A recovery was refused in a suit of trover and trespass against a vendor in a conditional sale where he attached the chattel in a suit on the notes, took a nonsuit, and held the chattel by virtue of the contract, as he did not by such suit waive his right to hold the property and was not estopped. The suit was a sufficient demand. The acceptance of payments on a note after possession taken and default of note did not waive the forfeiture. Matthews v. Lucia, 55 Vt. 308.

And where the purchaser was in default and while suit was pending for the debt he returned

moreland County permitting defendant to open a judgment which had been entered against him upon a judgment bond, and allowing him to make a defense to the action. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Williams, Sloan, & Griffith,** for appellants:

There is not a word or syllable in the writings to suggest an inference even that the remedies provided are not cumulative.

The parties to it knew that the term of hiring would practically exhaust the life of the machines in the arduous use for which they were leased.

It is a legal presumption that every person knows the law when he knows the facts; yet this presumption, though arbitrary and in most cases untrue in fact, is founded upon principles of public policy, for without some settled rule which imposes upon every person the duty of well considering and understanding the consequences of his own acts and contracts, there would be no limits to the excuse of ignorance and no security in any agreement.

1 Wait, Act. & Def. ed. 1885, 84.

It is a legal presumption, therefore, that every man who makes a contract makes it advisedly and with knowledge of its legal incidences and consequences.

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the chattel to the vendor against his objection and after the judgment for the price the purchaser demanded the chattel but was still in default. The vendor might pursue both the debt and the pledge until he obtained security. Root v. Lord, 23 Vt. 568.

The purchaser could not maintain replevin where the vendor had retaken the property after default under a contract in the form of a lease. The mere lapse of time after default, or accepting part payment before retaking possession, was not a waiver of title and right to possession. Quinn v. Parke & L. Mach. Co. 5 Wash. 276.

Some cases hold that a demand for the property is unnecessary.

The purchaser could not recover in an action of trespass where the vendor broke and entered the plaintiff's close and took away cattle held under a conditional sale, the title to remain in the vendor until paid for, and the vendor having the right to take them away at any time. No demand was made in this case for the oxen, and the vendor had a license to enter and take them away at any time before the whole of the price was paid. Heath v. Randall, 4 Cush. 198. See Nattin v. Riley, 54 Ark. 30 *supra*, I., d, and cases following.

And where a deputy sheriff acting for the vendor in a replevin suit took possession of a horse sold under a contract, to remain the property of the vendor until paid for, and demand of payment after default was made. Demand of the property was unnecessary as default terminated the vendee's rights, and that the officer seized the horse outside of his county made no difference as the taking could be justified under the contract. Proctor v. Tilton, 65 N. H. 3, Distinguishing Davis v. Emery, 11 N. H. 230, *supra*, I., d, as to demand of the property being necessary, as in that case the vendee had an election to buy, and in Kimball v. Farnum, 61 N. H. 348, *supra*, I., d, where the vendor sold his interest to another party who sued in replevin, a demand was necessary because the time had been extended with the understanding that the vendee might pay when he could.

And the lessee was refused a recovery in trespass where the lessor took the property back under a contract, although the evidence showed that after obtaining an entrance he had used a subterfuge to obtain possession and the lessee objected but was in default and no violence was used. As to a demand the act of taking the piano was a demand, and demand had previously been made for the money which has never been paid. It was said that if an entrance was obtained by the use of a falsehood in order to regain possession, to which the lessor was entitled, the lessee could not recover damages. North v. Williams, 120 Pa. 109.

If time is of the essence of the contract, or the contract is not executed by the purchaser, he cannot recover.

A vendee in a contract of conditional sale for the purchase of a stallion was refused a recovery against another party who had obtained possession by advancing the money to make a last payment, and who gave the purchaser an option to repurchase within three months upon the payment of said sum, as time was of the essence of the contract. Roberts v. Norton, 66 Conn. 1.

In Summerson v. Hicks, 134 Pa. 566, the purchaser was refused a recovery in replevin where the vendor resumed possession and immediately the purchaser tendered the balance but did not keep his tender good and time was of the essence of the contract, under a conditional sale in the form of a lease, the ownership to remain in lessor until payment in full.

But leave was given on reversing the case for the plaintiff in replevin to make his tender good; this entitled him to judgment. The defendant was entitled to his costs due at the time of tender into court, and cost of reversal. Id. 142 Pa. 344.

The purchaser was refused a recovery in replevin where he was in default in not executing a note of $80 and the contract provided that such note must be executed before the vendee was entitled to possession, and a note of $8 was executed by mistake, and a new note not tendered. Litterel v. St. John, 4 Blackf. 326.

In Sage v. Sleutz, 23 Ohio St. 1, it was said that the purchaser under a contract of conditional sale had no title to the property, where the vendor had taken the property back under a contract in form of a lease.

But a tender by the purchaser of the amount due after default may sometimes enable him to recover.

The purchaser was allowed a recovery in replevin where he had tendered the balance due and demanded the chattel after the vendor had retaken the same, where time was not of the essence of the contract, not on condition that the purchaser pay the note when it became payable, but "with the condition that said cow was to remain the property of said B (vendor) till said note was paid." The omission to pay the note at maturity would not operate as a forfeiture of his rights in the absence of a demand of payment, or of the property, and on such demand after the note was overdue, the purchaser would have the right to pay the note and retain the property. Taylor v. Finley, 48 Vt. 78.

And where the contract was in the form of a lease and there was no agreement that upon default the vendor should have the property and money already paid. If the contract was rescinded the purchaser was entitled to recover the money paid. If the contract was not rescinded the purchaser was entitled to possession upon the payment of the amount due. Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124.

A purchaser was allowed a recovery in trespass against the assignee of a purchase-money note who had taken possession under a contract providing if default should be made on any of the notes the purchaser's right to use or possess the chattels should cease, and the vendor might take and retain possession thereof where the purchaser re-

The parties are to be bound by the plain terms of the contract.

Shafer v. *Senseman*, 125 Pa. 310; *Duffield* v. *Hue*, 129 Pa. 94.

The words of the contract are to be taken most strongly against the party using them.

White v. *Smith*, 33 Pa. 186, 75 Am. Dec. 589; *Burkhard* v. *Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Allentown School Dist.* v. *Derr*, 115 Pa. 439; *Leatherman* v. *Oliver*, 151 Pa. 647.

Rent already accrued and overdue is not forfeited by eviction.

Tiley v. *Moyers*, 43 Pa. 404; *Kessler* v. *M'Conachy*, 1 Rawle, 435; *Gallagher's Estate*, 37 Pittsb. L. J. 306.

Clauses of forfeiture in oil and gas leases, equivocal in their terms, have uniformly been held for the protection of the lessor, and not of the defaulting lessee.

Galey Bros. v. *Kellerman*, 123 Pa. 491; *Wills* v. *Manufacturers' Nat. Gas Co.* 130 Pa. 222, 5 L. R. A. 603; *Ogden* v. *Hatry*, 145 Pa. 640; *Leatherman* v. *Oliver*, *supra*.

No question of bailment or conditional sale arises in this case. It is a contest between the original parties, and immaterial whether the contract as written would, as to third persons, creditors, be considered a conditional sale.

Hamilton v. *Billington*, 163 Pa. 76.

Messrs. **Atkinson & Peoples,** for appellee: The plaintiffs have retaken the property,

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mained in possession after default, and in consideration of a payment then made time was given to pay the balance, and the assignee of the vendor proceeded to advertise and sell the property under a contract, and before the sale the vendee tendered more than the balance due. The assent to the delay was a waiver of forfeiture and the purchaser's right to acquire title by paying the remainder continued until request was made for the balance. Hutchings v. Munger, 41 N. Y. 155.

And the purchaser may recover when the seizure is unwarranted, or if the vendor has elected to treat the sale as absolute, or has not complied with the statute.

A judgment was rendered against the vendor the plaintiff in replevin where the contract of sale of boat A and mules retained the title in the boat to the vendor until paid for and the vendor secured payment by a chattel mortgage upon boat B, and after default took possession of the mules and advertised them and boat A for sale, and advertised boat B for sale under the chattel mortgage, and then seized both boats in this suit of replevin and sold them under the advertisements. The mules being worth more than the balance due, the purchaser was allowed a judgment for the surplus and for the value of the detention of the two boats. O'Rourke v. Hadcock, 114 N. Y. 541, *supra*, I., d.

The purchaser was allowed to recover in tort for conversion by the vendor where the contract was in the form of a lease providing on default that the purchaser's right to the goods ceased, and no title vested in him until the conditions were performed, and on default the vendor brought an action for rent and attached property by trustee process and the vendor then took possession of the goods and prosecuted his action to judgment and collected a small sum of money. The election to treat the transaction as a sale before taking the goods rendered the vendor liable. Bailey v. Hervey, 135 Mass. 172.

A verdict of $750 was allowed to stand against the vendor for entering the vendee's house in his absence and taking away a set of furniture, notwithstanding the protest of the relatives present, where the contract of conditional sale allowed the vendor to retake possession on default, but did not authorize an entry in the vendee's house in his absence, without his consent, or without notice, to carry off its contents. Van Wren v. Flynn, 34 La. Ann. 1158.

In an action by the wife of a lessor of an apartment against a vendor, for an assault in entering the apartment against her will to take away the property in the possession of a tenant, under a conditional sale contract, providing that the vendor on default might enter the premises and take possession without being liable to trespass, it was held that the party in charge of the premises had a right to resist the entrance after requesting him to wait a short time until she could see the tenant. Drury v. Hervey, 126 Mass. 519.

III. *Forfeiture.*

a. *By vendor, of money received.*

As to forfeiture by vendor of money received, see *supra*, II., a.

A forfeiture by vendor of money received was not necessary to recover possession. Duke v. Schackleford, 56 Miss. 552, *supra*, I., d.

Where the contract did not so provide. Fairbanks v. Malloy, 16 Ill. App. 277, *supra*, I., d.

And where it was held that the remedy must be sought elsewhere. Thirlby v. Rainbow, 93 Mich. 164, *supra*, I., d.

And where the action was in detinue. McGinnis v. Savage, 29 W. Va. 362, *supra*, I., d.

And where the contract provided that the money paid was for the use of the chattel. Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236, and Hegler v. Eddy, 53 Cal. 597, *supra*, I., d.

But a forfeiture by vendor was necessary to recover possession. Ketchum v. Brennan, 53 Miss. 596, *supra*, I., d.

And a forfeiture by vendor of money received was necessary in replevin. Hamilton v. Singer Mfg. Co. 54 Ill. 370, *supra*, I., d.

The vendor may be required to return money received. Levan v. Wilten, 135 Pa. 61, *supra*, II., b.

As to a forfeiture under the statute by vendor of money received, see Jenks v. Howe Sewing Mach. Co. 34 La. Ann. 1241; Smith v. Wood, 63 Vt. 534, and Roberts v. Hunt, 61 Vt. 612, and French v. Osmer, 67 Vt. 427, *supra*, II., b; Caldwell v. Singer Mfg. Co. 7 Ohio, C. C. 460, and Weil v. State, 46 Ohio St. 450, and Cowan v. Singer Mfg. Co. 92 Tenn. 376, and Liegerman v. Puckett, 94 Tenn. 273, *infra*, V.

Forfeiture by vender of money received was not decided. Fleck v. Warner, 25 Kan. 492, *supra*, I., d.

b. *By purchaser, of money paid.*

As to a forfeiture by purchaser of money paid, see *supra*, II., a. And see *Ex parte* Crawcour, L. R. 9 Ch. Div. 419, *supra*, II., b.

That forfeiture was not decided. West v. Bolton, 4 Vt. 558, *supra*, II., b.

Purchaser did not forfeit the money paid, where the contract did not so provide. Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124, *supra*, II., b.

Purchaser did not forfeit money paid where vendor brought replevin and the purchaser was a married woman. Meagher v. Hollenberg, 9 Lea, 392, *supra*, I., d.

Purchaser did not forfeit money paid where time was not of the essence of the contract. Taylor v. Finley, 48 Vt. 78, *supra*, II., b.

IV. *Rescission.*

A rescission is not by retaking. Fairbanks v. Malloy, 16 Ill. App. 277, *supra*, I., d.

A rescission entitles to return of purchase money. Miller v. Steen, 30 Cal. 402, 89 Am. Rep. 124, *supra*, II., b.

whether it was by consent or adversely, exercising their own right of election, and by that act the entire contract was at an end, and all rights of either party thereunder were suspended and terminated.

Campbell Printing-Press & Mfg. Co. v. *Hickok*, 140 Pa. 290; *Scott* v. *Hough*, 151 Pa. 630.

Dean, J., delivered the opinion of the court:

The plaintiffs were manufacturers of agricultural implements. The defendant traveled from place to place, threshing farmers' crops. On the 2d of September, 1889, the plaintiffs put in defendant's possession a traction engine and thresher, he to use the same with care and keep in good order. The contract was one of hiring or bailment. As the parties evidently intended the event should be an absolute purchase, for security the vendors retained the title until final payment of the hire. The sum of the hire was the price of the machine,—$1,700,—to be paid as follows: On delivery, $750; on the 1st of January, 1890, $316.67, with interest; and a like sum on the 1st of January, 1891, and 1892, with interest. As collateral, "to secure the payment of said

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And a rescission is not necessary to maintain a replevin by the vendor. Duke v. Shackleford, 56 Miss. 552, *supra*, I., d.

And a rescission is prevented by accepting money. Gibbons v. Luke, 37 Hun, 576, *supra*, I., d.

As to a rescission being a condition precedent to obtain possession, see Ketchum v. Brennan, 53 Miss. 596, *supra*, I., d.

As to a rescission by surrendering notes in order to maintain trover, see Johnston v. Whittemore, 27 Mich. 463, *supra*, I., d.

As to a rescission by retaking possession, see *supra*, I., a, c; II., a.

V. *Statutory provisions as to rights and remedies.*

In some of the states the rights of the vendor and vendee in conditional sales are controlled by the statutes, which must be strictly followed.

The purchaser was allowed a recovery in conversion, where the vendor took possession of chattels under a contract in the form of a lease, providing on full payment for the use that the lessor would sell by bill of sale, and that the lessor might resume possession on default, and the vendor did not comply with the requirements of Mass. Stat. 1884, chap. 313, providing that a statement must be given to the vendee of the balance due on taking possession by the vendor; and the vendee may redeem within fifteen days thereafter. Whether the provisions of the statutes could be waived was not decided. Lee v. Gorham, 165 Mass. 130.

And the vendee recovered in trover from the vendor where in a few days after default, in the absence of the vendee, the vendor took possession of the chattel sold on conditional sale, and kept the same about six weeks and resold the same at private sale, as the vendor must comply with Vt. act. No. 93, Act. 1884, § 5, providing that the vendor may retake possession after thirty days from default and sell at public auction, giving the vendee ten days previous to the sale to redeem. Smith v. Wood, 63 Vt. 534; Roberts v. Hunt, 61 Vt. 612.

In a suit by a purchaser under Ohio act May 4, 1885, to recover from the vendor the money paid after retaking the machine, it was no defense that at the time of a contract of conditional sale the vendor took a chattel mortgage, as no makeshift should be allowed to avoid the statute. There would have been no trouble if the vendor had brought an action of replevin. Caldwell v. Singer Mfg. Co. 7 Ohio, C. C. 460.

Ohio Laws, 238 (May 4, 1885), providing that the vendor shall be guilty of a misdemeanor on retaking the chattel sold on conditional sale, without refunding the sum paid after deducting a reasonable use not to exceed 50 per cent, is not unconstitutional in impairing the obligation of contracts, or transferring property against the owner's consent, or depriving a party of his remedy by due course of law, or an attempt by penal enactment to assist in the collection of a debt; and is not invalid because no method is provided for determining the amount of compensation. Weil v. State, 46 Ohio St. 450.

In French v. Osmer, 67 Vt. 427, it was said that Vt. act 1884, in regard to conditional sales, providing that after thirty days from the time of condition broken the vendor may cause the property to be taken and sold at public auction by a public officer, does not alter the title of the vendor or make him a mere security holder. If the vendor wishes to sell he must proceed according to the statutes.

The purchaser of a chattel was allowed a recovery of the purchase money paid under a lease where the vendor had taken the property in replevin and had not complied with Tenn. act 1889, chap. 81, providing that the vendor having regained possession on default shall within ten days advertise the property for sale and with the proceeds satisfy his claim and expenses, and pay the remainder to the purchaser unless such sale is waived by the purchaser and seller. The vendor was not allowed to set off the value of the use of the machine for, from the nature of the contract and as matter of law, the vendee was entitled to use the machine as her own property. Cowan v. Singer Mfg. Co. 92 Tenn. 376.

But under this statute the purchaser could not recover until after ten days from the determination of a replevin suit where the right to the possession was contested. The act was intended to apply where there was no contest. Liegerman v. Pucket, 94 Tenn. 273.

The purchaser was refused a recovery in trespass where the purchaser on instalment under a contract as a lease delivered the attachments of the machine to the agent and permitted him to take the machine away, as La. act, 62 Ex. Sess. 1877, providing that such contracts shall be considered as contracts of sale and enforceable only by exercise of the vendor's privilege, and forbidding under penalties the enforcement of an agreement that the vendor might retake the property without judicial process, did not apply in such a case. Jenks v. Howe Sewing Mach. Co. 34 La. Ann. 1241.

The vendor was allowed a recovery of possession as against the purchaser, where the contract of sale was an oral agreement, as N. C. Code, § 1275, providing that all conditional sales of personal property in which the title is retained by the bargain or shall be reduced to writing and registered, was only intended to apply to third parties. Butts v. Screws, 95 N. C. 215.

But the vendor was refused a recovery on purchase-money notes, where he had taken the property back and resold the same, and the contract was in the form of notes which were unconditional, and a deed which was conditional and void under Me. Rev. Stat. chap. 111, § 5, providing that no agreement that personal property sold to another for which the note is given shall remain the property of the payee until the note is paid, is valid unless it is made and signed as a part of the note, and the purchaser was entitled to a credit upon the

rental," the defendant executed and delivered to plaintiffs a judgment bond of same date, in the penal sum of $1,900, conditioned for the payment of the three instalments, with interest, and further stated: "This bond is given as collateral to secure the rentals for certain machines leased by obligor from obligees." The first payment of $750 was made, and the defendant took possession of the machine, and used it in threshing the crop of 1889. Some time before the 1st of January, 1890, the defendant informed Seanor, one of the plaintiffs, that he would be unable to pay the first instalment of $316.67. On that day, Seanor called on defendant, and demanded payment, who again told him he was not able to pay, and that Seanor should take the machine away. Seanor then examined it, and the same evening arranged to have it removed. Defendant demanded his bond, or a receipt for it, before the machine was taken away; but Seanor refused to give either, and, early on the morning of the 3d of January, removed it. After taking the machine, on the same day, plaintiffs confessed judgment on the bond, and issued execution for the first instalment. On petition and affidavit of defendant, the court opened the judgment, and awarded an issue. At the trial the facts were, in substance, as we have stated them. The court below was of the

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notes for the surplus from the proceeds of the sale above the amount of the notes. The inference from the evidence in this case is that the vendor should retake the property and account for its value. Holt v. Knowlton, 86 Me. 456.

VI. *Waiver.*

In COLE v. HINES after default of payment of an instalment for the purchase price of a chattel, as shown by a rent note, the contract was voidable at the election of the vendor and the extension of the time of payment after such default prevented the vendor from seeking the goods during such extension. The contract in this case provided that the vendor "reserves the right to give more time than that agreed upon, if it suits his views, without violating this contract by such extension of time." But this clause was not passed upon by the court.

The same was held in Kimball v. Farnum, 61 N. H. 348, where time was extended and no demand was made for the money or for the property.

A forfeiture in a contract of sale of personal property to be paid for in instalments is waived by the seller after a default making a new contract with the original purchaser, and others, and receiving payments of the instalments then due, but one waiver is not evidence of another subsequent one. Hill v. Townsend, 69 Ala. 286.

In Taylor v. Finley, 48 Vt. 78, it was said that if the contract was such that a single omission to pay the note at maturity would entitle the seller to treat the contract as forfeited, other questions might arise as to the receipt of partial payments operating as a waiver of prior forfeitures arising from default. The party entitled to forfeiture loses it by not electing in time to take the benefit of it.

In Aultman v. Mallory, 5 Neb. 178, 25 Am. Rep. 478, it was said that if the vendor delivers property to the vendee conditionally, and afterwards waives his right to the title, he cannot afterwards maintain an action of replevin to recover possession.

Electing to take an order of sale is not a waiver of right to recover in the same suit in replevin. Keitt v. Counts, 15 S. C. 493, *supra*, I., d.

And nonsuit after attaching property is not a waiver of the right of possession. Matthews v. Lucia, 55 Vt. 308, *supra*, II., b.

A waiver of previous demand is made by accepting payment after default. Gibbons v. Luke, 37 Hun, 576, *supra*, I., d.

But a waiver of forfeiture is not made by accepting part payment after default. Matthews v. Lucia, *supra*.

A waiver of right of possession is not made by accepting part payment, Quinn v. Parke & L. Mach. Co. 5 Wash. 976, *supra*, II., b; Hegler v. Eddy, 53 Cal. 597, *supra*, I., d.

As to electing to levy preventing a recovery on debt, see *supra*, I., a.

As to electing to retake affecting a recovery of purchase money, see *supra*, I., a.

As to a waiver by negotiating notes being a bar to recovery of possession, see Heinbockle v. Zugbaum, 5 Mont. 344, 51 Am. Rep. 59, *supra*, I., d.

As to a waiver by an extension of time not a consideration for a new note, see Sinker v. Green, 113 Ind. 264, and Green v. Sinker, 135 Ind. 434, *supra*, I., a.

As to a waiver by extension of time of affecting replevin, see Bunker v. McKinney, 63 Me. 529, *supra*, I., d.

As to a waiver by an extension affecting a forfeiture of right to possession, see Hutchings v. Munger, 41 N. Y. 155, *supra*, II., b.

As to a waiver by laches preventing recovery and trover, see Gorham v. Holden, 79 Me. 317, *supra*, I., d.

As to a waiver by laches not decided, see Knox v. Perkins, 15 Gray, 529, *supra*, I., d.

As to enforcing contracts after an extension, see Earle v. Robinson, 91 Hun, 363, *supra*, I., a.

As to extension, see Levan v. Wilten, 135 Pa. 61, *supra*, II., b.

The vendor may waive the forfeiture. Bissell v. Bissell, 4 N. Y. Week. Dig. 338, *supra*, I., c.

VII. *Election of remedy under contract.*

Election by taking a chattel mortgage makes the sale absolute. McCormick Harvesting Mach. Co. v. Lewis, 52 Kan. 358, *supra*, I., a.

Attempting to enforce a purchase-money note by attachment, and then filing a claim against the purchaser's estate in insolvency, prevent recovery of possession. Crompton v. Beach, 62 Conn. 25, 18 L. R. A. 187, *supra*, I., d.

So, suit and attachment prevent taking possession. Bailey v. Hervey, 135 Mass. 172, *supra*, II., b.

So, suit on notes, levy and sale, prevent detinue. Montgomery Iron Works v. Smith, 98 Ala. 644, *supra*, I., d.

A suit on the purchase-money note prevents recovery of possession. Button v. Trader, 75 Mich. 295, *supra*, I., d.

Foreclosing security prevents recovery of possession. Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, *supra*, I., d.

Replevin prevents an order of sale foreclosing lien. Campbell Printing-Press & Mfg. Co. v. Walker, 43 Hun, 449, *supra*, I., e.

Other cases hold that an election by suit on note does not prevent retaking possession. Matthews v. Lucia, 55 Vt. 308, and Root v. Lord, 23 Vt. 568, *supra*, II., b.

Proving claim against insolvent estate does not prevent taking possession. Knox v. Perkins, 15 Gray, 529, *supra*, II., b.

As to election by retaking, affecting an action for the purchase price, see *supra*, I., a.

As to an election by suit, alternative remedy, see McRea v. Merrifield, 48 Ark. 160, *supra*, I., d.

As to an electon by taking judgment of order of sale in replevin, see Keitt v. Counts, 15 S. C. 493, *supra*, I., d. V. T.

opinion that—(1) The rights of the parties were to be determined by the written contract between them, the lease, and the bond; (2) that, on default of payment of any instalment, plaintiffs could enter judgment and collect by execution, or rescind the contract and repossess themselves of the machine, but could not adopt both remedies; (3) that the undisputed evidence showed a rescission of the contract, and thereafter defendant was no longer answerable on the bond. Therefore a verdict was directed for defendant. From the judgment entered, plaintiffs press this appeal.

The merit of the assignments of error depends solely on whether the construction given by the learned judge of the court below to the written contract, as set out in the lease and bond, was right. The contract was to pass the possession of the machine to the defendant, and to make secure the payment of its value to the plaintiffs. Its value, as fixed by both parties, was $1,700. It is fair to presume the plaintiffs intended by the contract to get this sum once, and that defendant did not intend to pay it, or any part of it, twice. Parties may, in contracting, provide penalties for nonperformance, but, unless they do so in unmistakable language, courts will not insert them. In the lease, after specifying the three instalments and their dates of payment, the defendant immediately said: "And, as collateral to secure the payment of said rentals, I have executed and delivered . . . my judgment bond, of even date herewith." Then almost the last words of the bond are: "This bond is given as collateral to secure the rentals." The principal obligation by the contract was to pay, for the machine, $316.67, with interest, on the 1st of January of the three following years; and "if default be made in said payments, . . . they, said Seanor & Bierer, or their agent, may resume actual possession of the same; and I hereby further authorize and empower the said Seanor & Bierer . . . to enter the premises wherever said machines may be, and take and carry them away." This was primarily the obligation to pay, and the remedy to enforce payment. Plaintiffs retained title to the chattel, with the right to resume possession in default of payment of the hire. Then the judgment bond is given, in express terms, as a security collateral to the performance of this principal obligation. There is no technical legal definition of the word "collateral," distinct from its common signification. It is an additional security for the performance of the principal obligation, and, on the discharge of the latter, it is to be surrendered. Therefore, the plaintiffs had two distinct remedies, either of which they might adopt to enforce their right. They parted with the possession of the machine at the price of $1,700; $750 of this to be paid in hand, which they received. They still retain title, with the right to resume possession on default in either payment of $316.67. But, the subject of the contract being a movable chattel, and this security being, at best, little more than a chattel mortgage, they took a personal judgment bond, with power of attorney to enter it and confess judgment in any court of record of the United States or elsewhere, as collateral to the original obligation. Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative,—they could not adopt both,—unless it was plainly expressed in the contract, or a necessary implication from its terms. The words of this contract negative such a construction. The defendant stipulates that "if default be made in said payments or any of them, . . . then, in that case, I hereby covenant and agree to return said machines to said Seanor & Bierer, and that they . . . or their agent may resume actual possession of the same." That was the penalty for default of the primary obligation, and repossession of the machine the discharge of it. On default of payment, the plaintiffs were not bound to accept the machine or take possession of it; they could have entered a judgment on the bond, levied on the machine and any other property of the defendant, in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond, and issued execution to levy on other property of defendant, which they had no right to do for the contract or obligation to which the bond was collateral no longer existed. It ought to have been surrendered to defendant when he demanded it, at the time plaintiffs took away the machine.

The contract in this case is not essentially different from those in *Campbell Printing-Press & Mfg. Co.* v. *Hickok*, 140 Pa. 290, and *Scott* v. *Hough*, 151 Pa. 630, in both of which cases we held that the remedies were distinct, and not cumulative. If the bailor rescinded by repossessing himself of the property, the right of personal action against the bailee was at an end. That the words "rescission" or "rescind" do not occur in this contract is not material. Rescission is a fact. The word itself may be used by the contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties which shall constitute the fact of rescission. The decision in *Campbell Printing-Press & Mfg. Co.* v. *Hickok*, *supra*, was based on the stipulation of the contract that the lessor had the right, on lessee's failure to pay any instalment, to repossess himself of the property; and, having exercised this right, the contract was rescinded in fact, and there was an end of personal obligation on part of lessee. While the word "rescinded" is used in that contract, the right to rescind and the act necessary to a rescission are plainly expressed without it, and the interpretation was fully warranted, even if the word had not been used. Here the plaintiffs, in effect, in their contract, stipulated that on default of payment of rental, they should have the right to take the machine back to make good the default. There was default, and, because of it, they took back the machine. This was both a right to rescind, and the exercise of the right or a rescission in fact. The construction put upon the whole contract by the learned judge of the court below was right.

Therefore the assignments of error are overruled, and *the judgment is affirmed.*

IOWA SUPREME COURT.

Mrs. Artie GOODWIN
v.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, *Appt.*

(.....Iowa.....)

1. **A clause in an insurance policy making it incontestable** except for fraud in procuring it after two years from its date will control an agreement in the application that death by suicide is not covered by the policy so that such death after the expiration of that period will not defeat liability on the policy.

2. **The laws of the state where a contract is made** are, in the absence of proof to the contrary, presumed to be the same as those of the state where it is sought to be enforced.

3. **Volumes of laws of a foreign state** which do not purport to have been published under authority of its legislature, and are not shown to be commonly admitted as evidence of such laws in that state, are not admissible to prove such laws in Iowa.

4. **False representations or warranties** in an application for insurance cannot be relied on by the insurer if a copy of the application is not attached to the policy as required by McClain's Code, § 1733.

5. **A copy of an application for renewal** or reinstatement of a policy must be annexed to it to enable the insurer to rely on false statements therein under McClain's Code, § 1733.

6. **Executing in one state a reinstatement of a policy made in another state** will not remove the policy from its character as a contract of the state where it was originally executed.

7. **An insurance policy cannot be canceled** for failure to comply with a notice which was misdirected and was returned to the insurer without reaching the insured.

8. **Declarations of an insured person** as to forfeiture of the policy are not binding on the beneficiary.

9. **Oral notice to a general agent** of an insurance company of change of address of the insured, given upon the street, is sufficient to bind the company.

10. **Notice of change of address** of the insured, given to one authorized to collect premiums, is binding on the company.

11. **There is no presumption that the addressee of a letter received it** from the fact that it was not returned to the sender if it was not directed to the place in which the addressee resided at the time.

12. **The burden of showing that the amount of insurance premium demanded is correct** is upon the insurer where the policy requires payment of a certain sum "less the return premiums awarded."

13. **That an insurance policy is renewable** from quarter to quarter instead of being for a period of years upon condition of payment of premiums does not withdraw it from the operation of the ordinary rules applicable to life insurance contracts.

(February 5, 1896.)

APPEAL by defendant from a judgment of the Superior Court of Cedar Rapids in favor of plaintiff in an action to recover the amount alleged to be due on a policy of life insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Hubbard & Dawley** and **Mills & Keeler** for appellant.

Mr. **Charles A. Clark,** for appellee:

The claim is incontestable except for fraud. Suicide is clearly cut out as a defense.

Mareck v. *Mutual Reserve Fund L. Asso.* (Minn.) 64 N. W. 68; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 297, 34 L. ed. 413; *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Grace* v. *American C. Ins. Co.* 109 U. S. 282, 27 L. ed. 934; *Moulor* v. *American L. Ins. Co.* 111 U. S. 342, 28 L. ed. 450; *Wadsworth* v. *Jewelers & T. Co.* 132 N. Y. 543; *Fitch* v. *American Popular L. Ins. Co.* 59 N. Y. 572, 17 Am. Rep. 372; *Hoffman* v. *Ætna F. Ins. Co.* 32 N. Y. 413, 88 Am. Dec. 337; *Wright* v. *Mutual Ben. L. Asso.* 118 N. Y. 243, 6 L. R. A. 731; 1 May, Ins. § 174; Cooke, L. Ins. pp. 29, 30; Richards, Ins. p. 53.

The court has refused to give liberal effect to a clause that suit must be commenced within six months after loss, but has held that clause to be modified by other provisions in the policy more favorable to the insured.

Ellis v. *Council Bluffs Ins. Co.* 64 Iowa, 508; *Carter* v. *Humboldt F. Ins. Co.* 17 Iowa, 460; *Hewitt* v. *Watertown F. Ins. Co.* 55 Iowa, 324, 36 Am. Rep. 174; *Bankhead* v. *Des Moines Ins. Co.* 70 Iowa, 389.

The court below was right in withdrawing from the jury all defenses based upon the application for the policy. No correct or full copy of the application was annexed to the policy.

1 McClain's Code, § 1733; *McConnell* v. *Iowa Mut. Aid. Asso.* 79 Iowa, 760; *Cook* v. *Federal L. Asso.* 74 Iowa, 746; *Lewis* v. *Burlington Ins. Co.* 71 Iowa, 97; *Ellis* v. *Council Bluffs Ins. Co.* 64 Iowa, 507; *Dunbar* v. *Phenix Ins. Co.* 72 Wis. 497; *United States* v. *Insurgents of Pennsylvania,* 2 U. S. 2 Dall. 342, 1 L. ed. 407; *Cooke* v. *Vaughan,* 4 Mees. & W. 69; *Smith* v. *Pennell,* 2 Dowl. P. C. 654; *West Winsted Sav. Bank & Bldg. Asso.* v. *Ford,* 27 Conn. 282, 71 Am. Dec. 66; 4 Am. & Eng. Enc. Law, p. 146.

The presumption is that the statutes of New York, both as to the requirement that a copy of the application shall be annexed and as to the provisions estopping the company where the medical examiner signs a certificate of health, are the same in all respects as the statutes of Iowa.

Bean v. *Briggs,* 4 Iowa, 464; *Crafts* v. *Clark,*

NOTE.—As to paid-up and nonforfeiting policies of life insurance, see *note* to Northwestern Mut. L. Ins. Co. v. Barbour (Ky.) 15 L. R. A. 449.

As to proof of foreign laws, see *note* to State v. Behrman (N. C.) 25 L. R. A. 449.

See also 43 L. R. A. 566; 47 L. R. A. 495.

31 Iowa, 77, 38 Iowa, 237; *Sayre* v. *Wheeler*, 31 Iowa, 112, 32 Iowa, 559; *Stephens* v. *Williams*, 46 Iowa, 540; *Church* v. *Crossman*, 49 Iowa, 444; *Webster* v. *Hunter*, 50 Iowa, 215; *Neese* v. *Farmers' Ins. Co.* 55 Iowa, 604; *Hadley* v. *Gregory*, 57 Iowa, 157; *State* v. *Nedal*, 69 Iowa, 478; *Leiber* v. *Union P. R. Co.* 49 Iowa, 688.

The burden is on an assessment or mutual company to prove what the true and correct amount of premium is and to prove its regularity, where it claims a forfeiture on the ground of nonpayment of such premium.

Shea v. *Massachusetts Ben. Asso.* 160 Mass. 291; *Mutual Reserve Fund L. Asso.* v. *Hamlin*, 139 U. S. 298, 35 L. ed. 168; *Tobin* v. *Western Mut. Aid Soc.* 72 Iowa, 261; *Underwood* v. *Iowa Legion of Honor*, 66 Iowa, 134; *Bates* v. *Detroit Mut. Ben. Asso.* 51 Mich. 587; 2 May, Ins. § 557; *Agnew* v. *Ancient Order of United Workmen*, 17 Mo. App. 254; *American Mut. Aid Soc.* v. *Helburn*, 85 Ky. 1; *Susquehanna Mut. F. Ins. Co.* v. *Gackenbach*, 115 Pa. 492; Niblack, Ben. Soc. 2d ed. § 477; *Thomas* v. *Whallon*, 31 Barb. 178; 2 Bacon, Ben. Soc. 2d ed. § 387; *Pacific Mut. Ins. Co.* v. *Guse*, 49 Mo. 332, 8 Am. Rep. 132.

Notice must be given in the absence of a statute, where the amount of the premium is uncertain owing to the deduction of dividends or profits.

Mutual Reserve Fund L. Asso. v. *Hamlin*, *supra*; *Home L. Ins. Co.* v. *Pierce*, 75 Ill. 426; *Mayer* v. *Mutual L. Ins. Co.* 38 Iowa, 303, 18 Am. Rep. 34; *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 30, 27 L. ed. 65; *Eddy* v. *Phœnix Mut. L. Ins. Co.* 65 N. H. 27; *Manhattan L. Ins. Co.* v. *Smith*, 44 Ohio St. 168, 58 Am. Rep. 806.

Express admissions of facts by the insured are not admissible against the beneficiary after the contract of insurance is made.

2 May, Ins. § 579*a*; *Dial* v. *Valley Mut. L. Asso.* 29 S. C. 560; *Union C. L. Ins. Co.* v. *Cheever*, 36 Ohio St. 208, 38 Am. Rep. 573; Bliss, Ins. § 383; *Rawls* v. *American Mut. L. Ins. Co.* 36 Barb. 357, 27 N. Y. 282, 84 Am. Dec. 280; *Washington L. Ins. Co.* v. *Haney*, 10 Kan. 525; *Fraternal Mut. L. Ins. Co.* v. *Applegate*, 7 Ohio St. 292.

Reinstatement is not a new contract but a revival and continuation and re-establishment of the original contract.

Lindsey v. *Western Mut. Aid Soc.* 84 Iowa, 734; *French* v. *Mutual Reserve Fund L. Asso.* 111 N. C. 391.

The contract did not provide that it should be void or should cease or determine by reason of the nonpayment of renewal premiums.

In the absence of an express agreement of this character a policy cannot be forfeited for nonpayment.

2 Bacon, Ben. Soc. § 352; 2 May, Ins. 3d ed. 343; Cooke, Life Ins. § 94; *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U. S. 242, 24 L. ed. 692; *New York L. Ins. Co.* v. *Eggleston*, 96 U. S. 577, 24 L. ed. 843; *Merriman* v. *Keystone Mut. Ben. Asso.* 138 N. Y. 123; *Darrow* v. *Family Fund Soc.* 116 N. Y. 544, 6 L. R. A. 495; *Carter* v. *Brooklyn L. Ins. Co.* 110 N. Y. 20; *Kausal* v. *Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776.

The company was bound by notice to the agent of change of address and his agreement to note the change.

Mayer v. *Mutual L. Ins. Co.* 38 Iowa, 305, 18 Am. Rep. 34; *Loughridge* v. *Iowa Life & E. Asso.* 84 Iowa, 146; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 80 U. S. 13 Wall. 235, 20 L. ed. 623; 1 May, Ins. §§ 152, 156; 1 Bacon, Mut. Ben. Soc. 160; *New York L. Ins. Co.* v. *Eggleston*, 96 U. S. 578, 24 L. ed. 843.

No presumption that a letter reached the addressee arises unless it appears that the person addressed resided in the city or town to which the letter was addressed.

Henderson v. *Carbondale Coal & C. Co.* 140 U. S. 37, 35 L. ed. 337; *Huntley* v. *Whittier*, 105 Mass. 492, 7 Am. Rep. 536; Bradner, Ev. p. 458; Underhill, Ev. p. 347; 2 Whart. Ev. § 1323.

To enable the presumption to operate it is essential that the letter should be addressed with specific correctness.

2 Whart. Ev. § 1328; *Hastings* v. *Brooklyn L. Ins. Co.* 138 N. Y. 477; *Phelan* v. *Northwestern Mut. L. Ins. Co.* 113 N. Y. 147; *Carter* v. *Brooklyn L. Ins. Co.* 110 N. Y. 22; *Garretson* v. *Equitable Mut. Life & E. Asso.* 74 Iowa, 421; *Garbutt* v. *Citizens' Life & E. Asso.* 84 Iowa, 294; *Courtney* v. *United States Masonic Ben. Asso.* (Iowa) 53 N. W. 238; *Phelan* v. *Northwestern Mut. L. Ins. Co.* 113 N. Y. 151.

Deemer, J., delivered the opinion of the court:

On the 16th day of November, 1887, the defendant, a corporation doing a life insurance business, organized and having its principal place in the state of New York, issued a policy of insurance to the plaintiff upon the life of her husband, Matthew Goodwin, agreeing to pay her, in the event of the death of the assured on or before noon of the 16th day of February, 1888, the sum of $5,000. The policy was issued on what is known as the "renewable term plan," a method of insurance originated by the president of the defendant company, and first used in the year 1887. By the terms of the contract, the defendant agreed to renew and extend the insurance, during each successive quarter year from the date thereof, upon the payment, on or before the 16th of February, May, August, and November in each successive year during the life of the assured, of the premiums for the actual age attained, in accordance with a schedule of rates printed on the back of the policy, less the return premiums awarded thereon. Goodwin, the assured, died by his own hand on the 11th day of November, 1891, at the city of Chicago, in the state of Illinois. His widow, the beneficiary in the policy, brought this suit, having first given notice, and made the proofs of death required by the terms of the policy. Defendant demurred to plaintiff's petition because there was no allegation therein that the policy had been renewed from time to time by the payment of premiums, and because the action was prematurely brought. The demurrer was sustained on the last ground, and overruled on the other; and thereupon plaintiff filed an amended and supplemental petition, avoiding the defect reached by the demurrer, and pleading some other matters not necessary to be here recited.

The defendant, in answer, admitted the execution of the policy, and its renewal from time to time down to May 16, 1891; admitted the death of Goodwin, but denied that the policy was in force at the time of his death. Defendant further pleaded, as a second division of its answer, that the assured made a written application for insurance, in which he agreed that the representations therein contained should be construed as warranties, and made the basis for the issuance of the policy, and that any false answers or statements should avoid the policy. It further pleaded that Goodwin represented in this application that he was in sound health, and was not then, and had not been, intemperate in the use of stimulants, and that he stated that he drank occasionally, but never to excess; that these representations were false and untrue; that Goodwin used intoxicating liquors habitually, and to excess; and that he made the representations he did with intent to deceive the defendant, and procure the policy in suit. In the third division of the answer the defendant pleaded other false and untrue statements made by Goodwin, respecting the place of his birth and the condition of his health, which need not be more particularly set out. In the fourth division the defendant pleaded that plaintiff and the assured wholly failed and neglected to pay the premiums necessary to be paid on May 16, 1891, in order to renew and extend the insurance from and after that date, and that the policy expired at that date by the express terms thereof; that thereafter, and on May 21, 1891, Goodwin applied for reinstatement in the defendant company, and, as a basis thereof, presented a health certificate, in which, among other things, he stated that he was then in good health and had been since May 16, 1891; that, in truth and in fact, Goodwin was not in good health and free from disease, and was not temperate in his habits, when he made the certificate of health. The fifth division pleaded failure of Goodwin or plaintiff to pay the quarterly premium due August 16, 1891, in order to extend the policy, and alleges that written notice of the amount of such premium, and of the place where and person to whom payment might be made, was mailed the assured on July 15, 1891,—the letter being addressed to him at Fifteenth and Harney streets, Omaha, Neb.; that being his last known postoffice address, and the one fixed by him, in the application for insurance, to which notice should be sent. The sixth division of the answer merely pleads the failure of Goodwin or plaintiff to pay the premium due August 16, 1891, and further alleges that the statutes of the state of New York, which, it is claimed, should govern and control the contract in suit, requiring notice, etc., did not apply to policies like the one in suit. In the seventh division the defendant averred that the application of Goodwin contained this statement: "It is agreed that death by my own hand or act (except when mentally unaccountable), or death in violation of, or attempt to violate, law, are risks not at any time assumed by the society under the policy applied for." And defendant further averred that Goodwin took his own life while mentally accountable, and therefore there was no liability on the part of the company. The plaintiff demurred to the fourth division of the answer because the representations there pleaded were not made in the application for insurance, and for the further reason that, by the terms of the policy, it was incontestable, except for fraud in obtaining the policy in the first instance; to the fifth division, because of several alleged defects in the notice sent out by the defendant company; to the sixth, because no computation had been made by the company as to the amount of the quarterly premium Goodwin should pay, no deductions or allowances having been made on account of any surplus portion of preceding payments not needed for death or quarterly fund; to the seventh for the reason that the policy sued on became and was incontestable, except for fraud in obtaining it. This demurrer was sustained, as to the fourth and seventh divisions of defendant's answer, and overruled as to the fifth and sixth, each party excepting. Thereupon defendant amended the fourth division by pleading discovery of the falsity of the representations therein referred to on July 1, 1892, and offered to confess judgment for the amount of the premium paid May 21, 1891. Thereafter other pleadings were filed by each of the parties; the defendant, among other things, alleging that the contract of reinstatement in May, 1891, was a Nebraska contract, and that there was no law of that state requiring that a copy of the certificate of health be attached to, or made a part of, the policy. The defendant further pleaded that the original application for insurance was made in Nebraska, and the policy delivered in Omaha, in that state, and that there was no law in either the state of Nebraska or the state of New York requiring a copy or copies of the application to be attached to or incorporated in said policy. Such were the issues on which the cause was tried. The court, however, in its instructions to the jury, eliminated all questions made by the pleadings, save the issue as to the nonpayment of the quarterly premium claimed to have been due August 16, 1891. The jury found for the plaintiff on the questions of fact presented, and with their findings we are not called upon to interfere. The questions presented by this appeal arise upon the sustaining of plaintiff's demurrer to certain divisions of the answer, the rulings of the court during the trial, and the giving and refusing of instructions to the jury.

1. The first question presented in argument relates to the sufficiency of the seventh division of the defendant's answer. The application which Goodwin made for his insurance contained a statement which, if standing alone, would avoid the plaintiff's cause of action, for it is conceded that Goodwin committed suicide. But the policy contained this provision: "Subject to the stipulations regarding payment of premiums, and extra-hazardous occupations, claim under this policy by death occurring two or more years after its date will be incontestable except for fraud in obtaining this policy." If there were nothing more to the case than this provision of the policy, there would be no doubt that plaintiff's claim could not be defeated because her husband took his own life; for a claim under the policy by death occurring two or more years after its date was incontestable except for fraud. We have a case then,

for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. *Thompson* v. *Phenix Ins. Co.* 136 U. S. 297, 34 L. ed. 413; *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Moulor* v. *American L. Ins. Co.* 111 U. S. 342, 28 L. ed. 449; *Wadsworth* v. *Jewelers' & T. Co.* 132 N. Y. 543; *Fitch* v. *American Popular L. Ins. Co.* 59 N. Y. 572, 17 Am. Rep. 372; *Garretson* v. *Equitable Mut. L. & E. Asso.* 74 Iowa, 419; *Meyer* v. *Fidelity & C. Co.* (Iowa) 25 Ins. L. J. 346; *Collins* v. *Merchants' & B. Mut. Ins. Co.* (Iowa) 64 N. W. 602. Now, by the terms of the policy, it was incontestable, after two years from its date, except for fraud in procuring it,—subject, however, to the stipulations regarding payment of premiums, and extrahazardous occupations. That is to say, claims under the policy by reason of the death of the assured were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. It will be observed that the clause on which the defendant relies is not found in the policy in suit, but in the application which preceded it in point of time, and there is significance in the fact that the words used in the application were not carried forward into the policy. Another rule of interpretation may well be used here, which is that when there is a conflict between the provisions of the policy and the statements contained in the application the former controls. Defendant's counsel contend with much plausibility that death by suicide was a risk not contemplated by the parties nor covered by the policy. But we think such a holding would import into the terms of the policy something not found therein, and not contemplated by the parties—at least, not by the assured—at the time the policy was issued. And as said in the *Wadsworth Case, supra*, "we should adopt that construction which we think the insurer had reason to suppose was understood by the insured." The proper construction of this policy, taken in connection with the application, we think, is that the policy does cover death by suicide occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein. This construction will give effect to all the provisions of the policy, and as such a result is always sought after by courts, in interpreting all classes of contracts, we are quite content with it. We are the better satisfied with this conclusion because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide to a fixed period, and make their policies incontestable on that ground thereafter. 13 Enc. Brit. p. 179. For the reasons suggested, as well as for others which might be offered, we think the demurrer to the seventh division of the answer was properly sustained. The case of *Mareck* v. *Mutual Reserve Fund L. Asso* (Minn.) 64 N. W. 68, from the supreme court of Minnesota, is directly in point; and while we do not concur in all the reasoning of that opinion, we are satisfied that the result reached is correct.

2. Defendant complains of the ruling on the demurrer as to the fourth division of the answer. It is sufficient to say at this time, with reference to this count, that the defendant amended it after the ruling on the demurrer, and no attack was made upon the division as amended, by defense or otherwise. True, the court withdrew the defense pleaded by this division from the jury, but this had no relation to the ruling on the demurrer. There is nothing here to complain of, even if it be conceded that the demurrer was improperly sustained.

3. The lower court withdrew from the jury all defenses based upon the application, or the certificate for reinstatement, for the reason that no full or correct copy of the application, and no copy of the certificate, were annexed to the policy. These holdings of the court are complained of. It is insisted that a substantially correct copy of the application was attached to the policy, and that, if it be conceded that the copy was insufficient, yet, as the contract was made either in the state of New York or of Nebraska, and as there is no law in either of said states requiring a copy of the application to be attached, it may rely upon any false statements or warranties contained in the application. The original application and policy of insurance have been certified up for our inspection, to aid us in determining whether a true copy of the application was attached to the policy, and an examination of them leads us to the conclusion that the statute hereinafter referred to has not been complied with. Among other things, the place to which notices of premiums shall be addressed is incorrectly stated in the copy. Again, some of the statements made by the assured with reference to his past afflictions were not carried out in the copy attached to the policy, and no part of the examiner's report is included in the copy attached. The relevancy of this omission is made apparent by McClain's Code, § 1733, which provides that: "All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representations of the assured which by the terms of the policy are made a part thereof, or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy. The omission to do so shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall be precluded from pleading, alleging, or proving such application or representations, or any part thereof or any falsity thereof or any parts thereof in any action upon such policy. . . ." As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and secretary of the company, in the city of New York. The premiums are made payable there, and the amount of the policy was to be paid, in the event of

the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the state of New York. It was therefore a New York contract, and is to be governed by the laws of that state. Richards, Ins. § 44. Now, in the absence of all proof to the contrary, the laws of the state of New York are presumed to be the same as in this state. *Seiverts* v. *National Ben. Asso.* (Iowa) 64 N. W. 671. The defendant, upon the trial, attempted to prove that there was and is no such statute in the state of New York as the one before quoted, and for this purpose offered in evidence four volumes of books, entitled "The Revised Statutes, Codes, and General Laws of the State of New York," which purports to contain the text, carefully compared with the original, of all the general statutory law of the state in force January 1, 1890, published by one Clarence F. Birdseye, of the New York bar. What purports to be a printed certificate of the secretary of state is also in one of these volumes, to the effect that so much of the matter contained in the text of this edition of the Revised Statutes as purports to be a copy thereof is a correct transcript of the text of the Revised Statutes as originally published under the authority of the state, except such typographical errors in the original as have been corrected in the copy, and except such parts as have been altered by the acts of the legislature, and that, with respect to such parts, it conforms to the acts by which such alterations have been made. None of these volumes purport to have been published under the authority of the legislature of New York, nor were they proved to be commonly admitted as evidence of the existing laws of that state in the courts thereof, as required by § 3718 of the Code of Iowa. They were therefore inadmissible, and the court below properly rejected them. We return, then, to the presumption that the law of New York was the same, with reference to attaching copies of the application, as it is here, and the conclusion is inevitable that defendant cannot rely upon any alleged false representations or warranties in the application for insurance. It is argued, however, that the reinstatement or renewal which was made in May, 1891, when the assured furnished the health certificate, was a Nebraska contract, and that there is no law of that state requiring copies of the application or certificate of health to be annexed to the policy, and that, if this be not true, the statute of this state does not apply to renewals or reinstatements. Adverting to this last claim first, it is sufficient to say that the statute we have quoted is about as broad as language can make it, and we think it covers a renewal or reinstatement of the policy. Moreover, the reinstatement was not the making of a new contract, for no new or different terms were agreed upon. It was simply the cancelation of a forfeiture, whereupon the contract was restored, and recognized as binding by the company. *Lindsey* v. *Western Mut. Aid Soc.* 84 Iowa, 734; *French* v. *Mutual Reserve Fund L. Asso.* 111 N. C. 391. The contract remained a New York contract after the reinstatement, the same as it was before, and must be governed by the laws of that state.

It is further to be noted that the application for reinstatement was accepted at the home office, in New York, and it is affirmatively shown that no officer or agent of the defendant in Nebraska had authority to make reinstatements or renewals. The defendant offered in evidence a copy of the Compiled Statutes of the state of Nebraska, which were rejected by the court below. We are inclined to think these statutes were sufficiently identified, but for the reasons above suggested, they were properly rejected. But, aside from all this, we do not think the company established a ground for forfeiture because of nonpayment of the May, 1891, premium. The notice which was sent the assured of the maturity of the premium was improperly addressed, and did not reach the assured, but was returned to the company. And there is no showing as to the amount due in May, for the nonpayment of which the forfeiture is asked. The defendant relies upon statements made by the assured as to the amount due, and as to the alleged forfeiture. It seems to be well settled, however, that his declarations are not binding upon the beneficiary. 2 May, Ins. § 579*a*; *Union C. L. Ins. Co.* v. *Cheever*, 36 Ohio St. 208, 38 Am. Rep. 573; Bliss, Ins. § 383; *Washington L. Ins. Co.* v. *Haney*, 10 Kan. 525; *Seiverts* v. *National Ben. Asso. supra.* The court below was right in refusing to submit the question of misrepresentations in the certificate of health.

4. We turn now to the alleged forfeiture for failure to pay the August, 1891, premium. It was conceded by both parties that the law of the state of New York required that the defendant, before it could forfeit a policy for nonpayment of premium, should, at least thirty, and not more than sixty days prior to the day when the premium is payable, address and mail, postpaid, to the assured, at his or her last known postoffice address, a written or printed notice stating the amount of such premium, the place where and the person to whom payable, and that unless the same should be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy, and all payments thereon, will become forfeited and void. It appears from the evidence that the defendant on the 15th day of July, 1891, addressed a notice to Matt. Goodwin of the maturity of the August 16, 1891, premium. This notice was addressed to the assured, at Fifteenth and Harney streets, Omaha, Neb. Now, it is claimed by the company that this notice was addressed to the last named postoffice address of Goodwin, while the plaintiff insists that both she and the assured gave notice to the defendant's agents of a change of address. This notice is claimed to have been given one Hall, a general agent of the defendant company, upon the streets of the city of Omaha, and to the Commercial National Bank of Omaha, which, for a time, at least, was charged with the duty of collecting premiums. The lower court submitted to the jury the question as to whether there was notice of a change of address given to either of these agents, and instructed that, if there was, then there was no

forfeiture. We think there was ample evidence to sustain these instructions. The notice to Hall is not denied, but it is claimed that it was given to him upon the street, in a casual conversation, and therefore was not binding upon the company. There was evidence tending to show that Hall was a general agent, and uncontradicted evidence that he received the notice. And we think it was given to him in such a manner as to bind his principal. The place where the notice was given is entirely immaterial, if it was conveyed to him as agent of the company, and for the purpose of having it act thereon. According to the evidence, Hall was directed to change the address from Fifteenth and Harney to the general delivery. On the 13th day of July, 1891, Mrs. Goodwin wrote a letter to the Commercial National Bank, which bank was then collecting premiums for defendant, to forward all notices of assessments under her husband's policy to 57 Twenty-Third street, Chicago, Ill. This letter was received by the bank July 15th, and on the 16th it notified the defendant to send notice as requested. This notice was received by the company July 20, 1891. The only question with reference to this notice of July 13, 1891, is whether it was binding upon the defendant. Appellant contends that notice to the bank was not notice to it, for the reason that it had no authority whatever, except to collect and receive premiums, and deliver receipts to the assured. It seems that this question has heretofore been decided by this court, adversely to appellant, in the cases of *Mayer* v. *Mutual L. Ins. Co.* 38 Iowa, 304; *Loughridge* v. *Iowa L. & E. Asso.* 81 Iowa, 141, 18 Am. Rep. 34, and authorities cited. The authorities cited by appellant's counsel are not in point.

5. It is also insisted that there was evidence to show that the assured received the notice, although it may have been incorrectly addressed; that it in fact went to the general delivery, where the assured directed it should go, and, as it was never returned to the defendant company, the presumption obtains that it was delivered. It is sufficient to say, in answer to this contention, that no such issue was made in the pleadings. The claim was that a notice was sent, as required by the New York statutes, to the last known postoffice address of the assured, and, as payment was not made within the time allowed thereby, that the policy was forfeited. The defendant did not, in any of its pleadings, aver that the assured had actual notice of the maturity of the premium. But, aside from all this, the notice was not addressed to the city or town where the assured, at the time, resided. He was then living in Chicago, and it seems to be a well-established rule that under such circumstances no presumption arises that the addressee received the notice. See *Henderson* v. *Carbondale Coal & C. Co.* 140 U. S. 37, 35 L. ed. 337; 2 Whart. Ev. § 1323; *Carter* v. *Brooklyn L. Ins. Co.* 110 N. Y. 23; *Garretson* v. *Equitable Mut. L. & E. Asso.* 74 Iowa, 421; *Garbutt* v. *Citizens L. & E. Asso.* 84 Iowa, 294; *Phelan* v. *Northwestern Mut. L. Ins. Co.* 113 N. Y. 151. The court did not err in refusing to submit the question as to the actual receipt of the notice by the assured, or in refusing to give the instructions asked by defendant upon this subject.

6. Complaint is made of the fifth paragraph of the court's charge, which required the defendant to show that the sum claimed as premium, *i. e.*, $18.65, was the correct amount which was due in August, 1891, after awarding and deducting return premiums for that quarter, etc. No valid objection can be lodged against this instruction, in view of the terms of the policy, which provide that the premium which could be required was "less the return premiums awarded," and that "maximum quarterly premiums were to be reduced in each case by surplus portion of preceding payments not needed for the death fund and quarterly fund." It appears that in every instance these return premiums had been deducted from premiums previously paid, and that they varied in amount. Knowledge as to the amount of the return premiums was solely in the possession of defendant, and, under well known rules, the burden was upon it to prove the amount thereof. Plaintiff could not do it, as she had no data upon which to act. This is merely stating a general rule,—that where the amount of the premium to be paid is variable, and knowledge as to the amount rests peculiarly with the company, that it must show that the amount demanded was the correct sum. *Tobin* v. *Western Mut. Aid Soc.* 72 Iowa, 261; *Underwood* v. *Iowa Legion of Honor*, 66 Iowa, 134; 2 May, Ins. § 345*a*. The instructions given by the court with reference to this subject were correct, and those asked by defendant, in so far as they embodied correct rules of law, were given by the court.

7. Certain errors are assigned on the admission and rejection of testimony. We need not set them out. It is sufficient to say that we discover no error. The questions presented are unimportant, and this opinion has already grown too long.

8. Some claim is made that the policy in suit, being a renewable one, from quarter to quarter, is not governed by the ordinary principles applicable to life insurance contracts. Suffice it to say, in answer to this claim, that we see no merit in it. The policy in suit is a continuing one. It gave the assured and his beneficiary the right to make it incontestable as to certain matters, and this they did, by the payment of premiums for more than two years. It also gave them the right to deductions for return premiums, as before stated, and promised them an additional credit at the end of ten years. Construed with such of the provisions of the New York statutes as we have, it clearly appears that it should have no other effect than an ordinary life policy, which could be forfeited for nonpayment of premiums, the same as other insurance policies. The contract was one of insurance, pure and simple; and the ingenuity of the author should not be allowed to work a fraud or injustice upon those who confided in the belief that upon payment of premiums after notice, as required by the statutes of New York, they, after the expiration of two years, had an incontestable policy.

We have patiently considered the whole case, and examined a long line of authorities cited

by counsel on either side, and have also made an independent search for cases which would aid us in disposing of the questions presented; and, while we have not discussed every proposition presented, we have considered those matters which we believe to be controlling, and are of the opinion that *the judgment should be affirmed.*

CALIFORNIA SUPREME COURT.

Edward ANDERSON, *Respt.*,
v.
PACIFIC BANK, *Appt.*

(.....Cal.....)

1. **A deposit of gold coin in a bank as a pledge to secure an obligation on a bail bond,** receiving an acknowledgment that it is payable on return of the certificate, with a clause stating that it is payable only on release of bonds and is not subject to check, constitutes a special deposit, the return of which can be enforced in case of the bank's insolvency, the nature of which is not changed by the fact that without the knowledge or consent of the depositor the money afterwards gets into the bank vaults through the regular channels.
2. **A demand is necessary** to start the running of interest on a special deposit as a pledge to secure a bail bond, even after the sureties have surrendered the persons bailed.

(May 13, 1896.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco, in favor of plaintiff in an action brought to recover an alleged special deposit from the assets of the defendant bank which had become insolvent. *Modified.*

The facts are stated in the opinion.

Messrs. **Sawyer & Burnett** for appellant.

Mr. **H. W. Hutton,** for respondent:

The $2,000 having been deposited as security became and was a pledge.

Civ. Code, §§ 2924, 2987; *Loughborough* v. *McNevin*, 74 Cal. 254; *Stone* v. *Owens*, 105 Cal. 297.

The title to the $2,000 still remained in plaintiff, defendant being merely a bailee or depositary with nothing but a lien and right of possession.

Civ. Code, § 2888; *Stone* v. *Owens, supra; Haber* v. *Brown*, 101 Cal. 452.

When the liability on the bonds ceased plaintiff was entitled to the return of his money.

Civ. Code, § 1822; *Palmtag* v. *Doutrick*, 59 Cal. 154; *Loughborough* v. *McNevin*, 74 Cal. 255; *Wetherly* v. *Straus*, 93 Cal. 287.

The transaction being a pledge, the defendant had no right to use the money without a special agreement to the contrary.

Jones, Pledges, § 501; Civ. Code, § 1835.

Even if the money was mingled it was without the knowledge or consent of the plaintiff.

Re Johnson, 103 Mich. 109.

The appellant had no right to use the money without plaintiff's knowledge or consent, and to allow it to take advantage of such a defense would allow it to profit by its own wrong.

Jones, Pledges, § 501; Civ. Code, §§ 1833, 3518, 3520.

The presumption is that when it was placed therein it was placed there intact.

Jones, Pledges, § 501; Civ. Code, §§ 1833, 3529; Code Civ. Proc. sub. 20, 33, § 1963.

The court allowed interest in this case as damages, damages being proper under Civ. Code, § 3287.

Martin v. *Ede*, 103 Cal. 157; *Kelly* v. *McKibben*, 54 Cal. 192.

If the bank should mingle the money a trust would be impressed to the exact amount on all other property of the bank and plaintiff could recover.

Massey v. *Fisher*, 62 Fed. Rep. 958; *Henderson* v. *O'Conor*, 106 Cal. 385; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. U. 54, 26 L. ed. 693; *Re Johnson*, 103 Mich. 109; *People* v. *City Bank of Rochester*, 96 N. Y. 32; *Re Le Blanc*, 14 Hun, 8, 75 N. Y. 598; *Farmers' & M. Nat. Bank* v. *King*, 57 Pa. 202; *Stollar* v. *Coates*, 88 Mo. 514; *Harrison* v. *Smith*, 83 Mo. 210, 53 Am. Rep. 571; *McLeod* v. *Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Peak* v. *Ellicott*, 30 Kan. 156, 46 Am. Rep. 90.

Henshaw, J., delivered the opinion of the court:

Appeal from the judgment given in favor of plaintiff under the following facts: Plaintiff and defendant entered into a contract whereby defendant agreed to furnish bail for Harry Christian and Martin Olson, who had been held for trial before the superior court. To protect defendant, and the sureties it might furnish, from liability or loss, plaintiff agreed to deposit with defendant the sum of $2,000 in gold coin as a pledge. Plaintiff delivered the money to McDonald, the acting president of the bank, leaving it within the president's room. He received from the bank the following acknowledgment: "Edw. Anderson has deposited in this bank two thousand dollars ($2,000), in gold coin, payable to self or order, on return of the certificate properly indorsed. (Payable only on release of bonds.) (Not subject to check.) R. H. McDonald, Jr., Vice President. W. S. Morse, Teller." The money afterwards, but without the knowledge or consent of the plaintiff, went into the bank vaults, through the regular channels. The bonds were furnished, and neither defendant nor the sureties were subjected to any liability or loss thereunder. Subsequently, the defendants in the criminal charge were surrendered into custody by their bondsmen, and plaintiff there-

NOTE.—On the question when a deposit in a bank is special so that the title remains in the depositor, see *note* to Mutual Acci. Asso. v. Jacobs (Ill.) 16 L. R. A. 516.

As to the validity of an agreement for payment in gold or silver, see *note* to Skinner v. Santa Rosa (Cal.) 29 L. R. A. 512.

after, upon February 26, 1894, made demand upon defendant, which had meanwhile become insolvent, for a return of the money pledged. The bank refused a return, and this action was instituted.

Under this statement, which is taken from the findings, appellant contends that the facts disclose a general, and not a special, deposit with the bank, and that, upon the bank's insolvency, plaintiff stands in the same position as that occupied by the general creditors of the institution. It is unquestionably true that one making a general deposit with a bank in the usual course of business parts with title to the moneys deposited. In the case of a special deposit, however, which is a mere bailment, the rule is the same with banking institutions as with individuals. Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of the pledgeor, title does not pass to the bailee or pledgee, but remains in the pledgeor. The pledgee acquires no right to make a general use of the property. Civ. Code, §§ 1835, 2888. It would seem, therefore, that in this case the question is completely disposed of by the finding of the court that the money was given and received as a pledge, and by the additional finding that it was afterwards carried into the bank's vaults through the regular channels without the knowledge or consent of the pledgeor. But, indeed, all of the circumstances found substantiate the ultimate finding that the deposit was a special one, while none are inconsistent with it. Defendant demanded a delivery to it of $2,000, not for banking purposes, but to protect the bondsmen it might procure. There was reason why the plaintiff should make a special deposit of $2,000 with the bank as bailee, and none at all why he should make a commercial deposit of that sum. The money was delivered in a manner strictly in accord with the idea of a pledge, but quite inconsistent with the notion of an ordinary banking deposit. The so-called "certificate of deposit" issued by the bank is not a certificate of deposit, but a mere receipt, expressing though briefly, the contract of pledge. Every contract by which possession of personal property is transferred as security only is to be deemed a pledge. Civ. Code, 2987. Under such a contract, that fact that the bank afterwards wrongfully commingled and used the funds, if it did do so, cannot be urged by it in defense as effecting any change in the contractual relations and rights of the parties. It would be but allowing it to plead its own wrongdoing to its own advantage. *Henderson* v. *O'Conor*, 106 Cal. 385; *Massey* v. *Fisher*, 62 Fed. Rep. 958; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

There is nothing in the case of *Mutual Acci. Asso.* v. *Jacobs*, 141 Ill. 261, 16 L. R. A. 516, upon which appellant relies, which can aid his contention here. The plaintiff in that case sued to recover the sum of $6,000 deposited by it with the banking house of Kean & Co., as indemnity on an appeal bond. But, as the court declares, the plaintiff gave its check to Kean & Co., which was cashed by that house; and the funds thus received with the knowledge of plaintiff were mingled and used with the general funds of the bank, and there was nothing in the certificate of purchase issued and received by plaintiff which indicated a special deposit. The court merely finds from a review of the evidence that it was not established that the deposit was special. In the case at bar the trial court finds a special deposit, and does not find a commingling and use of the money with plaintiff's knowledge. Indeed, it does not find any such commingling and use at all. It merely finds that after its reception, and without plaintiff's knowledge or consent, the moneys "went into the bank vaults through the regular channel." The bank vaults are the usual and proper places for the reception and keeping of special deposits. The finding strictly means no more than that the money went into the bank vaults as a special deposit in the regular manner.

The court allowed plaintiff, as damages, legal interest upon the money from the date upon which Christian and Olsen were surrendered by the sureties. But while plaintiff was entitled to a return of his money immediately after this event, defendant was not in default until its refusal, after demand, to make restoration of it. Not being in default, it should not be charged with interest as damages. This demand was actually made by plaintiff upon February 26, 1894, from which date plaintiff is entitled to interest as compensation.

The judgment is ordered modified accordingly, each party to bear his respective costs upon this appeal.

We concur: **McFarland, J.**; **Temple, J.**

MICHIGAN SUPREME COURT.

IONIA, EATON, & BARRY FARMERS' MUTUAL FIRE INSURANCE COMPANY

v.

IONIA CIRCUIT JUDGE.

(100 Mich. 606.)

1. When the matter in dispute is one of law merely, the Michigan supreme court will review the action of a circuit judge in granting an injunction.

2. The liability of a member of a mutual insurance company for losses occurring during his membership continues until an assessment has been made covering them.

3. Failure to adjust a loss until a member of a mutual insurance company cancels his membership will not relieve him from his share of the liability thereon.

NOTE.—*Liability of members of mutual fire insurance companies.*

I. *In general.*
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I. *In general.*

Two general classes of mutual insurance companies are described by Denio, Ch. J., in White v. Haight, 16 N. Y. 310. One was a company in which the members gave premium notes, only a small part of which were paid in advance and which were to be assessed *pro rata* whenever occasion should require. In the other, premiums were paid in cash, and the profits, if any, were divided among the members in proportion to the amount of premiums paid by them. Nearly if not quite all of the decisions as to liability of members have been rendered in respect to companies of the former class.

The liability of a member of a benefit society to an action for an assessment is the subject of a *note* to Ellerbe v. Barney (Mo.) 23 L. R. A. 435.

All questions as to the validity of policies, their suspension and forfeiture, as well as questions concerning the premium for insurance, although they arise in case of policies in mutual companies, are, so far as they are unaffected by the mutual character of the organization, to be regarded as a part of the general law of insurance, and are not here considered.

As to the effect on insurance by a foreign company which has not complied with the statutory requisites of the right to do business, see *note* to Phenix Ins. Co. v. Pennsylvania Co. (Ind.) 20 L. R. A. 405.

A policy made and accepted "with reference to the by-laws of the company . . . which are made a part of the policy" charges a policy holder with knowledge of a by-law, although it may not be appended to the policy. Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. 499. See further *note* to Moyer v. East Shore Terminal Co. (S. C.) 25 L. R. A. 48.

The exemption of the private property of the members of a mutual insurance company from corporate debts, which is made by its articles of association, does not apply to assessments against them for losses under the policies. Montgomery County Farmers' Mut. Ins. Co. v. Milner, 90 Iowa, 635.

A provision in the articles of a mutual insurance company limiting the liabilities of the members to the amount of undertakings given for premium is not valid when the only authority of statute therefor is a provision that the articles "may prescribe the liabilities of the members to be assessed towards defraying the losses and expenses of the company and the mode and manner of collecting such assessments," especially when another provision of the statute declares that a receiver shall assess upon all members and persons insured such sums as will in the aggregate be sufficient to pay all losses and liabilities, together with the services and expenses of the receiver. Russell v. Berry, 51 Mich. 287.

Where insurance is taken by the makers of a premium note given as part of the assets of a mutual insurance company the amount for the premiums therefor cannot be collected of the makers in addition to the amount of the note, as the premiums are properly chargeable to the note. Maine Mut. M. Ins. Co. v. Blunt, 64 Me. 95.

Where a mutual marine insurance society used a Lloyds policy which was not in all respects suited to their purposes, and the amount of premium paid and the rate per cent were left blank, but the words "£20 per centum" were added in italics in a separate line, it was held whatever these words meant they did not limit the amount for which each member was liable to 20 per cent on the sum he had insured. Gray v. Gibson, L. R. 2 C. P. 120.

P. 481. See also 34 L. R. A. 806.

4. Assessments upon the members of a mutual insurance company to pay a loss may include interest and expenses incident thereto resulting from not paying it when due, and also the costs of litigation incurred in defending actions.

5. Members of a mutual insurance company who did not pay their shares of a void assessment to cover a valid claim will not be permitted to object to the crediting of the amounts paid thereon by other members upon the sums assessed against them under a new levy to meet the liabilities for which the void assessment was levied.

6. Thirty per cent is not an unreasonable amount to levy for contingencies in levying an assessment upon the members of a mutual insurance company to meet liabilities, where a new assessment for deficiencies arising from failure to collect cannot be made under the law of the state, and litigation in connection with the collection of the assessment is probable.

(June 2, 1894.)

APPLICATION for a writ of mandamus to compel the Ionia circuit judge to dissolve an injunction which he had issued against the levying of an assessment upon the members of a mutual insurance company. *Granted.*

II. *Who are members.*

a. *In general.*

A person who refuses to take a policy in a mutual fire insurance company for which he has applied, or to sign the deposit note, is not a member or liable for the premium. Real Estate Mut. F. Ins. Co. v. Roessle, 1 Gray, 336.

A manufacturing corporation organized under the laws of Minnesota is held entitled to take insurance on its property in a mutual insurance company organized under Minn. Laws 1881, chap. 91, authorizing the formation of millers' and manufacturers' mutual insurance companies, and may be bound by its premium notes given for insurance in such company. St. Paul Trust Co. v. Wampach Mfg. Co. 50 Minn. 93.

A firm which succeeds to the business of a prior firm and gives a new note in renewal of a premium note given by the old firm for security of dealers to a mutual insurance company is bound by the obligation. Maine Mut. M. Ins. Co. v. Blunt, 64 Me. 95.

In case of mutual insurance on ships it was held that part owners of a vessel insured in a mutual company by the owner of other shares in the vessel, who was the managing owner having authority to insure it in such an association, are liable to contribute to the payment of the losses of the association in case of his bankruptcy whether they are technically members of it or not, where the insurance in such an association is on vessels belonging to its members or in which members are interested or have shares, and the articles provide that every person shall be deemed to have agreed to become a member who insures any ship therein. Great Britain 100 A 1 S. S. Ins. Asso. v. Wyllie, L. R. 22 Q. B. Div. 710; Ocean Iron S. S. Ins. Asso. v. Leslie, L. R. 22 Q. B. Div. 722, note.

These cases are distinguished from the case of United Kingdom Mut. S. S. Assur. Asso. v. Nevill, L. R. 19 Q. B. Div. 110, on the ground that in the latter case the contract made no one liable to contribute except the managing owner who procured the insurance.

On the question whether or not those who insure on the cash or stock plan in a mutual company are to be held liable as members, the decisions are divided.

In a Canadian case it was held that one insuring for a cash premium under 40 Vict. chap. 72, § 35, is liable as a member of a mutual company and subject to assessment for losses during his membership provided the deposit notes are insufficient to pay them. Hochlaga Mut. F. Ins. Co. v. Lefebvre, 6 Mont. L. N. 236, 7 Mont. L. N. 226. (Berryman's Ins. Dig. 157.)

So, in Wisconsin, the holder of a policy issued for a cash premium is held to be a member liable to assessment in a mutual fire insurance company organized under the Wisconsin statutes (S. & D. Ann. Stats. §§ 1941*a*–1941*g*) by which all property insured is made subject to assessment. Rundle v. Kennan, 79 Wis. 492.

But elsewhere it is held otherwise.

Thus, in Illinois one who insures his property in a mutual company for a specified premium does not become a member of the company so as to be liable for the payment of instalments of a note which he gives for the premiums which come due after the insolvency of the company, as the consideration for them fails. Farmers' & M. Ins. Co. v. Smith, 63 Ill. 187.

So in an earlier case it was said that the holder of a policy issued for a cash premium under lawful authority in the charter of the company is not a member of the company. Illinois F. Ins. Co. v. Stanton, 57 Ill. 354. This was declared in an action on such a policy, and the court said while the company was organized on a mutual plan this transaction did not seem to have any element of mutuality.

And in the New York case of Howard v. Franklin M. & F. Ins. Co. 9 How. Pr. 45, it was held that one who obtains insurance from a mutual company by payment of a cash premium does not become a member or stockholder within the meaning of the New York act of April 10, 1849, § 16, providing for suits against members or stockholders for losses.

Likewise, in Pennsylvania one who takes a cash policy in a mutual insurance company which has the right to issue such policies cannot be held liable as a member for future assessments because of a by-law attempting to create such liability if he did not have notice of the by-law before his policy was issued. Given v. Rettew, 162 Pa. 638, Affirming 11 Lanc. L. Rev. 114.

So, a stock note is not liable to assessment for losses in a mutual insurance company and cannot be treated as a premium note. Pennsylvania C. Ins. Co. v. Gayman, 7 Legal Gaz. 234. (Brightly's Dig. (Pa.) vol. 2, p. 1411.)

b. *Transferees of policy or property.*

On the transfer of property insured in a mutual company the purchaser does not become liable to assessments in the absence of any assignment of the policy to him or of any contract creating such liability between him and the former owner. Bowditch Mut. F. Ins. Co. v. Buffum, 2 Gray, 550.

But assignees of a policy in a mutual fire insurance company who have been substituted to all the rights of the original assured with the assent of the company thereby become members and are liable to assessment, where the statutes simply provide that "every person insured by the company shall be a member." Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116.

A transfer by a guardian of a policy in a mutual fire insurance company to the owner of the property insured, which is assented to by the company and recorded and the policy accepted by the transferee, makes him a member of the company subject to assessments as such. Cumings v. Hildreth, 117 Mass. 309.

A purchaser of property insured in a mutual assurance society under a statute which makes the

The facts are stated in the opinion.

Messrs. **George E. Nichols** and **M. A. Nichols** for relator.

Mr. **Vernon H. Smith** for respondent.

Hooker, J., delivered the opinion of the court:

The Ionia, Eaton, & Barry Company above named, is a mutual fire insurance company, organized and doing business under the laws of this state. In the year 1889 it had losses and expenses, and an assessment was made for the purpose of providing a fund with which to discharge its liabilities. Relators allege that this assessment was insufficient to cover all of said liabilities existing for that year, and that a large indebtedness existed, that they did not attempt to assess. The amount of the indebtedness unprovided for consisted of (1) undisputed losses and expenses in excess of the assessment; (2) two losses, unadjusted, which were subsequently litigated, known as the "Van Alstine and Towle Losses;" (3) costs and expenses of such litigation; (4) interest upon the amounts mentioned. An assessment was made to raise a fund to pay this indebtedness, and upwards of $5,000 was paid upon it. Such assessment being declared void, no further effort was made to collect it, but the money

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property liable for the payment of quotas, and provides that the insured on selling the property shall apprise the purchaser of the insurance and indorse the policy to him, and that such purchaser shall be considered as a subscriber in lieu of the original and the property remain liable for the quotas, takes the property subject to such quotas, although the policy is not indorsed to him. Mutual Assur. Soc. v. Byrd, 1 Va. Cas. 170.

Property insured in the Mutual Assurance Society under the Virginia act of December 22, 1794, was made liable for assessments on account of losses insured against and on transfer to a bona fide purchaser continued subject to this liability. Mutual Assur. Soc. v. Watts, 14 U. S. 1 Wheat. 279, 4 L. ed. 91. The statute expressly provided that in every case of such change the purchaser or mortgagee should be considered as a subscriber in lieu of the original, and the property remain liable for the payment of the quotas in the same manner as if the right thereof had remained in the original owner.

But on the sale of such property without notice it was held it did not continue liable for the premium which by the Virginia act of 1805 must be paid before the insurance could commence. This makes a clear distinction between such premium and the quotas or assessments which might thereafter become payable. Mutual Assur. Soc. v. Faxon, 19 U. S. 6 Wheat. 606, 5 L. ed. 342.

An assignee of a policy in a mutual insurance company who expressly agrees to pay the assessments thereafter made against "said policy" is not relieved from liability on such assessments by the fact that the original premium note has been surrendered on the payment by a surety of assessments made up to the time of the assignment of the policy. The court considered that this would be so whether the assignee was in the position of a purchaser of the premises or that of a mortgagee. But there was a further consideration in the fact that the assessments against the assignee were actually made before the note was surrendered. New Hampshire Mut. F. Ins. Co. v. Hunt, 30 N. H. 219.

As to the effect of transferring the insured property to terminate the liability of the original member, see *infra*, VII., c.

III. *Notes of members.*

a. *Kinds and effect.*

The distinction between notes given to form the capital of a mutual insurance company and those given for premiums after the company has begun business is frequently pointed out by the judges and the former held to be enforceable irrespective of losses, and the latter only for the *pro rata* share of losses in common with other premium notes. This is clearly stated in Dana v. Munro, 38 Barb. 528.

A premium note taken for insurance after the organization of a company was held to be an obligation only to pay assessments and not to constitute a stock note, although the agent of the company before its organization had solicited the insurance and renewed the solicitation after it was ready to do business. *Ibid.*

The form of a note does not determine the question whether or not it is given as a stock or capital note of a mutual insurance company, but this matter is open to inquiry. Jackson v. Van Slyke, 52 N. Y. 645; Sands v. Son, 56 N. Y. 662.

A note which is in the form of a mere premium note is not presumed to be given as an original stock note, that is, a note given on the organization of the company as security for its liabilities. But evidence is admissible to determine that fact. Bell v. Shibley, 33 Barb. 610.

Where a note was given to a mutual insurance company on a transaction which was in form an open policy, but there was some evidence to indicate a different intention, and it was with the maker's knowledge published in the annual statement required by law as a business note of the company, it was left to the jury to say whether or not it was given as a premium note in advance for the security of dealers. Brouwer v. Hill, 1 Sandf. 629.

So, in case of premium notes in advance taken after the organization of a mutual insurance company it was held to be a question of fact whether they were given as a part of the fund for the security of dealers or merely for premiums in the usual course of business. Merchants' Mut. Ins. Co. v. Rey, 1 Sandf. 184.

And a note which purports to be for the premium on a single specific policy to be issued on specified property and payable in such portions and at such time or times as the directors might require agreeably to their charter is subject to explanation by parol evidence of the facts to show whether it was intended to form a part of the capital required by law and payable absolutely without any assessment, or to be a premium note on which an assessment was necessary in order to recover anything upon it, but nothing short of the most conclusive evidence or of an express admission could establish it to be a note given as part of the premium capital of the company. Dana v. Munson, 23 N. Y. 564.

Where a note was given to a mutual insurance company for an open policy after the maker had paid a note for premiums in advance and long after the company had commenced business, it was held to be a question for the jury whether it was given for premiums in advance and for the security of dealers or whether it was given for an ordinary open policy, the testimony being in conflict on the question. Maine Mut. M. Ins. Co. v. Stockwell, 67 Me. 382.

The question whether a premium note was given under § 9 of the Maine special act of 1870 for the better security of those concerned to be used for the purpose of paying claims or otherwise in the course of business and for which the signers were entitled to a compensation, or merely as the premium for a particular policy, was held to be a question for the jury, in Maine Mut. M. Ins. Co. v. Far-

collected had been used in payment of the obligations of the company. Thereupon, a new assessment was ordered, for an amount sufficient to cover the sums mentioned, and 30 per cent additional, to cover expenses of collection, and shrinkage. One William D. Place, who from January, 1884, until the date of filing his bill, was a member of, and insured in, said company, filed a bill of complaint, stating the facts hereinbefore outlined, and praying an injunction restraining the levy of such assessment, which he asserted would be a cloud upon his title. The bill alleges the following grounds for the claim that such asesessment should not be made, *viz.*: First, the Towle and Van Alstine losses did not become a liability during the year 1889, inasmuch as they were not adjusted, but were subsequently litigated, and were therefore not chargeable upon policy holders for that year; second, the costs and expenses incident to that litigation were not chargeable to policy holders of that year, as they were incurred later; third, the amount

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rar, 66 Me. 133, where the claim was that it was for an open policy for premiums in advance to be earned by the company, and that all earned premiums had been paid, leaving nothing due on the note, and the note was given after the company had begun business, having obtained the requisite amount of notes for that purpose. If the note was given under § 9 for security, then it remained a valid obligation for the balance after deducting premiums earned.

The surrender of a note which was claimed to have been given as a subscription note, but which was not shown to have been given to make up capital for the company or to be used as the basis of credit, and the taking instead of a new note for the unearned balance of the former one to which a new obligor joins with the express understanding that the new note is to be termed an open policy note for the unearned premium of an open policy issued at the same time to the makers, is not unlawful, especially, where the charter of the company does not have any provision for subscription notes which are to be valid and binding whether the premiums for which they are advanced are ever earned or not. Lawrence v. McCready, 6 Boew. 329.

Premium notes clearly intended only as a contingent fund for the payment of losses as they should occur and be assessed from time to time, and not as a present capital payable absolutely at their full amount, are unjustifiably diverted when the directors attempt to use them for the purpose of extending the charter of the company without the consent of the makers, and do not thereby become liable to collection without any assessment. People, Barton, v. Rensselaer Ins. Co. 38 Barb. 323.

The use of premium notes without consent of the makers as the basis for an extension of the charter of the company under the New York act of 1849, if it does not operate prejudicially to the makers, was said not to be a diversion of the notes in Hyatt v. Esmond, 37 Barb. 601. But in this case the court found that the note in question had not been thus used but was given after the extension of the charter had been made.

A note given to increase the capital stock of a mutual insurance company cannot be sued on and treated as a premium note, and an assessment by the company is not evidence that money is due on such a note, but it must be shown that there was a resolution to increase the capital stock, and that it was so increased. Pennsylvania C. Ins. Co. v. Gayman (Pa.) 5 Ins. L. J. 319.

The liability of members upon depcsit notes cannot be increased by the fact of the insolvency of a mutual insurance company and the transfer of its assets to a receiver. Shaughnessy v. Rensselaer Ins. Co. 21 Barb. 605.

The fact that the original premium note had matured and a renewal note been given is immaterial in determining the liability of the maker on the renewal note, but that is the same as if it had accrued during the currency of the original note. Hone v. Folger, 1 Sandf. 177; Hone v. Allen, Id. 171, note; Howard v. Hinckley & E. Iron Co. 64 Me. 93.

b. *Consideration.*

The defense of a partial failure of consideration in an action on notes given for advance premiums as a security on which the maker was to receive a percentage cannot be sustained because of the maker's failure to take insurance for the whole amount of the premiums represented by the note. Cruikshank v. Brouwer, 11 Barb. 228.

Notes given for advance premiums subject to the right of the company to use them for the payment of losses and liabilities or any purpose connected with the business of the company are enforceable without any reference to the question whether or not insurance had been taken on their account. Osgood v. Toplitz, 3 Lans. 184; Osgood v. Strauss, 65 Barb. 383, Affirmed 55 N. Y. 672; Brouwer v. Appleby, 1 Sandf. 158.

The same was held where the note had been transferred as collateral security. Great Western Ins. Co. v. Thayer, 60 Barb. 633.

So in Maine notes given for premiums in advance by members of a mutual insurance company which has no capital stock and which is authorized to receive such notes for security and to negotiate them for paying claims or otherwise in the course of business, are held to be on sufficient consideration even if no insurance has been obtained therefor by the makers and the company has become insolvent. Howard v. Palmer, 64 Me. 86. The notes of this class constituted the assets of the company which it was required to have in a certain sum before it could do business.

Premiums that have actually been paid by makers of notes for advance premiums to a mutual insurance company cannot be deducted from the amount of such notes, although instead of paying the premiums the makers might have had them allowed on the notes had they so chosen. Howard v. Hinckley & E. Iron Co. *supra.*

See also, as to want of consideration where insurance is invalid, *infra*, VI., d.

c. *Maturity.*

The maturity of notes given for advance premiums as security notes under the act of April 10, 1849, § 5, and made payable at specified times, not exceeding twelve months from date, cannot be postponed until the exhaustion of the cash capital of the company, but the time of payment is made absolute according to their terms and not dependent upon any such contingency as the occurrence of losses, the exhaustion of capital, or any demand of payment or making of assessments. Osgood v. Strauss, 65 Barb. 383, Affirmed 55 N. Y. 672.

A note given to a mutual insurance company for premiums in advance is in effect payable on demand in substantial compliance with the 5th section of the New York act of April 10, 1849, requiring such notes to be payable "at the end of or within twelve months" from the date, although it provides for payment "in such portions and at such time or times as the directors may, agreeably to their charter and by-laws, require." Hill v. Reed, 16 Barb. 280.

voluntarily paid upon the void assessment of 1892 could not be lawfully assessed to reimburse those who had paid it, who were to be credited such amounts upon the new assessment; fourth, there was no authority to assess 30 per cent for contingencies. An injunction *pendente lite* was issued, a motion to dissolve which was denied, whereupon this proceeding was instituted to compel such dissolution.

Ordinarily, this court does not review the action of the circuit judge in injunction cases. Where, however, as in this case, the return shows the question in dispute to be one of law merely, it will consider the case. The points raised by the bill are those which will be discussed.

Questions arising over matters involved in this case were considered in the case of *Ionia, E. & B. Farmers' Mut. F. Ins. Co.* v. *Otto*, 96 Mich. 558, and it was there held, in substance, that where an assessment was made to cover certain losses and expenses, subsequent assessments, made necessary by a fail-

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A by-law providing that neglect or refusal to pay an assessment due from a member shall entitle the organization to sue for and recover the whole amount of his deposit note or notes which shall remain in the treasury subject to the payment of losses and expenses which have then accrued or may thereafter accrue, and the balance, if any, to be returned to him after ninety days from the expiration of the term for which his insurance was made, is upheld as a valid exercise of a charter power to adopt by-laws; and the objection that it was void as creating a forfeiture is not sustained, because it was a contract to which the member is a party. Cahill v. Kalamazoo Mut. Ins. Co. 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

A charter provision that the whole amount of a premium note may be recovered on failure to pay any assessment upon it may be enforced notwithstanding a provision that the note is to be returned on demand after thirty days from the expiration of the policy. St. Louis Mut. F. & M. Ins. Co. v. Boeckler, 19 Mo. 135.

A provision in a statute incorporating a mutual fire insurance company making the whole amount of a deposit note due in case of default for thirty days after notice to pay an assessment thereon becomes a part of the contract of the members, and may therefore be enforced in another state. Jones v. Sisson, 6 Gray, 288.

The right to recover the whole amount of a premium note for default in payment of an assessment is also enforced in accordance with the charter of a company, in Missouri State Mut. F. & M. Ins. Co. v. Spore, 23 Mo. 26.

The whole amount of a deposited premium note with costs is also held to be recoverable on default of payment of an assessment within a stipulated time, under Neb. Comp. Stat. 1887, chap. 43, § 18. Farmers' Union Ins. Co. v. Wilder, 35 Neb. 572.

The subject of forfeiture of insurance in a mutual company and all other questions as to the matter of insurance between the insured and the company of which he is a member are omitted from this note.

A stipulation in a policy that the whole amount of a premium note shall become due on failure to pay any instalment at maturity is valid and makes such note due and enforceable for the whole amount on failure to pay an instalment, notwithstanding the insurance ceases upon such default where the benefit of lower rates has been obtained during the time the policy was in force by reason of taking the policy for a longer period. Continental Ins. Co. v. Boykin, 25 S. C. 323; Continental Ins. Co. v. Hoffman, Id. 327.

In the case last named the default was made on the first instalment that came due on the premium note, but the first year's premium had been paid in cash. The court described the case as a hard one but said the reduction of the rate that was obtained by taking a five years' policy and of which the benefit had been had for one year constituted a consideration which made the contract valid as between persons of full age and of sound mind, although it was one-sided, unequal, and unjust.

The article of association and by-laws of a mutual fire insurance company organized under the Indiana statute (1 Gavin & H. p. 395, § 45) may provide that all premium notes shall be paid in instalments as ordered by the directors after notice, and that the entire note shall become due and collectible if assessments made are not paid. German Mut. F. Ins. Co. v. Franck, 22 Ind. 364.

As to the necessity of assessments to make a cause of action on such notes, see *infra*, IX., a.

d. *Negotiation.*

Premium notes may be transferred in absolute payment or as security for valid debts of the insurance company when taken for advance premiums under a charter making them the absolute property of the company subject to use for payment of losses and liabilities or any other purpose connected with the business of the company. Great Western Ins. Co. v. Thayer, 60 Barb. 633.

The negotiability of a premium note is not affected by a provision that if not paid at maturity the whole amount of premium on the policy shall be considered as earned and the policy null and void so long as the note remains overdue and unpaid. Kirk v. Dodge County Mut. Ins. Co. 39 Wis. 138, 15 Am. Rep. 36.

A subscription note or a premium note in advance given to a mutual marine insurance company and transferred by the company to pay a loss may have the protection given to negotiable instruments in the hands of bona fide holders against defenses set up by the maker, such as a lack of consideration. Aspinwall v. Meyer, 2 Sandf. 180.

As collateral security for the payment of the debts of a mutual insurance company it may transfer its notes received under charter authority for premiums in advance where the charter authorizes their negotiation to pay claims or otherwise in the course of business. Brookman v. Metcalf, 32 N. Y. 591; Crooke v. Mali, 11 Barb. 205.

Persons taking such notes in this way as collateral security may be protected as bona fide holders. Brookman v. Metcalf, and Great Western Ins. Co. v. Thayer, *supra*.

The deposit of a subscription note by a mutual insurance company as security for other notes which are discounted, applying the money to the proper business of the company, is, so far as the maker is concerned, the same as if the note had been negotiated absolutely when such negotiation was within the power of the company. Holbrook v. Basset, 5 Bosw. 147.

A note given for premiums in advance under a charter authorizing such notes to be taken and to be negotiated for the purpose of paying claims or otherwise in the course of business can lawfully be transferred by a mutual company in payment of a claim for a loss. Howland v. Myer, 3 N. Y. 290; White v. Haight, 16 N. Y. 310.

An agreement that 5 per cent shall be allowed as interest on the whole amount of a note for advance premiums without any deduction for such sums as might be written against is not valid and will prevent recovery on the note by the insurance com-

ure to collect, could not be levied upon those whose policies had been canceled previous to the former assessment. But it was plainly intimated in that case that a member could not avoid his liability upon accrued losses and expenses by cancelation and payment of assessments theretofore made. He who insures obligates himself to pay a proportionate share of the losses and expenses for the period during which he is insured; and, as said in the *Otto Case*, if the liability has not been covered by assessment, it continues, though he may have meanwhile ceased to be a policy holder. Much can be said against the doctrine that such member should not be liable for deficiencies arising from failure to collect assessments, but we think that question settled by authorities cited in the *Otto Case*. We consider it clear, however, that until the assessment has been once made the liability continues. The *Otto Case*, page 561, 96 Mich., expressly states that the Towle and Van Alstine losses were existing liabilities at the time of their occurrence. We

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pany or a member to whom it has been transferred in payment of a loss, as he is not a bona fide holder. Chesbrough v. Wright, 41 Barb. 28, Aff'd on other grounds 51 N. Y. 662.

Premium notes given upon subscriptions to a mutual insurance company are not valid in the hands of a member of the company to whom they have been transferred in payment of a loss, when the subscription was made on condition that it should not be binding until a certain sum was subscribed and that condition has not been satisfied. Chesbrough v. Wright, 51 N. Y. 662.

The power of the president of a mutual insurance company to indorse and convert into money notes taken for advance premiums and which were necessary assets required to permit the company to begin business is upheld in Aspinwall v. Meyer, *supra*; Caryl v. McElrath, 3 Sandf. 176.

The maker of a premium note as security for liabilities of a mutual insurance company who redeems it from one to whom the company had pledged it by paying the amount of the pledge may still be held liable to the company for the balance after deducting the amount so paid. Craig v. McHenry, 35 Pa. 120.

The right of an insurance company to transfer a premium note on a purchase of bank stock cannot be controverted by the maker of the note when sued by the indorsee. Brown v. Donnell, 49 Me. 421, 77 Am. Dec. 266.

But the right of a mutual insurance company to transfer a premium note is denied in Gore Dist. Mut. F. Ins. Co. v. Simons, 13 U. C. Q. B. 560.

e. *Collection by receiver or assignee for creditors.*

A receiver of a mutual insurance company can enforce notes given for advance premiums as assets of the company when it has become insolvent although they have not been indorsed by the company. Howard v. Palmer, 64 Me. 86.

A receiver of a mutual insurance company can sue in his own name upon a premium note under the Indiana statutes, giving him power "to bring and defend actions," and also providing that he shall reduce the assets to possession under the rules prescribed for administrators, since an administrator sues in his own name. Manlove v. Burger, 38 Ind. 211.

A renewal note given to continue a premium note made in advance for security as assets of a mutual insurance company is enforceable by a receiver in case of the insolvency of the company in the same way that the original note would have been if the insolvency had arisen before it became due. Howard v. Hinckley & E. Iron Co. 64 Me. 93.

A resolution by the directors of a mutual insurance company transferring its assets to an assignee for creditors substantially complies with the condition of a note payable as the directors may require. Hill v. Reed, 16 Barb. 280.

The use of a note given merely as a premium note, and not an original stock note, as if it were the latter, may constitute a fraudulent perversion of its object and design, which will render it invalid in the hands of a receiver of the company. Bell v. Shibley, 33 Barb. 610.

As to assessments by receiver, and their collection, see *infra*, IX.

f. *Defenses.*

The defense that the signature to a premium note was forged is not waived by the policy holder by accepting a policy containing a recital that such a note had been given. Beeber v. Papst (Pa.) 6 Cent. Rep. 191.

For defenses to notes which go to the entire contract of membership, such as invalidity of the insurance, illegality of the corporation, or fraud in procuring the contract, see *infra*, VI.

As to invalidity of assessments, see also *infra*, IX.

IV. *Altered charter, by-law, or contract of membership.*

The acceptance by a majority of the members of each of several mutual fire insurance companies of an act of the legislature making a new corporation and declaring that it "shall not affect the legal rights of any person" and shall take effect "when accepted by the members of said corporations" does not make a member of an old company who does not expressly assent a member of the new corporation. Hamilton Mut. Ins. Co. v. Hobart, 2 Gray, 543.

The fact that a mutual insurance company obtained a new charter which did not purport in terms to be an amendment of the old one, but had precisely the same title and embodied most of its provisions with certain additions, is held insufficient to constitute a defense to an action on a premium note given to the old company after the term of the insurance has expired. Hope Mut. F. Ins. Co. v. Beckmann, 47 Mo. 93; Hope Mut. F. Ins. Co. v. Koeller, Id. 129.

An agreement by members of a mutual company that they will abide by the constitution, rules, and regulations already established or which may thereafter be established by a majority of the insured is sufficient to bind a member to a change from his obligation by an alteration of the charter by act of the majority. Korn v. Mutual Assur. Soc. 10 U. S. 6 Cranch, 192, 3 L. ed. 195; Mutual Assur. Soc. v. Korn, 11 U. S. 7 Cranch, 396, 3 L. ed. 383.

In case of a mutual fire insurance company organized under the laws of Virginia it was held that the separation of Alexandria from the state of Virginia had no effect on the contracts of members in Alexandria. Korn v. Mutual Assur. Soc. *supra*.

An amendment by legislative act to the charter of a mutual insurance society made on request of the majority of the society, whereby town and country risks were separated and different rates provided for, is valid as to a nonassenting member of the society. Currie v. Mutual Assur. Soc. 4 Hen. & M. 315, 4 Am. Dec. 517.

The additional premium charged under the Virginia act of 1805, § 7, was held payable only on the excess between the old and the new valuation when the property was revalued, and not upon the whole

think it cannot be said that the managers of a company of this kind can relieve present policy holders, and burden future ones, by delay in adjusting or by litigating losses. These losses were a part of the legitimate cost of insurance for that year, whenever and however adjusted. The subject was again alluded to, and the validity of these claims recognized, on motion for rehearing of the *Otto Case*, 97 Mich. 525. In the case of *Union Mut. F. Ins. Co.* v. *Spaulding*, 61 Mich. 77, cited by counsel, the assured had surrendered his policy, and paid an assessment which not only covered all existing losses, but also a large sum for contingencies. The court said that "there can be no doubt on the findings that defendant did pay in full all that was his proportion of any existing losses of the company, as well as of any assessment levied. Whatever losses subsequently arose from failures to collect, or from any other cause, were not existing losses." No assessment having been made for these losses, or for the amount of liability for 1889 not

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sum of the revaluation. Atkinson v. Mutual Assur. Soc. 10 U. S. 6 Cranch, 202, 3 L. ed. 199.

But on a change in the rates of premium arising from a variation of risk made under the Virginia act of 1805 separating town buildings from country buildings the additional premium is held payable upon the whole sum insured. Mutual Assur. Soc. v. Korn, *supra*.

A member who agrees to be governed by the by-laws of the association where its articles of incorporation authorize the managers to adopt such rules and by-laws as to them may seem proper is subject to an amendment of a by-law by the managers, especially when it was made before his policy was issued, whereby the amount of property placed on the books of the company which was necessary before any insurance should be binding was reduced below the amount originally stated. Montgomery County Farmers' Mut. Ins. Co. v. Milner, 90 Iowa, 685.

A change made by a mutual insurance company in its manner of doing business, whether it is lawfully effected or not, cannot relieve the liability of makers of notes given for premiums in advance on the organization of the company, as they are not sureties to the company but to its creditors. Osgood v. Toole, 60 N. Y. 475, Affirming 1 Hun, 167.

V. *For what losses or obligations liable.*

a. *In general.*

Claims in dispute cannot be included in an assessment upon a premium note. Mutual F. Ins. Co. v. Phœnix Furniture Co. (Mich.) 2 Det. L. N. 159.

A mutual company cannot make assessments for prospective losses unless authorized by statute. Orr v. Beaver and Toronto Mut. F. Ins. Co. 26 U. C. C. P. 141.

But a member of a mutual company cannot contest his liability to an assessment on the ground that the loss for which it was made should not have been paid, and that actions therefor could have been defeated under the statute of limitations. Sands v. Hill, 42 Barb. 651.

Liability to assessments on premium notes cannot be avoided by showing that the losses for which assessments were made were due to bad management. West Branch Ins. Co. v. Smith (Pa.) 5 Ins. L. J. 319.

The extravagance, incompetency, or carelessness of the directors of a mutual insurance company constitute no defense to a member when charged with an assessment upon his deposit note. Koehler v. Beeber, 122 Pa. 291.

Where a loss has been paid out of money hired by the company without making any assessment therefor, it may properly make an assessment upon the parties whose policies were in force at the time of the loss. Tobey v. Russell, 9 R. I. 58.

Claims for moneys received from some of the members on invalid assessments may be made the basis of assessment against the members of a mutual insurance company when a part of them had refused to pay the invalid assessments. *Re* People's Mut. Eq. F. Ins. Co. 9 Allen, 319.

Interest on such claims may also be included. *Ibid.*

An assessment upon a premium note is not valid when made to pay a note of the company for money borrowed before the maker of the premium note became a member of the company and the renewals of the company's note were invalid. Victoria Mut. F. Ins. Co. v. Thompson, 32 U. C. C. P. 476.

So, an assessment to pay a judgment obtained on the notes of a mutual insurance company, given for borrowed money, may be lawfully made upon its members. Orr v. Mercer County Mut. F. Ins. Co. 114 Pa. 387.

b. *During what time or period.*

Only such losses and expenses as are incurred during the period of membership can be charged against a member of a mutual insurance company. Great Falls Mut. F. Ins. Co. v. Harvey, 45 N. H. 292.

Losses incurred at a time when a person was not a member of a mutual fire insurance company cannot be assessed against him. Swing v. H. C. Akeley Lumber Co. (Minn.) 25 Ins. L. J. 303; Koehler v. Beeber, 122 Pa. 291; People's F. Ins. Co. v. Hartshorne, 90 Pa. 465; McLellan v. Keystone Mut. Ins. Co. 3 Luzerne Leg. Obs. 53 (Brightly's Dig. (Pa.) Vol. 2, p. 1411); Mutual Valley F. Ins. Co. v. Rausch (Pa.) 1 Leg. Rec. Rep. 250 (Berryman's Ins. Dig. p. 161).

But a note constituting part of the absolute funds of the company may be collected to pay obligations even if they accrued before he became a member. Nashua F. Ins. Co. v. Moore, 55 N. H. 48.

That is to say that losses must have occurred during the life of a policy in a mutual fire insurance company in order to be assessed against the holder. Wardle v. Townsend, 75 Mich. 385, 4 L. R. A. 511; Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; Manlove v. Bender, 39 Ind. 371, 13 Am. Rep. 280; Downs v. Hammond, 47 Ind. 131; Embree v. Shideler, 36 Ind. 423; Green v. Beaver and Toronto Mut. F. Ins. Co. 34 U. C. Q. B. 78.

Assessments made prior to the membership of a member of a mutual life or accident company cannot be collected unless he has contracted to pay them. Evarts v. United States Mut. Acci. Asso. 40 N. Y. S. R. 878, citing Knight v. Supreme Council O. of C. F. 24 N. Y. S. R. 845.

So, a member of a mutual insurance company is not in default for nonpayment of an assessment the notice of which shows on its face that it is largely to meet losses which occurred prior to his membership. Susquehanna Mut. F. Ins. Co. v. Tunkhannock Toy Co. 15 W. N. C. 306.

An assessment against all the members of a mutual fire insurance company to pay liabilities for losses and expenses is invalid as to those who became members after the losses occurred but valid as to the others. Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray, 77.

A horizontal assessment of a specified percentage on the face of each premium note without regard to its proportion of the losses and expenses which occurred during the life of each policy or the amount which had been paid on the note violates a cardinal rule of mutual insurance as well as Wis.

covered by the first assessment, the directors might legitimately make an assessment to cover them, with interest and expenses incident thereto, including costs of litigation. It was the duty of the company to pay all of this within sixty days. It chose to do otherwise, and interest and money spent in trying to avoid the payment of a lawful obligation can hardly be chargeable to subsequent policy holders, who have no interest in, or liability upon, such obligations. The assessment of 1892 was void. Being void, it was no impediment to a new assessment, in making which the officers of the company have reassessed the amounts paid upon those who paid them, and propose to credit on such assessments such sums. This is equity, and we see no reason for complaint on the part of those who did not pay their void assessments. Certainly, equity has no injunctions for those who seek to escape honest liabilities by imposing undue burdens on others. May, Ins. § 559; *People's Mut. Ins. Co.* v. *Allen*, 10 Gray, 300; *Nelson* v. *Milford*, 7 Pick. 18. The assessment of a sum for contingencies is not uncommon; and where, as

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Rev. Stat. § 1967, and cannot be upheld. Davis v. Parcher & J. & A. Stewart Co. 82 Wis. 495.

Only those who were insured at the time when a deficiency occurred in the funds of a mutual insurance company should be required to contribute to the supplying of such deficiency. Greenhow v. Buck, 5 Munf. 263. In this case the deficiency was in the funds necessary to insure payment for future losses and not in any amount necessary for losses that had already occurred.

A member cannot be assessed to supply a deficiency arising from uncollected assessments not made during the existence of his policy. Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341.

Losses that arise after the surrender of a policy, whether from failure to collect assessment that had been previously made or from any other cause, are not existing losses for which a member continues liable after surrendering his policy and payment of assessments for his proportion of the existing liabilities of the company. Ionia, E. & B. Farmers' Mut. F. Ins. Co. v. Otto, 96 Mich. 558; Union Mut. F. Ins. Co. v. Spaulding, 61 Mich. 80.

An assessment made on a premium note given for a policy which was issued for one year cannot be made after the expiration of the year for a loss which is not shown to have occurred during that time, although there is a claim that the intent was to have the policy for five years. Columbia F. Ins. Co. v. Bolton, 2 Pearson (Pa.) 222.

Losses occurring after the cancelation of a policy in a mutual company cannot be included in an assessment on a premium note given for that policy. York County Mut. F. Ins. Co. v. Turner, 53 Me. 225.

As to liability after the insured property has been destroyed for the remainder of the term for which it was insured, see *infra*, VII., b.

The written terms of a policy or premium note cannot be contradicted by proof of a custom or practice of an insurance company to cancel their policies and surrender the premium notes given therefor upon the happening and payment of losses. New Hampshire Mut. F. Ins. Co. v. Rand, 24 N. H. 428.

By-laws of a mutual insurance company declaring that members whose policies are in force at the time an assessment may be declared shall be liable to assessment, and again that members whose policies have expired at the time of an assessment shall be liable for unpaid losses and other liabilities existing at the time of such expiration *pro rata* with those then in force, and the amount thus ascertained and levied shall be deducted from the gross amount for which assessment is to be made and the balance assessed upon the policies then in force, are construed, in Susquehanna Mut. F. Ins. Co. v. Stauffer, 125 Pa. 416, to make the policies in force at the time of a loss liable to assessment in the first instance, whether they have expired or not, and to charge any deficiency remaining after such assessment upon the policies which have been issued subsequent to the loss and up to the time of the assessment. The court in this case distinguishes the case of Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. 492, in which the by-laws received a different construction as based on an inaccurate copy of the by-laws in the record.

In the case of Thropp v. Susquehanna Mut. F. Ins. Co. 125 Pa. 427, the by-laws receive the same construction as in the Stauffer Case. The court explained that the by-law simply adds to the general rule which charges losses on the policies in force at the time of their occurrence a provision that any deficiency may be charged upon later policies issued before the assessment.

c. *Return premium.*

Unearned or return premiums cannot be repaid by making assessments on members of a mutual fire insurance company whose contract makes them liable to assessment "for the losses and expenses of said company." Manlove v. Bender, 39 Ind. 371, 13 Am. Rep. 280; Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; Mutual F. Ins. Co. v. Phœnix Furniture Co. (Mich.) 2 Det. L. N. 159.

Cancelation of policies by operation of law without any request of the holders does not entitle them to any unearned premiums for which assessments can be made on policy holders, where the only provision for unearned premiums by the statute or by-laws is in relation to voluntary cancelations by act of one of the parties. Dewey v. Davis, 82 Wis. 503; Atlas Paper Co. v. Seamans, Id. 504.

The statute liability of the members as corporators cannot be availed of to raise money to repay unearned premiums and an assessment for that purpose is void except when made in accordance with the contract. Com. v. Mechanics' Mut. F. Ins. Co. 112 Mass. 192.

But return premiums on a policy canceled during the solvency of a mutual fire insurance company which by the contract with the member he is entitled to recover may constitute a basis for assessments by the terms of the particular contract and the time and circumstances of the cancelation. Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116.

And it was held in Traders' Mut. F. Ins. Co. v. Stone, 9 Allen, 483, following Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen, 27, that the amount due for return premiums to members whose policies have been annulled may be included in an assessment of the members of a mutual fire insurance company under a statute authorizing it to pay "just claims" against the company, where the contract authorizes the directors to assess "such sums as may be necessary upon the members in proportion to their premium and deposit," and the by-laws provide for return premiums on cancelation of policies. Commenting on this case, it is said in Com. v. Massachusetts Mut. F. Ins. Co. *supra*, that in the case of Fayette Mut. F. Ins. Co. v. Fuller, *supra*, there was no deficiency of assets and therefore no question of priorities.

The premium notes of the members of a mutual company organized under Minn. Laws 1881, chap. 91, by millers and manufacturers, which constitute the contingent fund of the company, may be resorted to, if necessary, when the company becomes

under our decisions, a new assessment for a deficiency arising from a failure to collect cannot be made, it is proper to include a liberal sum. It is usually within the discretion of the directors. *People's Eq. Mut. F. Ins. Co.* v. *Babbitt*, 7 Allen, 235; May, Ins. § 559; *Bangs* v. *Gray*, 12 N. Y. 477. Thirty-three and one third per cent was held reasonable in *Re People's Mut. Eq. F. Ins. Co.* 9 Allen, 319. In view of the probabilities of litigation, we are of the opinion that 30 per cent was not unreasonable. See *Wardle* v. *Townsend*, 75 Mich. 385, 4 L. R. A. 511.

There is another reason why we think that the circuit judge should have dissolved the injunction. The complainant's bill shows that he has been a member of said company from 1884 until he filed the bill, and therefore liable for his proportion of all these liabilities. We fail to discover any reason why he should complain of an assessment to pay debts which the company is legally bound to pay.

Writ granted.

The other Justices concurred.

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insolvent, to pay the unearned premiums on policies of simple insurance on the all-cash plan whose holders sustain no other relation to the corporation than that of parties who had thus contracted with it. Such notes constitute a part of the capital of the corporation and a part of the fund upon the credit of which their contracts of insurance are entered into. *Re* Minneapolis Mut. F. Ins. Co. 49 Minn. 291.

d. *Division into classes generally.*

Premium notes of any particular class are assessable only for losses upon policies in that class, where a division of risks into classes is authorized by charter and has actually been made. Sands v. St. John, 4 Abb. App. Dec. 153.

Under statutes expressly providing for separate classes of business of a mutual fire insurance company and that an assessment upon the premium notes of one class cannot be made to pay the losses or expenses of another class, one whose property is placed in a certain class cannot enforce a judgment for a loss against property expressly devoted to the payment of losses in a different class. Naill v. Kansas Farmers' F. Ins. Co. 47 Kan. 223.

An assessment made upon the members of a mutual insurance company to cover losses that have occurred during a certain period, which ignores a separation of the policies into classes, is held invalid, where the charter required the property insured to be divided into four separate and distinct classes in each of which the premium notes shall be assessed to pay losses in that class only. Atlantic Mut. F. Ins. Co. v. Moody, 74 Me. 385.

The separation of the business of a mutual fire insurance company into classes so that an assessment upon the notes of one class can be made to pay losses in that class only is authorized by Kan. Comp. Laws 1879, chap. 50*a*. Kansas Farmers' Mut. F. Ins. Co. v. Amick, 45 Kan. 738.

An adoption of the provisions of Mass. Stat. 1849, chap. 104, which authorized a division of risks into classes, is necessary in order to permit an assessment on one class only. People's Equitable Mut. F. Ins. Co. v. Arthur, 7 Gray, 267.

A division of the risks into separate classes by a company which had accepted the Massachusetts act of 1849, chap. 104, was sustained in Citizens Mut. F. Ins. Co. v. Sortwell, 8 Allen, 217.

The division of risks into different classes or departments, making the premium notes in each department assessable for losses in that department only, is lawful under the New York act of April 10, 1849. White v. Coventry, 29 Barb. 305; Sheldon v. Roseboom, 29 Barb. 309, note; White v. Ross, 4 Abb. App. Dec. 539, Overruling Thomas v. Achilles, 16 Barb. 491.

But all the assets, including premium notes in both classes into which risks have been divided, must be resorted to to pay losses in either class if necessary because of the insufficiency of the assets specially applicable to that class. White v. Ross, *supra*.

In case of a division of insurance business into two departments managed and kept separate and distinct from each other, it was held that an assessment upon the premium notes to pay debts of the company could be made without showing that the liability to be paid was incurred in that department of the business to which the notes assessed belong. The court said: "The company could not apply the proceeds of an assessment upon the premium notes in one department, to pay losses which had occurred in the other, but it could lawfully order an assessment upon the premium notes to pay its debts, taking care to apply the proceeds of the assessments according to its charter and by-laws." Kelly v. Troy F. Ins. Co. 3 Wis. 254.

But the right of a company to divide its business into distinct classes and make the notes in one class liable to assessment for losses in that class only is sustained in Allen v. Winne, 15 Wis. 113. In this case a receiver assessed notes in a farmers' department to pay a loss in the merchants' department, but this was held invalid.

So, in a Canadian case it is held that the liability of members of a mutual insurance company, the business of which is divided into branches, is only for the separate branch in which they are insured, and not for the general debts thrown by the company into hotchpotch. Beaver and Toronto Mut. F. Ins. Co. v. Spires, 30 U. C. C. P. 304.

Members of solvent branches of a mutual insurance company in which each branch is separate in respect to payment of losses cannot be charged with assessments to pay off members who have subscribed to a guaranty fund in order to pay off a liability due to the guaranty members, except so far as may be necessary to discharge losses paid in the branches to which the members belong and not repaid by them. Duff v. Canadian Mut. F. Ins. Co. 27 Grant, Ch. (U. C.) 391.

As to effect on premium note of insuring property in the wrong class, see Union Mut. F. Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375, *infra*, VI., b.

e. *Losses on cash or stock policies.*

A mutual insurance company which has divided its risks and capital into classes without any authority to do so, and also insures property for a cash premium and not upon the mutual principle, makes all its members liable to assessment on their premium notes irrespective of the class in which they have been placed. Fitzpatrick v. Troy Ins. Co. 5 Biss. 48.

Losses on cash or stock policies issued by a mutual insurance company may be included in the liabilities which can be assessed on premium notes, where the company can lawfully issue both kinds of policies and it becomes necessary to resort to the notes because the cash is exhausted. Cooper v. Shaver, 41 Barb. 151; Lycoming F. Ins. Co. v. Newcomb, 1 Legal Chron. 9, 4 Legal Gaz. 409 (Brightly's Dig. (Pa.) vol. 2, p. 1412); Lycoming F. Ins. Co. v. Buck, 4 Legal Gaz. 182, 1 Legal Chron. 257 (Brightly's Dig. (Pa.) vol. 2, p. 1412).

The premium notes given to a mutual insurance company may be assessed for losses arising under cash policies issued by the company under authority of the New York act of 1849. White v. Ha-

IOWA SUPREME COURT.

COREY *et al.*
v.
James P. SHERMAN *et al.*, *Appts.*

(.....Iowa.....)

1. The objection that there was a plain and adequate remedy at law cannot be taken in an equity suit for the first time on appeal.

2. One or more stockholders of a mutual insurance company may on behalf of all bring a suit to set aside the appointment of an assignee, and to cancel assessments, and for other relief, under Iowa Code, § 2549, authorizing one or more persons to sue for the

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vens, 4 Abb. App. Dec. 582, 20 How. Pr. 177; Mygatt v. New York Protection Ins. Co. 19 How. Pr. 61; Cooper v. Shaver, 41 Barb. 151, Overruling Hart v. Achilles, 28 Barb. 576.

The right of a company to issue policies on the cash plan and on the mutual plan also, under the Pennsylvania special act of July 14, 1855, is sustained in *Re* Tradesmen's Mut. F. Ins. Co. 5 Pa. Dist. R. 7.

Persons who become members of a mutual insurance company on the mutual plan after the company had been authorized to insure for cash premiums are liable for assessments for losses on policies issued upon the cash plan. Hummel's Appeal, 78 Pa. 320.

A member of a mutual insurance company who was insured on the mutual principle cannot be assessed to pay losses on the risks which were taken in another class on the cash principle and afterwards transferred to the former class and reinsured. This was not a reinsurance within the meaning of a statute authorizing a mutual company to reinsure risks in "any mutual or other insurance company," as this does not cover the case of reinsurance in another branch of the same company. Beaver and Toronto Mut. F. Ins. Co. v. Trimble, 23 U. C. C. P. 252.

See also *Re* Minneapolis Mut. F. Ins. Co. *supra*, V., c.

VI. *Defenses against contract.*

a. *In general.*

An agreement by the president of a mutual insurance company to give up a premium note given for better security of dealers with the company at the end of the twelve months which it had to run, when directly conflicting with the contract made by the note itself, is void. Brouwer v. Appleby, 1 Sandf. 158.

The mere fact that some policies were issued containing an agreement that they should be nonassessable, when the company had no authority to issue such policies but when they were actually treated as assessable, does not constitute a defense to an assessment upon another policy, as the holder thereof is not injured by the inoperative agreement which has been practically ignored. National Mut. F. Ins. Co. v. Yeomans, 8 R. I. 25, 86 Am. Dec. 610.

The fact that directors took a different proportion between the cash premiums and deposit notes of members of the company as the terms of insurance when changes were found expedient did not avoid an assessment unless it appeared that some damage resulted therefrom. Marblehead Mut. F. Ins. Co. v. Underwood, 3 Gray, 210.

b. *Contract invalid or unauthorized.*

The unconstitutionality of a statute giving a mutual insurance company power to insure cannot be set up by a member of the company as a defense to an action on a premium note. Freeland v. Pennsylvania C. Ins. Co. 94 Pa. 504.

Neither can a member set up as a defense that the contract was *ultra vires*. *Ibid.*

The due incorporation, organization, and right to act in doing business of a mutual insurance company is to be presumed in the absence of proof to the contrary in an action against one of its members for the assessment, even if he is not estopped to deny them. National Mut. F. Ins. Co. v. Yeomans, 8 R. I. 25.

And later the same court held that members of a mutual insurance company cannot avoid payment of their just ratable assessments by attacking the lawfulness of the organization of the company. Providence F. & M. Ins. Co. v. Murphy, 8 R. I. 131.

An attempt by makers of premium notes to escape liability thereon on the ground that the corporation has never been legally organized or has not complied with the statutory requisites of the right to do business is unsuccessful in case of Jones v. Dana, 24 Barb. 395, in which the general rule is applied that as to persons who deal with a company doing business as a corporation, exercising corporate powers, it is a corporation *de facto*.

The estoppel of a member of a mutual fire insurance company to deny the corporate character of the organization when it brings suit against him on a premium or deposit note is declared in Cahill v. Kalamazoo Mut. Ins. Co. 2 Dougl. (Mich.) 124, 43 Am. Dec. 457. This illustrates the general doctrine respecting the denial of corporate existence by a person whose contract has recognized such existence and is here mentioned as an instance without attempting to develop the law or collect the cases on this matter of estoppel.

The want of the requisite capital of the corporation cannot be set up as defense to assessments on members of a mutual insurance company as they cannot thus impeach its existence. Cooper v. Shaver, 41 Barb. 151.

So, want of compliance with the statute in respect to the amount of subscriptions to be made before a mutual insurance company could begin business cannot be set up by one of the members as a defense against an assessment upon his deposit note. Trumbull County Mut. F. Ins. Co. v. Horner, 17 Ohio, 407.

Makers of premium notes under an agreement to give them subject to the terms as a supplement to the charter of the company for the better security of its dealers to be liable only for losses during the period for which the notes are given cannot escape liability for such losses on the ground that the company had never accepted that supplement to its charter where it had acted under it and the makers of the notes had received the benefit of it. Fell v. McHenry, 42 Pa. 41.

The fact that some of the subscriptions to a mutual insurance company prove worthless, although they were included in the amount required to permit the company to do business, does not release a member from liability on a note which he voluntarily gives for the amount of his subscription as advance premiums. Holbrook v. Basset, 5 Bosw. 147.

One who becomes a member of a mutual insurance company by taking insurance before the approval of the act incorporating it is not liable to pay any portion of the losses and expenses of the company. Farmers' Mut. F. Ins. Asso. v. Burch (S. C.) 24 S. E. 503.

The insurance of property in one class which ac-

benefit of the whole, when the question is one of common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court.

3. The fact that the right to vote and control the management of an insurance company is vested in those members only who are guarantors does not prevent the company from being regarded as a mutual one, or impair the legal existence and the obligations of deposit notes given for premiums.

4. A mutual insurance company is not changed into a stock company by raising a guaranty fund to secure temporarily the payment of losses when assessments are insufficient, even if such guaranty fund should be held valid.

5. The provision in Code, § 1146, that premium notes must on their face state that they were given for insurance, is by § 1160 made inapplicable to notes given for mutual obligations by persons organized for mutual insurance under the provisions of § 1058, for organizing corporations in general.

6. Policies for specific amounts for an

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cording to a by-law of a mutual fire insurance company should have been assessed in another class under a charter requiring a division of the risks into classes does not make a policy or a premium note therefor void, although the directors act with full knowledge of the facts, since the by-law cannot be regarded as a limitation and restriction of the power lodged in them by the charter. Union Mut. F. Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375.

c. *Fraud or mistake.*

Where there was abundant evidence to show that a mutual insurance company was a fraud from its inception, and a member was induced to enter it by false representions as to its condition, it was held that this constituted a defense to an action on his premium note. Sunbury F. Ins. Co. v. Humble, 100 Pa. 495.

False representations as to the solvency of a mutual insurance company, made by its agent under authority of its directors, whereby a person is induced to become a member, may constitute a good defense against assessments upon his premium note. Boland v. Whitman, 33 Ind. 64.

The insolvency of a mutual insurance company at the time a premium note was given was set up in defense by the maker when sued thereon by an indorsee, and it was held that if this was true and the insolvency was known to the officers of the company who issued the policy and took the note, then it was fraudulent and void except in the hands of innocent indorsees. Brown v. Donnell, 49 Me. 421, 77 Am. Dec. 266.

So, false representations made to induce a person to become a member of an insurance company, to the effect that it is a purely mutual company and does business only in the state and never takes large risks in large cities, if these were material matters of inducement to membership, may constitute a defense to an assessment upon a premium note. Lycoming F. Ins. Co. v. Woodworth, 83 Pa. 223.

A surrender of policies limiting liability of the member to the amount of premium notes given by him in exchange for a new policy without any new consideration or the surrender of the premium notes by which the liability of the insured was increased twofold was held in Wyman v. Gillett, 54 Minn. 536, to have been fraudulently obtained by the company, and therefore the limitation of the member's liability contained in the original contract was upheld.

Representations of an agent of a mutual insurance company to obtain a contract of membership to the effect that it would cost the member nothing except the amount which he paid in cash, are in effectual to relieve the member from liability on a premium note which he gave in addition to the cash payment. Farmers' Mut. F. Ins. Co. v. Marshall, 29 Vt. 23.

So, representations by an agent of a mutual insurance company as to the times and amounts of assessments that might be made on the premium notes, where the statutes provide that assessments could only be made to pay losses by fire, cannot constitute any defense to the insured, although the assessments actually made are greater than he supposed from the agent's statements that they would be. Boland v. Whitman, *supra*.

And the maker of a note under an agreement which he signed to advance a note for premiums in advance in accordance with the charter of the company which provides that such notes are for the better security of those concerned cannot contest his liability on such note on the ground that he signed the agreement without reading it in reliance on false representation that the note was to be given for an open policy to be surrendered when payable on payment of premiums earned. Maine Mut. M. Ins. Co. v. Hodgkins, 66 Me. 111. In this case the note was stamped "Given for open policy," and it was held that it was in fact given for such policy, although it was for premiums in advance and also for the better security of the dealers with the company. The court held that the rights of the parties must be determined by the contract as written, although one party may have misconstrued its legal effect.

And representations by an agent of a mutual insurance company to a person whom he induces to become a member, to the effect that he will not be liable to any assessments, and that his application will be taken upon a certain plan which will not subject him to assessments, will not constitute any defense to an assessment in accordance with the written contract, even if there was a mutual mistake of the parties, especially where the party has had the benefit of the insurance before he objects to the contract as written. Susquehanna Mut. F. Ins. Co. v. Swank, 102 Pa. 17.

A mistake of law on the part of all the members of a mutual insurance company and the express statements of the general agent of the company and the fact that a member is liable in any event only to the amount of his premium note is sufficient to prevent a member who becomes such on reliance on such representations from being held liable to any greater extent. Macklem v. Bacon, 57 Mich. 334.

False statements of legal conclusions as to the liability of members of a mutual insurance company, made to induce them to become members, are not a defense to them. Mansfield v. Cincinnati Ice Co. 28 Ohio L. J. 113.

But fraud in obtaining a premium note, liable to assessments, perpetrated by false representations inducing the insured to believe that his policy was issued for a definite sum without any liability to assessment, is sufficient to defeat liability to an assessment upon the note. Keller v. Equitable F. Ins. Co. 28 Ind. 170.

False statements by an agent of a mutual insurance company to the effect that it does not take insurance in Pittsburg, or other large cities, made to induce a person to become a member of the company will not constitute any defense to an assessment on his premium note, where such declarations of the agent were not within his authority. In this case there was an offer to prove that the president of the company on appointing the agent said they would not or did not insure in Pittsburg while as matter of fact they did at that time and afterwards, but this evidence was held inadmissi-

all-cash premium, issued to persons who are not bound to pay any assessments are without authority of law when issued by a mutual insurance company which was organized under Code, § 1160, authorizing insurance of the property of members of the company only, and which was subject to § 1159, prohibiting a mutual company to take risks upon the stock plan.

7. Members of a mutual insurance company are presumed to know the provisions of its articles of incorporation and by-laws.

8. Makers of deposit notes given to a mutual insurance company to cover future assessments, although they may have been deceived by misrepresentations as to a guaranty fund for partial protection against assessments, are not entitled to have their notes canceled without paying assessments for losses which occurred during the time for which they had the benefit of their insurance, at least when they have asked no relief until after the company has ceased to do business and assigned its property for the benefit of creditors.

9. For losses on cash policies unlawful by the statute, the insured is not liable to assessment on his deposit note.

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ble. Hackney v. Alleghany County Mut. Ins. Co. 4 Pa. 185.

False statements of facts inducing persons to become members of a mutual insurance company will not relieve them from liability as members, where they have remained members without attempting to obtain relief until after the rights of innocent third persons have intervened, as in the case of other persons becoming members on the faith of their membership. Mansfield v. Cincinnati Ice Co. *supra;* Dettra v. Kestner, 147 Pa. 566; Dettra v. Lock, 5 Pa. Dist. R. 200.

d. Failure of consideration.

A premium note given for a policy which is entirely void because of a false warranty by the insured is declared to be without consideration and invalid in Frost v. Saratoga Mut. Ins. Co. 5 Denio, 154, 49 Am. Dec. 234, but the question actually decided in this case was that the policy was void.

A premium note is not enforceable where the policy for which it was given was never delivered. Giles v. Jacques, 1 Montreal Sup. Ct. 166 (Berryman's Ins. Dig. 1210).

If the policy delivered is not in accordance with the contract the maker of the premium note is not liable thereon. Sun Mut. L. Ins. Co. v. Belane, 5 Montreal L. N. 42 (Berryman's Ins. Dig. 1211).

The election of an insurance company to declare a policy void because of other insurance defeats its right to hold the insured liable thereafter as a member of the company for further losses. Tuckerman v. Bigler, 46 Barb. 375.

In case of an attempt to insure mortgaged property when the company has a right to insure unencumbered property only, the insured is not subject to the payment of quotas assessed for such insurance. Ingrams v. Mutual Assur. Soc. 1 Rob. (Va.) 661.

So, in a suit to subject certain property to quotas of insurance, wherein it was held that the property was not insurable in the company which assumed to insure it, there was held to be no liability for the quotas claimed. Mutual Assur. Soc. v. Holt, 29 Gratt. 612.

The invalidity of insurance in a mutual company which is effected in a branch of business that is not authorized by law will prevent the insured from being liable to assessments for such insurance. Beaver and Toronto Mut. F. Ins. Co. v. Spires, 30 U. C. C. P. 304.

Premium notes given by a member of a mutual insurance company are void if his lack of title or insurable interest in the property prevents the policy from being valid. Bersch v. Sinnissippi Ins. Co. 28 Ind. 64.

But, on the other hand, it was held in Massachusetts that lack of insurable interest or other defense against a policy in a mutual company does not relieve the holder thereof from liability to assessment as a member. Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116.

So, in New England Mut. F. Ins. Co. v. Belknap, 9 Cush. 140, the court held that even if such defense would be good in case of an ordinary insurance policy it was not so in a mutual company in which the mutual promises of the members were the basis of the insurance. Consequently the fact that a member has an insurable interest in only part of the property insured does not limit his liability to assessment on his deposit note.

No rebate or deduction from the amount of a premium note or an assessment thereon is required by the fact that the company's charter expires during the life of the policy. Huntley v. Beecher, 30 Barb. 580.

VII. *Termination of liability.*

a. *Rescission or cancelation of contract.*

The rescission of a contract between a mutual insurance company and a member by their mutual agreement is lawful and seems essentially necessary to the safe and proper transaction of the business. Akers v. Hite, 94 Pa. 394, 39 Am. Rep. 792; Boland v. Whitman, 33 Ind. 64.

So, in case of a life company it was held that a rescission of the contract between a member of a mutual insurance company and the company mutually agreed upon, when there are no liabilities of the company, is sufficient to prevent any further assessments upon the member. Bostick v. Maxey, 5 Sneed, 173.

The cancelation of policies and the surrender of premium notes under an agreement of compromise to end a litigation between the company and the member terminates membership and prevents the member from being held liable on subsequent obligations of the company. Wadsworth v. Davis, 13 Ohio St. 123.

The cancelation of a policy by a mutual insurance company with return of the premium notes on the ground that the risk is undesirable before the dissolution of the company will prevent an assessment on a premium note for such policy after the company is dissolved. Mansfield v. Franklin Furniture Co. 1 Ohio Dec. 511.

The president of a mutual insurance company has no power to surrender a note given as security and for advance premiums after it has become due. Brouwer v. Appleby, 1 Sandf. 158.

Neither have the trustees of the company any right to cancel such note without consideration. Brouwer v. Hill, 1 Sandf. 629; Hone v. Allen, Id. 171, note.

The surrender of notes taken by a mutual insurance company for security of dealers with it and for advanced premiums under a vote that notes shall be so surrendered providing no claim is made by the makers on the company for their use is not valid when there is no other consideration for the surrender and the notes are needed for the payment of the company's debts. Maine Mut. M. Ins. Co. v. Pickering, 66 Me. 130.

The promise of an agent of a mutual company to surrender a premium note in consideration of the surrender of the policy of the maker, and his payment of a certain sum which was then due from him as a valid assessment upon his note, is invalid and without consideration. Sands v. Hill, 42 Barb. 651.

The officers of the company cannot release a member of a mutual insurance company from his

fully issued by a mutual company, members who took lawful policies on the assessment plan cannot be compelled to contribute by assessment on their premium notes merely because they knew of the issue of the cash policies, but did nothing to estop themselves from denying liability on account of them.

10. A guaranty fund is not, strictly speaking, assets of a mutual insurance company for the purpose of determining its solvency, when the company is required to refund all moneys obtained from it.

11. The obligation to contribute to the payment of prior losses on assessments is not terminated by the insolvency of a mutual insurance company and its assignment for the benefit of creditors.

12. Notice of assessments by mutual insurance companies need not be given before they are made, unless expressly provided for by the articles of incorporation and by-laws.

13. Premium notes given by members of a mutual insurance company can-

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contract and statutory obligations with other members upon his payment of less than all dues and his ratable share of all losses up to the date of his withdrawal as required by Sandborn & Berryman Anno. Stat. (Wis.) § 1941 *f*. Seamans v. Miller's Mut. Ins. Co. 90 Wis. 490.

See also main case of COREY v. SHERMAN as to cancelation for issue of policies without authority.

A note given to enable the maker to vote at an ensuing election of trustees, intending and expecting that it would appear in the annual statement as one of the assets of the company and stand among the securities given for the protection of its dealers, cannot afterwards be withdrawn by the maker. Brouwer v. Hill, 1 Sandf. 629.

The surrender of premium notes and canceled policies on receipt of a certain percentage of the amount of notes, which the directors have acquired to be collected ceasing to insure property, when they vote that such percentage would pay all the prior losses of the company, will not relieve the members whose policies are surrendered from liability for pre-existing losses which the assessments were insufficient to pay. Doane v. Millville Mut. M. & F. Ins. Co. 45 N. J. Eq. 274, Reversing 43 N. J. Eq. 522.

The surrender of a premium note, although made without any payment by the member at the time of the surrender, when the party supposed there were no valid claims to which he was subject, was held binding on the company, even if some contested claims which it was thought could not be established proved to be binding obligations. The court says: "Proof that the parties were mistaken in judgment concerning the validity of the claims could not annul the adjustment." One of the judges dissented from this decision on the ground that the statute entitled the member to receive his note only upon payment of his just proportion of all losses and expenses, and that the surrender of his note without any consideration and without the payment in fact of his just proportion of existing liabilities should not be binding as against a receiver of the company which had become insolvent. Hyde v. Lynde, 4 N. Y. 387.

Under a contract by which a note is given for premiums in advance on the organization of the company, and the maker is to have the right to pay the note by premiums on insurance taken by him or others whom he procured to take it, his liability on the note is terminated when it has been surrendered to him on payment thereof in the manner agreed. Whether the charter authorized such an arrangement or not, and whether or not the person who made the agreement on behalf of the company before its incorporation had authority to do so was held immaterial after the corporation itself had received the consideration agreed upon and had surrendered the note. It was held to be then too late to substitute a different agreement in favor of a receiver of the company. Emmett v. Reed, 8 N. Y. 312.

Members cannot be allowed to surrender their policies and withdraw from a mutual fire insurance company and thereby escape liability for the losses and expenses which they assumed by their membership because each member makes a contract not only with the corporation itself but with every other member thereof. Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; Manlove v. Bender, 39 Ind. 271, 13 Am. Rep. 280.

A vote of the directors canceling all outstanding policies, to take effect on a certain day, does not so effectively destroy the company and terminate their office as to prevent them from making an assessment on deposit notes at a subsequent date. Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen, 27.

The acceptance of the surrender of a policy and its cancelation by an authorized agent of a mutual company will terminate the liability of the member to assessments on obligations subsequently accruing. Cumberland Valley Mut. Protection Ins. Co. v. Herbert, 2 W. N. C. 155.

The surrender of a policy in a mutual company under an agreement that it shall be canceled terminates the liability of the member to assessments for liabilities subsequently accruing, although it leaves him liable to assessment for liabilities which accrued during his membership. Akers v. Hite, 94 Pa. 394, 39 Am. Rep. 792; Campbell v. Adams, 38 Barb. 132.

As to liability of assignee, see New Hampshire Mut. F. Ins. Co. v. Hunt, 30 N. H. 219, *supra*, II., b.

The cancelation of a policy does not release the holder from his liability as a member of a mutual fire insurance company under Mass. Gen. Stat. chap. 58, § 54, to assessment within two years for losses which occurred while he was a member. Com. v. Mechanics' Mut. F. Ins. Co. 112 Mass. 192.

To complete a withdrawal by a member of a mutual fire insurance company his policy must be actually surrendered, and it is not sufficient that he and the secretary of the company understood that he was withdrawing, where the charter provides that he may withdraw by returning the policy and payment of his obligations. Schroeder v. Farmers' Mut. F. Ins. Co. 87 Mich. 310.

A surrender of policies to one of the directors for cancelation on a promise by the board of directors to cancel them and return the stock notes, and the payment of all just liabilities up to that time, terminates the liabilities of a member of the company. Akers v. Hite, 94 Pa. 394, 39 Am. Rep. 792.

A member of a mutual insurance company who gave notice to have his policy canceled during the time in which he had a right to have it canceled was held to terminate his membership and prevent subsequent liability when he received no reply from the company and supposed that his policy was canceled. The mere notice is sufficient to terminate the insurance in such a case. Home Ins. Co. v. Burnett, 26 Mo. App. 175.

A member of a mutual insurance company who pays a cancelation fee but neglects to pay an assessment which is due and which he is required to pay in order to sever his membership still remains liable as a member, although he has surrendered his policy. Burmood v. Farmers' Union Ins. Co. 42 Neb. 598.

Surrenders of premium and deposit notes made without requiring the holders to pay their proportionate share of losses cannot be set up long afterwards and after the company has become insolv-

not be canceled because the company without authority issued policies in fixed amounts for cash premiums so long as there is a liability for losses to persons insured on the mutual plan.

(October 21, 1895.)

APPEAL by defendants from a decree of the District Court for Black Hawk County in favor of complainants in a suit brought to set aside the appointment of the assignee of a mutual insurance company, to cancel assessments upon members, and for other relief. *Reversed.*

The facts are stated in the opinions.

Messrs. **Boies, Couch, & Boies, Charles A. Clark,** and **G. W. Burnham** for appellants.

Messrs. **Alford & Gates, C. W. Mullen,** and **Henderson, Hurd, Daniels, & Kiesel** for appellees.

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ent as a defense to the collection by the receiver of assessments on the existing members, as this would necessarily force him into interminable litigation with the makers of the surrendered notes. Davis v. Parcher & J. & A. Stewart Co. 82 Wis. 495.

On the surrender of his policy by a member of a mutual fire insurance company, with payment subsequently of an assessment made after the surrender which more than paid all his liabilities up to the time when his policy was canceled, if the assessment had been fully collected, he was discharged from further liability, although the fact that some of the assessments against other persons were uncollectible left a portion of the liabilities incurred while he was a member still unpaid. Tolford v. Church, 66 Mich. 440.

So, the surrender of a policy by a member of a mutual fire insurance company with full payment of the only assessment outstanding against him which covered all losses existing at the time it was made, with a further amount for estimated expenses and shortages, is sufficient to terminate his liability as a member, although by reason of unexpected shortages in collecting the assessment from other members a deficiency remains unprovided for. Union Mut. F. Ins. Co. v. Spaulding, 61 Mich. 77.

The surrender of a policy and payment of all assessments made at the time by a member who had a right to withdraw under the charter of the company by surrendering his policy and paying "his proportion of all assessments to which this company is liable at the time of his withdrawal" does not relieve him from liability for subsequent assessments to pay disputed losses which were in litigation at the time of the cancelation. Ionia, E. & B. Farmers' Mut. F. Ins. Co. v. Otto, 96 Mich. 558, Rehearing denied in 97 Mich. 522.

A letter from the secretary to an assignee of a policy in a mutual insurance company referring to an assessment and saying that the company cancels all policies on which the assessment is not paid within thirty days, and that if he has paid the agent he is all right, if not the company will renew the policy when it is paid, is properly construed to be a notice of cancelation of the policy and relieves the assignee of subsequent liability as a member of the company when he acts on that construction of it and returns the policy to the assignor, obtains other insurance, and informs the company of the fact. Columbia Ins. Co. v. Masonheimer, 76 Pa. 138.

The fact that the directors declared a policy void for nonpayment of assessments which were invalid does not terminate the liability of the holder to assessments thereon, since the policy itself remains valid. *Re* People's Mut. Eq. F. Ins. Co. 9 Allen, 319.

A notice of a vote to suspend the insurance of a member in a mutual company because of his nonpayment of an assessment, if ineffectual to prevent the continuation of his insurance, does not constitute a defense against assessments upon his premium note when he has not consented to terminate the policy until it expired. New England Mut. F. Ins. Co. v. Butler, 34 Me. 451. See also *infra*, VII., d, as to member's default.

b. By loss and payment of insurance.

The fact that the insured property of a member of a mutual company is destroyed long previous to the expiration of his policy does not relieve him from liability to assessment upon his premium note for any losses incurred during the term of the policy, where the charter of the company provides for liability in proportion to the deposit note and makes the insured property subject to a lien in the nature of a mortgage to secure the deposit note which shall continue during the policy. Bangs v. Skidmore, 21 N. Y. 136, Affirming 24 Barb. 29.

A member who receives payment of a total loss upon his policy and surrenders it remains liable to assessments on his premium note where that has been retained by the company. Boot & S. Mfrs. Mut. F. Ins. Co. v. Melrose Orthodox Cong. Soc. 117 Mass. 199.

Where property was insured in a mutual company for six years and was totally destroyed the second year, it was held that the insured was liable to pay all legal assessments on his premium note until the expiration of six years in the same manner as though the property had not been destroyed, and cannot insist as a condition of such liability upon having a new structure erected in place of the old one insured. New Hampshire Mut. F. Ins. Co. v. Rand, 24 N. H. 428.

The right to assess premium notes during the term of a policy in a mutual company, although after the destruction of the property insured, is also sustained in Swamscot Mach. Co. v. Partridge, 25 N. H. 369.

c. By transfer of property insured.

Alienation of property insured in a mutual company by which the insurance is terminated, together with the surrender of a policy for cancelation, will relieve the member from future liability. Niagara Dist. Mut. F. Ins. Co. v. Gordon, 29 U. C. C. P. 611.

The authorities do not agree as to the effect of a sale of the property which avoids the insurance upon the liability of the vendor as a member of the company.

Thus, it was held in Pennsylvania that a member of a mutual insurance company who by sale of the insured property terminates the policy thereby ceases to be a member or to be liable for subsequent losses. Wilson v. Trumbull Mut. F. Ins. Co. 19 Pa. 372.

But in a later case it is said that while this might be so in the absence of a contract to the contrary, the destruction of the buildings insured and a sale of the land does not, without any surrender of the policy, terminate the liability of a member of a mutual company to assessment during the term of his policy, where it stipulates for payment of assessments during that term and provides for a surrender of the policy in case of a sale of the property. Thropp v. Susquehanna Mut. F. Ins. Co. 125 Pa. 427.

And in Massachusetts it was held that the alienation of his insured property by a member of a mutual insurance company without surrendering his policy or transferring it to the purchaser of the property leaves him still a member of the company, subject to assessments, although by a by-law of the company the policy becomes void by the

Kinne, J., delivered the opinion of the court:

1. The record in the case is voluminous, and the facts quite complicated. We shall endeavor to state as precisely as possible the facts touching the organization and manner of doing business of the defendant company. In February, 1887, a notice, signed by James P. Sherman, one of the incorporators of defendant company, was published stating in substance that said Sherman and his associates would organize a corporation to be known as the Citizens' Mutual Insurance Company, "for the purpose of mutual insurance against loss by fire or tornado among its members, by mutual obligations given therefor;" that the association would commence business March 17, 1887, and continue twenty years; that the place of business should be Waterloo, Iowa; that the business should be conducted by a board of directors, elected as provided in articles of incor-

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transfer of the property. Cumings v. Sawyer, 117 Mass. 30.

In Indiana it was first decided that liability on a premium note is not terminated until the actual surrender of the policy and the payment of all assessments for losses sustained before the surrender, although the policy has become void by sale or mortgage of the insured property and the lien of the company on the property lost. Indiana Mut. F. Ins. Co. v. Coquillard, 2 Ind. 645; McCulloch v. Indiana Mut. F. Ins. Co. 8 Blackf. 50.

But directly overruling the previous decisions, it is decided in Indiana Mut. F. Ins. Co. v. Conner, 5 Ind. 170, that liability on a premium note ceases, except as to assessments for losses previously incurred, when the policy becomes void by reason of a transfer of the property, even if the policy is not surrendered for cancelation in accordance with the requirement of the charter.

So, in New York the forfeiture of the insurance of a member in a mutual company by sale of property insured without any surrender of his policy and payment of his proportion of the existing liabilities as required to terminate his relation to the company does not relieve him from liability for losses subsequently occurring. Hyatt v. Wait, 37 Barb. 29.

A clause in the charter of the company declaring persons insured therein "so long as they shall be insured in said company, shall be and continue members thereof, and no longer" is held insufficient to relieve the member from liability merely because he avoids his policy by alienating the property. *Ibid.*

A member is entitled to receive back his note given to a mutual insurance company in consideration of the policy when by alienation of the property the insurance has become void, although he takes back a chattel mortgage to secure the purchase money, and the charter provides that in such case he may surrender his policy and receive back his deposit note. Miner v. Judson, 2 Hun, 441.

A resolution of a mutual insurance company that when an insured had alienated his property before any loss was sustained his premium note should not be assessed, although he had not surrendered his policy, constitutes a waiver of compliance with charter provisions requiring the policy to be surrendered, and dispenses with the formality of a surrender, when there are no losses to be paid in case of such alienation of property. Huntley v. Beecher, 30 Barb. 580.

d. *By member's default.*

Forfeiture of membership of a mutual insurance company by nonpayment of assessments does not relieve a member from existing liabilities on his premium note. St. Louis Mut. F. & M. Ins. Co. v. Boeckler, 19 Mo. 135; Iowa State Ins. Co. v. Prosses, 11 Iowa, 115; Dettra v. Murray, 5 Pa. Dist. R. 201; Insurance Co. v. Sorter, 1 Clev. Rep. 133 (Walker & Bates' Ohio Dig. vol. 3, p. 313, ¶ 48).

Failure to pay an assessment within the time required, which by the terms of the policy made it void, does not *ipso facto* avoid the policy so that a later assessment cannot be lawfully made on the premium note if the policy has not been surrendered or canceled and no demand made for the premium note. Columbia Ins. Co. v. Buckley, 83 Pa. 293, 24 Am. Rep. 172.

In case of default on a premium note given to a mutual fire insurance company to pay a gross premium for a term of five years, the note may be enforced, where there is nothing in the policy to show an intent to permit the insured to withdraw from his obligations. Minnesota Farmers' Mut. F. Ins. Asso. v. Olson, 43 Minn. 21.

Failure to pay annual interest and assessments on a premium note for which the policy may be forfeited does not relieve the policy holder from subsequent assessments, if such failure is waived by the company. Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. 499.

The effect on the liability created by premium notes of a default which suspends the policy during default is a question which seems to be unaffected by the character of the company, whether mutual or otherwise, and is therefore not included in the present note. An illustration of the case is furnished by Phenix Ins. Co. v. Rollins, 44 Neb. 745.

A member of a mutual insurance company cannot defeat his own liability on his premium note by setting up the falsity of his own statements in his application for the insurance for which the company might have avoided the policy, where it did not do so. Huntley v. Perry, 38 Barb. 569.

Under a provision that members must have their property revalued once in seven years in order to continue their insurance, but on such revaluation making the insurance continue under the original policy, the failure of a member to have such revaluation made will not release him from liability to the society. The court says: "It is certainly much more reasonable that he should be subject to a loss or inconvenience for his own neglect, than that he should be released from his liability to the society in consequence of it." Korn v. Mutual Assur. Soc. 10 U. S. 6 Cranch, 192, 3 L. ed. 195.

e. *By termination of company.*

The fact that the charter of a mutual insurance company expires by its own limitation during the life of the policy does not avoid the policy or discharge the insured from his liability upon the premium note. Huntley v. Beecher, 30 Barb. 580.

The failure of a mutual insurance company does not constitute a failure of consideration so as to defeat an action for pre-existing obligations on a premium note given by a member of the company Conigland v. North Carolina Mut. L. Ins. Co. Phill. Eq. 341, 98 Am. Dec. 89; Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116; Sterling v. Mercantile Mut. Ins. Co. 32 Pa. 75, 72 Am. Dec. 773; Vanatta v. New Jersey Mut. L. Ins. Co. 31 N. J. Eq. 15; Hone v. Boyd, 1 Sandf. 481; Union Ins. Co. v. Greenleaf, 64 Me. 123; Cary v. Nagel, 2 Biss. 244; Schimpf v. Lehigh Valley Mut. Ins. Co. 86 Pa. 373. See also main case of COREY V. SHERMAN.

Especially is this true when the insurance was carried for the full term and the policy never surrendered or offered for cancelation. Graff v. Simmons, 58 Ill. 440.

poration and by-laws; that the guaranty fund or capital stock should not exceed $50,000, to be paid as ordered by the directors and required by the articles and by-laws; that the highest indebtedness of the association, except for insurance liability, should not exceed $10,000, and private property of the incorporators should be exempt from corporate liability. After and prior to March 17, 1887, defendants signed and acknowledged articles of incorporation, which were recorded in the office of the recorder of Black Hawk county and with the secretary of state. These articles seem never to have been formally adopted at a meeting of the corporators, but were, as we have said, signed and assented to by them, and always acted upon as such. In substance they provided that the association was formed for the purpose of mutual insurance "upon our property and that of all other persons who may become members of this association by the giving of mutual

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But the appointment of a receiver for a mutual insurance company which has become insolvent cancels existing policies and precludes any assessments for premiums which were unearned at the time of the insolvency. Davis v. Shearer, 90 Wis. 250.

When a note is given for the nominal premium on an open policy to cover risks to be afterwards indorsed thereon, the premiums upon which are to be settled and the terms of insurance fixed when the indorsement is made, the company or its receiver cannot recover in case of insolvency any more than the premiums actually earned. Lawrence v. McCready, 6 Bosw. 329; Elwell v. Crocker, 4 Bosw. 22.

But when notes are given as part of the capital stock of a mutual insurance company under the New York act 1849, § 5, they are valid and collectible by the company or its receiver whether the maker has actually obtained any insurance for such notes or not. Elwell v. Crocker, 4 Bosw. 22.

Such a note given for premiums in advance to a mutual insurance company under charter authority is treated as a statutory security, the validity of which is not dependent upon any question of consideration and is therefore held valid for the whole amount of the note as an asset of the company in case of its insolvency, although the premiums on insurances actually received by the maker did not amount to the whole sum for which the note was given. Deraismes v. Merchants' Mut. Ins. Co. 1 N. Y. 371.

And notes given as an advance for premiums on policies of insurance which the makers agreed to take thereafter, when given under charter authority which provides that the company may negotiate such notes for the purpose of paying claims or otherwise in the course of its business and that a compensation not exceeding 5 per cent per annum may be allowed to the signers, were held collectible by a receiver of the company which had become insolvent notwithstanding the makers had never taken any insurance in consideration of the notes. Brown v. Crooke, 4 N. Y. 51. The court approves the above case of Deraismes v. Merchants' Mut. Ins. Co. as being identical in principle with the case in hand, although in the later case the notes were given as new notes after the company had been carrying on business, while in the Deraismes case the note was one of those given to aid the organization of the company.

Where a portion of a note given for advance premiums and security of dealers has been earned by insurance, the remainder continues a valid obligation on the insolvency of the company. Hone v. Allen, 1 Sandf. 171, note.

The insolvency of the company at the time a person became a member thereof does not prevent his being liable as a member if the rights of other parties have become involved. People's Mut. F. Ins. Co. v. Bergstresser, 11 Pa. Co. Ct. 646, 1 Pa. Dist. R. 771.

See also *supra*, VI., c, as to fraud.

VIII. *Liability of guaranty members.*

The right of the company to raise a guaranty fund is considered here only so far as it involves the liability of members.

The raising of a guaranty capital as additional security for the payment of losses which was not authorized by the charter was held, in Trenton Mut. L. & F. Ins. Co. v. McKelway, 12 N. J. Eq. 133, to be invalid and a contributor to such capital who gave a bond and mortgage to secure his contribution was held to have a good defense to an assessment thereon for losses which the guaranty capital was intended to secure. This decision is based on a strict application of the rule that a corporation cannot exercise any powers not expressly given in its charter or necessary to the exercise of the powers therein enumerated and given.

On the other hand, in Iowa it is held that guaranty fund notes executed to furnish money to a mutual insurance company for temporary use in paying its legitimate expenses and losses, the amount so paid to be refunded from money realized from assessments duly made on obligations given by members for insurance, are valid and binding on those executing them, notwithstanding the illegality of a provision in the articles of incorporation of such company that the makers of such notes shall be members and the directors shall be selected from them alone. Berry v. Anchor Mut. F. Ins. Co. (Iowa) 62 N. W. 681.

See also main case of COREY v. SHERMAN.

In deciding the right of guaranty members to a surplus fund in the stock department of a mutual company which had two distinct departments, it was said that the risk and liability of guaranty members were the same as if the stock department was a separate company and was not connected with the mutual department in any way. Traders & M. Ins. Co. v. Brown, 142 Mass. 403.

IX. *Assessments.*

a. *Necessity.*

An assessment on a premium note is a condition precedent to recovery thereon, when it is given as a mere premium or deposit note payable at such times as the directors may require, as distinguished from notes given as security to enable the company to do business. Sands v. St. John, 36 Barb. 628; Savage v. Medbury, 19 N. Y. 32; Toll v. Whitney, 18 How. Pr. 161; Great Falls Mut. F. Ins. Co. v. Harvey, 45 N. H. 292.

And a member of a mutual insurance company is not liable to an action upon his deposit note where he is not in default in paying any assessment lawfully made thereon. Williams v. Lakey, 15 How. Pr. 206.

A receiver cannot proceed to collect the whole amount of the deposit notes without making any assessment although he is substituted for the directors in respect to the power to collect such notes, where the note is by its terms payable "as the directors may agreeably to their charter and by-laws require." Shaughnessy v. Rensselaer Ins. Co. 21 Barb. 605; Williams v. Babcock, 25 Barb. 109; Devendorf v. Beardsley, Id. 656.

Proof of an order or requirement by the directors of a mutual insurance company for the pay-

pledges thereof." They also provided the corporation should have the right to sue and be sued, to have a seal, to render the interests of shareholders transferable, to exempt the private property of members from liability for corporate debts, to make contracts, acquire and transfer property, make rules and regulations for the management of its business; that its principal place of business should be Waterloo. That its business should be conducted by a board of directors chosen by the guarantors or shareholders from among their members as required by the by-laws. That said guaranty fund or obligation should not exceed $50,000 in shares of $100 each, transferable among members upon the books of the company and that fund might be increased by vote of two thirds of the holders thereof, and that each share should be entitled to one vote upon all questions affecting the interests of the association. That it should be subject to assessment by the board of di-

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ment of all or a portion of a premium note is necessary to obtain a recovery thereof, when the note is payable at such time or times as the directors may agreeably to the charter and by-laws require. Warner v. Beem, 36 Iowa, 385.

An *ex parte* order of court that a receiver sue for the whole unpaid balance on premium notes which were made payable as the directors might require is not sufficient to show any liability, but an assessment on the notes is a condition precedent to any right of action upon them. Williams v. Lakey, *supra*.

But a note given in advance to enable the company to begin business is held in White v. Haight, 16 N. Y. 310, to be absolute and payable at all events without any assessment. It is held that these notes are to be considered as capital, operative of themselves and not on account of the happening of another event, such as the occurrence of losses, and may be transferred or collected not only to pay losses but otherwise to obtain money for any other lawful purpose. In this case such a note was held collectible by a receiver after the insolvency of the company and assessment amounting to the whole of the note which had been confirmed by the court.

The decision in White v. Haight, *supra*, to the effect that a promissory note made to aid the formation of a mutual insurance company under the New York act of 1849 is absolute and payable at all events without any assessment, is followed in Bell v. McElwain, 18 How. Pr. 150; White v. Foster, 18 How. Pr. 151; Hart v. Achilles, 28 Barb. 576.

And in Massachusetts when liability of a member of a mutual fire insurance company under its by-laws constitutes a part of the absolute funds of the company, no assessment is required although the member promises to pay on demand in such sums as may be called for by a vote of the directors or by the treasurer. Shawmut Mut. F. Ins. Co. v. Stevens, 9 Allen, 332; Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray, 82.

Proof of losses and of an assessment is not necessary to recovery by a mutual insurance company upon a premium note payable in instalments absolutely at specified times, when it, with a certain cash payment, was made as the premium for a policy not issued on the plan of mutual insurance, and the company is entitled to issue such policies under its charter. Davenport F. Ins. Co. v. Moore, 50 Iowa, 619.

See also Nashua F. Ins. Co. v. Moore, *infra*, IX. k, 3.

b. *Who can make.*

An assessment made by a minority of a board of directors as a committee who made it in a less sum than the board of directors had voted should be assessed was held illegal, where the charter of a mutual fire insurance company provided that the directors should settle and determine losses. Monmouth Mut. F. Ins. Co. v. Lowell, 59 Me. 504.

An assessment can be made by the directors only, where the act of incorporation of a mutual company provides that after receiving notice of any loss or damage and ascertaining the sum, or after rendition of any judgment against the company therefor, the directors shall settle and determine the sum to be paid by the several members thereof as their respective portions of such loss, which shall always be in proportion to the original amount of their deposit notes. Therefore an assessment made by the treasurer with the assistance of another person, no report of which was submitted to the directors or any ratification thereof made by them, is invalid. Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341.

A resolution by the directors that the treasurer be authorized to give up premium notes of any person who has paid all assessments and dues does not amount to a ratification of an assessment made by persons other than the directors. *Ibid.*

In respect to assessments not made by the directors themselves the court distinguishes the case of Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252, in which the court said the assessment was a matter of mere arithmetical computation, analogous to the vote of a town for raising a tax, while in the Chase Case it says: "It can hardly be said that to make such an assessment as the referee in this case describes in his report was a matter of mere arithmetical computation which called for no exercise of discretion on the part of the directors." This assessment was found by the referee to include, among other things, about $1,600 for making the same and for estimated future expenses, for salaries of officers, for attending courts, and for printing and advertising.

The statutory power of a receiver of a mutual insurance company to make assessments upon premium notes is upheld in Hyatt v. McMahon, 25 Barb. 457, against the claim that such a statute was unconstitutional and void as to pre-existing notes. The court considers this contention to be conclusively answered by the general power of repeal reserved in the charter and general statute of incorporation.

The assessment of premium notes which by 36 Vict. chap. 44, O, §§ 41, 43, is to be made by the directors cannot by order of court be made by a master or receiver, especially where the statutory provision authorizing it to be done by a receiver has been omitted from the statute on revision. Hill v. Merchants' & Mfrs. Ins. Co. 28 Grant Ch. (U. C.) 560.

A receiver may lawfully make an assessment on a premium note under the Pennsylvania act of May 1, 1876, which authorizes him to do all acts which might be done by the corporation. Solly v. Moore, 11 Pa. Co. Ct. 333.

A voluntary assignee for creditors of a mutual insurance company cannot make a valid assessment on a premium note which is payable as the directors may require. Hurlbut v. Root, 12 How. Pr. 511.

An assignee for creditors of a mutual insurance company does not succeed to the powers of the corporation or of its directors, and has no authority to make an assessment upon premium notes even when they constitute the only assets of the company. Hurlbut v. Carter, 21 Barb. 221.

But directors of a mutual company have power

rectors, not exceeding 10 per cent in any six months, for the purpose of meeting losses and expenses for which the association may be liable, but only when there was not sufficient money raised from assessments or pledges of members to pay such losses when due; and all moneys so paid from said fund were to be regarded as advancements, and were to be paid from the funds of the association, as ordered by the directors. The directors were to select from their own number, or from the guarantors, the officers. That the fund of the association to pay losses and the necessary expenses shall consist exclusively of moneys raised by assessment on mutual pledges given by the members for their insurance, which assessment shall be made only by the directors or executive committee, and may be limited by the by-laws. All persons insuring in the association become members thereof during the period of their insurance. Afterwards the company

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to make an assessment upon members of the company after an assignment for creditors has been made. Schimpf v. Lehigh Valley Mut. Ins. Co. 86 Pa. 373.

For other illustrations of assessments by receivers, see Seamans v. Millers' Mut. Ins. Co., Howard v. Whitman, Capital City Mut. F. Ins. Co. v. Boggs, Tobey v. Russell, Cooper v. Shaver, Sands v. Sanders, Sands v. Graves, Sands v. Shoemaker, Bangs v. Duckinfield, Mutual F. Ins. Co. v. Phœnix Furniture Co., Lycoming F. Ins. Co. v. Langley, and other cases, *infra*, IX. f, *et seq.*

c. *Who to be assessed.*

A qualified membership may exist after the termination of a policy of insurance which will sustain a liability on a premium note for an assessment and for the whole amount of the note in default of payment of the assessment as required by charter. Hyatt v. Esmond, 37 Barb. 601. See also main case of IONIA, E. & B. FARMERS' MUT. F. INS. CO. v. IONIA CIRCUIT JUDGE.

One assessed by a mutual insurance company cannot complain that others who are not liable are also assessed, since he is not injured thereby. *Re* Slater Mut. F. Ins. Co. 10 R. I. 42.

Directors of a mutual insurance company in making assessments do not act judicially where the charter provides that members shall be bound to pay in proportion to the amount of their deposit notes, and their assessment is invalid if they assume the discretion to omit from assessment some members who are liable. Herkimer County Mut. Ins. Co. v. Fuller, 14 Barb. 373. They cannot take into account the length of time for which a person has been a member as affecting his liability to an assessment.

The omission from an assessment by a mutual fire insurance company of some of the members who are known to be liable makes it invalid as to others. Swing v. H. C. Akeley Lumber Co. (Minn.) 25 Ins. L. J. 303.

An assessment on a portion only of the members liable thereto when the rest are intentionally omitted, although with the intent to assess them afterwards, is held invalid as a departure from the provisions of the statute which requires assessments in proportion to the amount of premiums and deposits and there did not appear any obvious necessity for such departure. Marblehead Mut. F. Ins. Co. v. Hayward, 3 Gray, 208.

Members who give deposit notes subject to assessment for insurance in a mutual company which has power to issue policies on the cash plan also cannot defend against assessments on the ground that they are made upon deposit notes only and not also upon the members who are insured on the cash plan. Schimpf v. Lehigh Valley Mut. Ins. Co. 86 Pa. 373.

An assessment made upon the remaining notes after the directors had canceled such of the stock notes of a mutual insurance company as the company deemed to be worthless was held valid, where the company was authorized to cancel the worthless notes and its corporate powers had been vested in the board of directors. Marine Mut. M. Ins. Co. v. Neal, 50 Me. 301.

An agreement that an advance note should be subject to assessments "at an equal per cent with all other advancements" is to be taken in connection with a by-law of the company which permits the cancelation of advance notes whenever the company deems it to be for its own interests to cancel them, and therefore the remaining notes after such cancelation constitute all the notes that are required to be assessed. Maine Mut. M. Ins. Co. v. Swanton, 49 Me. 448.

A note stipulating for the payment of annual interest but upon which no interest has ever been paid is not entitled to the benefit of a by-law providing that notes upon which the interest has been paid in advance shall not be assessed until after other notes have been assessed to an amount equal to the interest paid. Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. 499; Crawford v. Susquehanna Mut. F. Ins. Co. (Pa.) 11 Cent. Rep. 653.

As to who are liable as members, see also *supra*, II.

d. *Marshaling funds.*

Under by-laws providing that directors may make such assessments as may be necessary, where there is no provision declaring premium and deposit notes to be absolute funds of the company and as such to be first applied to the payment of losses and expenses, the prior application of such premium and deposit notes is not necessary before making an assessment under the statute. Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen, 27.

The deposit notes should first be exhausted before resorting to the further liability imposed by Mass. Gen. Stat. chap. 58, §§ 48, 54, upon the policy holders as members of the corporation. Com. v. Monitor Mut. F. Ins. Co. 112 Mass. 150; Appleton Mut. F. Ins. Co. v. Jesser, 5 Allen, 446.

Under a by-law of a mutual fire insurance company that each member shall pay the premium and deposit his written agreement to hold himself liable for an equal amount in the capital stock of the company to be assessed and collected by the directors in such sums and at such times as they shall deem expedient, making all premiums and deposits thus paid in the absolute funds of the company pledged to pay expenses, borrowed money, and losses, and further providing that in case losses happen so as to consume the absolute fund each member shall be held to pay a certain further sum, the absolute funds must be exhausted before any further assessment is made. Appleton Mut. F. Ins. Co. v. Jesser, *supra*.

Earned premiums that are uncollectible and worthless may properly be regarded as "used up" within the meaning of a by-law providing for an assessment to pay losses "after the earned premiums shall have been used up." Whether the claims were worthless was held to be a question of fact for the jury. Marine Mut. M. Ins. Co. v. Neal, 50 Me. 301.

The other assets of the company are "exhausted," within the meaning of a provision that notes given for premiums in advance as additional security shall be liable for losses after the cash capital and other resources are exhausted, when it clearly appears that these resources are insufficient to pay

published a notice of incorporation, containing the matters required in such notices, and, in addition thereto, the following: "The said corporation, by its articles of incorporation and by-laws, authorizes and provides for a guaranty fund, not to exceed $50,000 consisting of limiting individual pledges made by certain of the incorporators and other members, which shall be paid as ordered by the directors, and as required in said contracts and by-laws;" also providing that the private property of subscribers to said fund should be exempt from the debts of the corporation, except to the extent and in accordance with the terms and conditions of their respective pledges. Said guaranty pledge provided: "I promise to take the number of shares of said fund set opposite my name, at $100 per share, payable on the order of the board of directors of said association, provided not to exceed 10 per cent thereof shall be payable in any six months,

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the liabilities and it is not necessary that the other assets should all be collected and applied before resorting to such notes. Osgood v. Toole, 60 N. Y. 475, affirming 1 Hun, 167.

Moneys received as cash premiums by a company lawfully doing business upon both mutual and stock plans, and properly used to pay losses and expenses to that extent, relieve from assessments members whose premium notes are then held, and the effect is to cast the greater burden upon those whose notes may happen to be in force thereafter when the company becomes insolvent; but there is no remedy for any injustice which may result from this mode of transacting the business of the company. Shaughnessy v. Rensselaer Ins. Co. 21 Barb. 605.

In the absence of any charter provision to the contrary effect, under a provision which fixes the burden of a loss at any particular time upon those who are then members of the company, the proceeds of insurance on the cash plan are subject to the same application as premium notes received during the same period. The cash premium belongs precisely where the premium note whose place it takes would belong and is subject to the same appropriation, with this modification, that it must be first applied and no part of it can be withdrawn upon the expiration of the policy although it should not have been all expended. Therefore the cash premiums cannot be lawfully applied to pre-existing liabilities of the company so as to leave the premium notes given in the same period that the cash premiums were taken subject to assessment for all the losses accruing during that period without the application of the same premiums to reduce them. Ohio Mut. Ins. Co. v. Marietta Woolen Factory, 3 Ohio St. 348.

The failure of the directors to comply strictly with the by-laws and credit the makers of notes the net profits of a certain year is immaterial, where all the profits were much less than the losses during the period which had to be considered, although for that particular year there were some net profits. Marine Mut. M. Ins. Co. v. Neal, 50 Me. 301.

e. *How and when made.*

Failure to pay an assessment does not work a forfeiture of the policy in a mutual company unless the assessment was made in accordance with the charter. Planters' Ins. Co. v. Comfort, 50 Miss. 662.

No part of an assessment can be recovered where it was partly invalid and the notice was for the assessment as an entirety. Victoria Mut. F. Ins. Co. v. Thomson, 9 Ont. App. Rep. 620.

A by-law which makes all members liable to assessment for losses when their policies are in force at the time of the assessment, and all members whose policies have expired liable for unpaid losses which existed at the time of the expiration, is binding on the directors in making an assessment, and must be followed by them. Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. 492.

The plain provisions of the charter of a mutual insurance company must be followed by the directors in making an assessment for losses, even if they deem some other rule more equitable. Slater Mut. F. Ins. Co. v. Barstow, 8 R. I. 343.

Assessments upon members of mutual fire insurance companies cannot be graduated by the age of the policy under a provision that they shall be made "in proportion to their premium and deposit." Com. v. Mechanics' Mut. F. Ins. Co. 112 Mass. 192.

The equitable assessment of all the notes held by a company which is provided for by by-law in a certain contingency is properly made by assessing them upon the basis of the rating of the risk and not by percentage upon the face of the notes, where some of the notes were made with annual interest and others were made without interest, and in a sum much larger than those which bore interest. Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. 499.

Mere errors of miscalculation constituting a variance between notices of assessment and the amounts proved on trial will not destroy the claim for the assessment. Thropp v. Susquehanna Mut. F. Ins. Co. 125 Pa. 427.

An assessment made upon all the polices of a mutual company to pay the unpaid salary of its president and bills of lawyers for professional services, if substantially correct, will not be held invalid even if it is not mathematically exact and is not so apportioned that each member will have to pay exactly his proportion for the services performed during the term of his policy. Tobey v. Russell, 9 R. I. 58.

A slight disproportion occasioned by laying an assessment on deposit notes only instead of the amount of the premiums and deposit notes will not invalidate an assessment on premium notes which call for payment at such times as the directors may, agreeably to their by-laws, require, where the by-laws provide that the deposit note shall be double the premium, and that on all policies for less than a year the deposit note may be for such a sum as the president may determine. It is said that the only cases in which any practical difference would result are those of a small number of policies issued for less than a year. People's Mut. Ins. Co. v. Allen, 10 Gray, 297.

Where an ascertained liability was found to exist on a certain day, and it was impracticable to assess this amount if strictly confined to policies in existence when the items of this liability accrued, an assessment upon all the policies outstanding at the time this amount was ascertained in proportion to the time of their existence and the amount of their premiums was sustained as the nearest approximation to the correct result. *Re* People's Mut. Eq. F. Ins. Co. 9 Allen, 319.

A division of the total expenses for a year into twelve equal parts and adding to each part the amount of losses for a certain month and assessing this upon the policies in existence during that month was sustained as substantially correct. *Ibid.*

Basing an assessment upon a computation of losses from month to month without regard to the fact that policies expire at various times during each month or adopting as the general rule of computing losses to take the month in which the

and provided the whole amount of my subscription shall be void, at my option, after three years from" February 24, 1887. The sum of $50,000 was subscribed to this fund. In no other respect was the law touching insurance companies as found in Code, §§ 1122–1131, and other sections relating to stock companies, complied with.

The company proceeded to transact a general insurance business, taking all kinds and classes of risks, issuing several kinds of policies, upon amounts received in cash and partly in cash and partly in notes; and sometimes, when cash policies were issued, and the money therefor was not paid at the time, a promissory note was taken in lieu of cash. Policies were also issued upon the mutual plan, and a note, incorporated in the application, was taken for the amount of the premium, and an assessment for one sixth of said amount, or one year's premium, was collected in advance, and annually thereafter.

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policy terminated and exclude that in which it commenced does not make the assessment invalid. People's Mut. Ins. Co. v. Allen, *supra*.

A reasonable approximation to equality is sufficient in making an assessment, where exact equality cannot be obtained. Citizens' Mut. F. Ins. Co. v. Sortwell, 10 Allen, 110; Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen, 27.

The approximation to an assessment upon several losses as they occur is sufficient without making an assessment upon every loss however insignificant in amount. Marblehead Mut. F. Ins. Co. v. Underwood, 3 Gray, 210.

Computations for assessments need not be made upon the occasion of each loss, but may be made upon a rule that will approximate to it as near as is practicable and reasonable. New England Mut. F. Ins. Co. v. Belknap, 9 Cush. 140.

When several losses occur at the same time and so nearly together that the same notes are liable to be assessed for the payment of them all but one assessment is necessary. Shaughnessy v. Rensselaer Ins. Co. 21 Barb. 605.

An assessment may be made upon estimates of liabilities without any reference having been made to determine definitely the amount thereof. Davis v. Parcher & J. & A. Stewart Co. 82 Wis. 495.

Estimates of losses after a great fire in a city, based on the knowledge of the company's risks in that city before the actual liabilities had been fully ascertained, may constitute a sufficient basis for an assessment. Hummel's Appeal, 78 Pa. 320.

But an examination and determination of the amount of losses and expenses to which a note is liable to contribute, and of the whole amount of notes liable to assessment therefor, must be made by the directors of a mutual insurance company or by the receivers before they can make any assessment on such notes, and the omission of the assessment required by the contract cannot be supplied by proof on the trial showing that an assessment might properly have been made. Sands v. Graves, 58 N. Y. 94.

The amount of claims which the receiver of a mutual insurance company or the court will allow as just demands against the company, together with an indebtedness previously allowed by the directors of the company as shown by their books, must be ascertained before an assessment can be made to pay such indebtedness. Downs v. Hammond, 47 Ind. 131; Embree v. Shideler, 36 Ind. 423.

A simple ascertainment of the rate per cent for making an assessment, without completing and consummating the assessment by carrying out the amount which each member is to pay upon an extension book, does not make a valid assessment, and a notice given thereupon is premature. Bangs v. McIntosh, 23 Barb. 591.

An assessment stating the rate per cent at which the premium notes in force at specified dates are respectively assessed is not insufficient because it does not specify the name of a party bound to contribute nor the amount of his notes. The parties interested possess, or are deemed to possess, the means of reducing the notice to a certainty. Bangs v. Duckinfield, 18 N. Y. 592.

A general assessment and notice that every premium note in each class is assessed for its full amount is sufficient as to a note in a class in which the losses exceed the amount of all the notes, especially if the losses of the company exceed what is collectible on all notes of all classes. The particulars of the assets and debts need not be stated in the assessment. Sands v. Sanders, 26 N. Y. 239.

An assessment on a premium note given to a mutual fire insurance company is held within the power of the directors at any regular meeting without prior notice that the assessment would be made, although one by-law prescribes: "In case an assessment be needed for any purpose the directors shall have power to order such assessment at any meeting called for that purpose,"—as the intent of this provision is to provide for exceptional cases and not to negative the ordinary power of the directors. Bay State Mut. F. Ins. Co. v. Sawyer, 12 Cush. 64.

An assessment or call made at a meeting of a board of directors was held to be void when the only directors present were persons who had not been legally chosen as directors, but had been voted for to increase the board at a meeting called for a different purpose. People's Mut. Ins. Co. v. Westcott, 14 Gray, 440.

The record need not affirmatively show that a quorum of the members were present as required by a by-law of a mutual insurance company at the time when a statute was accepted where the contrary does not appear and the record shows that the meeting was duly called and proper notice given. Citizens' Mut. F. Ins. Co. v. Sortwell, 8 Allen, 217.

A vote by directors of a mutual insurance company is a sufficient requirement of a payment to be made on a premium note under a charter providing that all assessments shall be determined by them. Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252.

A resolution by a board of directors of a mutual insurance company levying a certain percentage on the premium notes of all the members but without specifying their names or the precise sum required to be paid by each may constitute a good and valid assessment. Lycoming F. Ins. Co. v. Rought, 97 Pa. 415.

But an assessment specifying different rates for "small notes" and "large notes" without showing how these notes are distinguished from each other or how it is to be determined which class will include any particular note is insufficient. Bangs v. Duckinfield, 18 N. Y. 592.

The annual assessment enforceable by a penalty provided for by a New Hampshire statute which authorized the company to require a a certain per cent to be paid by a member before his policy was issued and thereafter make an annual assessment not exceeding the original sum paid in was held in Rix v. Mutual Ins. Co. 20 N. H. 198, to be something different from a call for a payment of a portion of a note given for the deposit or premium on which the policy was issued.

In an equity case the court, while relieving the plaintiff from the effects of a supposed forfeiture, imposed on him the condition of treating a resolution to wind up the affairs of the company as hav-

Each note provided that not more than one sixth of the amount should be assessed against the maker in any one year. In these cases applications were made by the insured. In cases where cash was taken for insurance, or notes in lieu of it, no applications were made by the insured. Such policies were ordinarily issued upon a daily report from the agent soliciting the risk. In some cases applications were taken with an instalment note incorporated therein, providing in terms for the payment of the premium in fixed annual instalments. The policies in form were like those issued by regular mutual and stock companies. All policies provided for cancelation by the company,—in one mutual form by tendering to the assured a ratable proportion of the premium received, in the other by returning the obligation or note, or by notice by mail to the assured; in the cash form of policy, upon giving notice to the assured, and returning a *pro rata* share of the

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ing the legal effect of an assessment of 100 per cent on the premium notes. Conigland v. North Carolina Mut. L. Ins. Co. Phil. Eq. 341, 98 Am. Dec. 89.

During the war of the rebellion a mutual assurance society in Virginia attempted to assess quotas on property insured in Berkley county, which was within loyal territory while the office of the company was in Richmond. It was held that this transaction was not valid but that the power to make such assessments was suspended, at least during the war. Mutual Assur. Soc. v. Berkley County Supers. 4 W. Va. 343.

Delay in making an assessment, if not unreasonable, will not invalidate it, although the statute requires that it shall be made to pay any just claim forthwith. Marblehead Mut. F. Ins. Co. v. Underwood, 3 Gray, 210.

Several months delay in making an assessment is held insufficient to make it invalid. People's Mut. Ins. Co. v. Allen, 10 Gray, 297.

On a loss exceeding in amount all the deposit notes of a mutual company it is bound to assess them for the full value and cannot apportion the losses by annual assessments of 20 per cent thereof each, although its policies are issued for a term of five years. Rhinehart v. Alleghany County Mut. Ins. Co. 1 Pa. 359.

f. *Amount; items included.*

The limitation of liability of a member to assessment, fixed by Mass. Stat. 1797, chap. 67, at $2 for each dollar advanced as premium on deposit, is not changed as to a company chartered in 1798 by Mass. Gen. Stat. chap. 58, § 48. Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116.

Simple excess in the amount of an assessment arising from error of judgment will not vitiate the assessment, where the managers act honestly and prudently. Rosenberger, L. & Co. v. Washington Mut. F. Ins. Co. 87 Pa. 207.

An assessment made by the managers of an incorporated mutual fire insurance company largely in excess of an amount required to pay the loss for which they are empowered by its charter to make an assessment is void and may be disregarded by the members. Farmers' Mut. F. Ins. Co. v. Knight (Ill.) *post*, —.

An assessment upon the members of a mutual insurance company of more than double the amount of the deficiency in its funds is held to be unreasonable and void, if no special circumstances are shown which require so large an assessment. People's Eq. Mut. F. Ins. Co. v. Babbitt, 7 Allen, 235; Traders' Mut. F. Ins. Co. v. Stone, 9 Allen, 483. But both these cases are disapproved on this point in Com. v. Dorchester Mut. F. Ins. Co. 112 Mass. 142.

An assessment upon the members must be reasonable and is invalid if it is for a greater amount than is necessary to meet existing claims, with a reasonable allowance for expenses and failures to make collections. People's Eq. Mut. F. Ins. Co. v. Babbitt, 7 Allen, 235. This case is criticised in Com. v. Dorchester Ins. Co. as overlooking the fact that the statute is not the only authority or source of right to make assessments, and does not attempt to control or restrict the exercise of rights or powers conferred by contract, and the court decidedly disagrees with the earlier decision so far as it denies the right of members to confer upon an association by contract the powers requisite to determine the necessity and amount, and to apportion by assessment the contribution which each shall make to a common fund for their several obligations.

The fact that assessments are much more in amount than the liabilities of the company is not sufficient to show that the assessment is invalid, where it appears that a considerable part of the assessments cannot be collected. Buckley v. Columbia Ins. Co. 92 Pa. 501.

A deficiency in an assessment resulting from inability to collect from a portion of the members may be made good by another assessment on the members who have paid. Davis v. Sharp, 2 West. Law Month. 40 (Walker & Bates' Ohio Dig. vol. 1, p. 657).

Proper allowances may be made on assessment for failures likely to result in collection in consequence of insolvency of members and other causes, and if reasonable in amount and consistent with good faith they will not vitiate the assessment. Rosenberger, L. & Co. v. Washington Mut. F. Ins. Co. 87 Pa. 207; Bangs v. Gray, 12 N. Y. 477, Reversing 15 Barb. 264; Wardle v. Townsend, 75 Mich. 385, 4 L. R. A. 511. See also the main case of IONIA, E. & B. FARMERS' MUT. F. INS. CO. v. IONIA CIRCUIT JUDGE.

But if in addition to a sum actually needed the assessment aims to accumulate a fund for payment of future losses, it is in excess of the authority of the managers and not binding on the members because it is no part of the contract that members shall pay *pro rata* into a fund for payment of losses when they shall occur and which may not occur until after their membership ceases. Rosenberger, L. & Co. v. Washington Mut. F. Ins. Co. *supra*.

Assessments on members of a mutual insurance company in the hands of a receiver may be made to include the expenses of the receivership and also an allowance for shrinkage and uncollectible assessments. Seamans v. Millers' Mut. Ins. Co. 90 Wis. 490.

An allowance for expenses of making collection of assessments may be included therein. *Re* People's Mut. Eq. F. Ins. Co. 9 Allen, 319; Sands v. Boutwell, 26 N. Y. 233.

An assessment on members of a mutual insurance company is not to be limited to the indebtedness of the company and the expense of collection, where the statute provides that it shall also include reasonable compensation for a receiver and for the expenses of closing up the business. Tobey v. Russell, 9 R. I. 58.

Including 10 per cent for expenses in an assessment upon premium notes does not render it void. Hyatt v. Esmond, 37 Barb. 601.

Including 35 per cent additional to meet estimated expenses, bad debts, interest, and cost of collection when making an assessment for losses cannot be justified by the general authority of directors to assess agreeably to their act of incorporation and by-laws. York County Mut. F. Ins. Co. v. Turner, 53 Me. 225.

Including in an assessment for losses 95 per cent

premium. Policies could be canceled upon request of the assured, in the mutual forms, by surrendering the policies and payment of all assessments due at that time in the one form, and all assessments charged against it at the end of the month in the other; and in the cash form, upon request of the assured, the company reserving the usual short rates for the time the policy was in force. An instruction and rate book was issued for agents, in which attention was called to the fact that assessments could not exceed one annual premium in any one year, and other matters which need not be set out. When it began business the company also issued cards, circulars, and folders advertising its assets and mode of transacting business, and setting forth that it had a guaranty fund of $50,000 pledged to the payment of losses, in the event that money raised from the assessments on premium notes should be insufficient for that purpose. It also represented that it was do-

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additional to meet estimated bad debts, interest, expenses, and costs of collection is held illegal in York County Mut. F. Ins. Co. v. Bowden, 57 Me. 286, when there is no authority for it in the charter and by-laws but the law contemplates assessments to meet actual existing liabilities in just proportions. The court says if made to meet possible contingencies a fund might be raised which might never be called for, and that to sustain such an assessment might do great injustice to the other members of the company. It is further said that such an assessment is in direct violation of some charter provisions, among which is a provision that each note shall pay the expenses of collecting assessments upon it and a lien created upon the property to secure the cost of collection as well as the assessment.

In an assessment by a receiver to pay liabilities, the expenses of a suit establishing a claim and the receiver's pay and expenses, with all other incidental expenses in collecting the assessment and settling up the affairs of the company, may be included. Howard v. Whitman, 29 Ind. 557.

But by Indiana statutes (1 Gavin & H. §§ 46, 47, 50, p. 395), assessments were allowed to pay losses only, and not to pay expenses of the company. Sinnissippi Ins. Co. v. Taft, 26 Ind. 240; Sinnissippi Ins. Co. v. Wheeler, Id. 336; Sinnissippi Ins. Co. v. Farris, Id. 342.

Fraud in the manner of making assessments upon members of a mutual fire insurance company by making them largely in excess of the unpaid loans and losses of the company and including losses which occurred prior to the premium notes assessed may be shown in defense against an assessment. People's F. Ins. Co. v. Hartshorne, 90 Pa. 465.

An assessment which includes the amount of previous assessments for losses which have been paid is invalid. Cooper v. Shaver, 41 Barb. 151.

An assessment is not void because it embraces a prior assessment upon the same premium note which still remains unenforced. Sands v. Sweet, 44 Barb. 108; Jackson v. Van Slyke, Id. 116.

An outstanding unpaid assessment should not be merged in a later assessment, but the latter should be without reference to the former. Campbell v. Adams, 38 Barb. 132.

A promise in a deposit note to pay "in such portions and at such times as the directors of said company may, agreeably to their act of incorporation and by-laws require," will justify an assessment including reasonable sums for interest on money borrowed and probable losses by bad debts, as well as an allowance for collecting assessments in the form of an abatement for prompt payment. Jones v. Sisson, 6 Gray, 288. See also the main case of IONIA, E. & B. FARMERS' MUT. F. INS. CO. v. IONIA CIRCUIT JUDGE.

Interest is recoverable on a premium note for the nonpayment of an assessment after it has become payable. Hyatt v. Wait, 27 Barb. 29; Sands v. Annesley, 56 Barb. 598.

But interest is not recoverable on the amount of a premium note when the right to recover is based upon a default to pay a much smaller assessment and by way of a penalty. Bangs v. McIntosh, 23 Barb. 591.

The case of Bangs v. McIntosh is followed in Bangs v. Bailey, 37 Barb. 630, where it was said that "on nonpayment of a partial assessment, the deposit note is not due and owing in the sense of any rule which imposes interest upon a debt."

An addition of 25 per cent to the amount of an assessment, unless paid within thirty days after notice, is not invalid. People's Mut. F. Ins. Co. v. Groff, 154 Pa. 200.

A by-law giving the right to recover 10 per cent per month upon unpaid assessments is held invalid, where the charter of the company gives the company a right of action to recover such assessments when they have remained unpaid for thirty days after demand, and is construed by the court to allow the recovery of simple interest thereon in such action. National Mut. F. Ins. Co. v. Yeomans, 8 R. I. 25, 86 Am. Dec. 610.

The authority of a receiver to levy assessments is strictly limited by the order of court granting it, and an order authorizing an assessment equal in amount to assessments previously levied will not justify an assessment by him including penalties for nonpayment of a prior assessment in addition to the amount of the assessments themselves. Capital City Mut. F. Ins. Co. v. Boggs, 172 Pa. 91.

Where the money raised by previous assessments was not apportioned *pro rata* by the company, but some losses were paid in full, some in part, and some not at all, a receiver may assess the members of the company at the time when each loss occurred respectively for the proportion of money which had been diverted from its proper object to be paid upon such loss for their benefit. Tobey v. Russell, 9 R. I. 58.

Losses occasioned by bad investments may be covered by an assessment on members of a mutual fire insurance company and the fact of a previous illegal assessment which has not been enforced will not defeat an assessment made in lieu thereof, with a provision for crediting those who paid the illegal assessment. People's Mut. Ins. Co. v. Allen, 10 Gray, 297.

An assessment may include a sum to be raised for dividends due and not paid in one class of the company's business when this is necessary to insure the payment of all the liabilities of the company. *Re* Slater Mut. F. Ins. Co. 10 R. I. 42.

A formal assessment to the entire amount of a premium note, made without any inquiry or determination as to the amount of losses outstanding and of the notes liable to be assessed therefor, is void. Sands v. Graves, 58 N. Y. 94.

After policy holders have paid their deposit notes in full, which is the measure of their liability under their contract, they cannot be assessed by a receiver. Seamans v. Millers' Mut. Ins. Co. 90 Wis. 490.

g. Notice or demand.

A notice of assessment before the assessment is complete is inoperative. Bangs v. McIntosh, 23 Barb. 591.

A notice of an assessment on a premium note is not invalid because it says that the assessment

ing business under state authority, and that it was duly authorized, under chap. 4 of title 9 of the Code, to transact a fire insurance ousiness. It also made reports to the auditor of state showing the guaranty fund. The business transacted by the company outside of Iowa was mostly on the cash plan, and generally on policies running a year, and the indebtedness of the company at the time it made the assignment was largely for losses incurred in other states. In February, 1888, the company prepared a statement of the policies it had issued, and sent it to the auditor of state, who issued to it a certificate under § 1153 of the Code, and a like certificate was issued for the years 1889 and 1890. In 1890, and possibly in 1889, the income of the company was not sufficient to meet its losses and expenses.. On January 23, 1891, the guarantors met, and ordered a special assessment of 10 per cent on the amount of each subscription to the guaranty fund, which was charged

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was made by the company, when the board of directors only have power to make the assessment, as the legal effect is the same. Williams v. German Mut. F. Ins. Co. 68 Ill. 387.

A notice which does not give a member information from which he can tell what amount he is required to pay is not valid. Bangs v. McIntosh, *supra*.

Under a by-law providing that notice of assessments designating the class or classes of property assessed shall be given, a notice which designates the class need not give notice of the amount to be paid, especially when the members to be assessed have actual notice of the precise amount claimed and of the losses and expenses which give rise to the assessment. Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252.

A notice published in a newspaper to the members of a specified class in a certain mutual fire insurance company, "that the directors of said company have ordered an assessment on the members of said class payable on or before the 15th of February, 1857, with interest thereto," although it does not state the names of parties assessed or the amounts assessed or the percentage of assessment, is held sufficient in York County Mut. F. Ins. Co. v. Knight, 48 Me. 75, under a charter which in general terms requires notice to be published without specifying the form of it.

A by-law requiring notice of an assessment to be published in one newspaper in a certain county and "in such other newspapers as the directors may deem necessary" seems to be considered sufficiently complied with by notice in one newspaper in the county named, unless the directors order further publication. Sands v. Boutwell, 26 N. Y. 233

It was held in Cooper v. Shaver, 41 Barb. 151, that the publication of notice by the secretary of the company provided for in New York Laws 1853, chap. 466, § 13, cannot be literally carried out after the suspension of the powers of the company by sequestration, and hence that provision must be regarded as directory which is sufficiently satisfied by the making of an actual demand by the receiver before commencing suit.

The court was equally divided in Sands v. Sanders, 26 N.Y. 239, on the proposition that a receiver has no discretion as to giving notice of assessment in a mode different from that required by by-laws when the statutes provide that the directors shall give notice "in such manner as they shall see fit, or as the by-laws shall have prescribed," even if it might be held that the directors had discretion to give notice in another mode.

But in Sands v. Graves, 58 N. Y. 94, the opinion by Grover, J., says that he concurs with those who in Sands v. Sanders thought a recovery could not be had on an assessment in the absence of publication as required by the by-laws.

So the power of the receiver to exercise any discretion in giving notice different from that prescribed by by-laws is denied in Sands v. Shoemaker, 4 Abb. App. Dec. 149.

Personal notice of an assessment and demand of payment cannot aid a defective publication, where the statute requires personal notice as well as publication. Sands v. Sanders, and Sands v. Shoemaker, *supra*.

That personal notice is not sufficient to supply a defect in publication of a notice as required by by-law is also declared in Sands v. Graves, 58 N. Y. 94.

Personal notice is held sufficient under a provision for an assessment within thirty days after notice "shall have been published." Jones v. Sisson, 6 Gray, 288.

Notice of assessment being required by by-laws to be given in two newspapers after which sixty days were allowed for payment, it was held that personal notice was not a sufficient substitute. Northampton Mut. Live Stock Ins. Co. v. Stewart, 39 N. J. L. 486.

That a personal demand is necessary under New York Laws 1853, 909, § 13, before an action can be brought against the maker of premium notes for an assessment, was held in Sands v. Annesley, 56 Barb. 598.

But without mentioning this case, the court of appeals overrules it by deciding that a personal demand is not necessary under New York Laws 1853, § 13, in order to make a person liable for an assessment on his premium note which he has agreed to pay at such time or times as the directors may require agreeably to their charter and by-laws, but personal demand is thereby made necessary only when recovery on the entire note is claimed because of neglect to pay an assessment within thirty days after publication of notice. Sands v. Lilienthal, 46 N. Y. 541.

There being no requirement of a demand before the commencement of a suit for assessments of which notice was published in the statute under which a mutual fire insurance company was incorporated, such demand is held not to be necessary, but the published notice is regarded as a sufficient demand. York County Mut. F. Ins. Co. v. Knight, 48 Me. 75.

A notice of an assessment which on its face shows that it includes losses before the party assessed became a member of the company throws on the company the burden of proving that it did not in fact include such losses. Susquehanna Mut. F. Ins. Co. v. Tunkhannock Toy Co. 15 W. N. C. 306.

Notice of assessment was held, in Frey v. Wellington Mut. Ins. Co. 4 Ont. App. Rep. 293, to be insufficient because mailed on the 12th requesting payment on the 24th of the same month, while the statute required it to be given thirty days before payment.

Failure to give a member of a mutual insurance company notice of an assessment as required by the by-laws will prevent the recovery of the assessment, and a foreign attachment issued to reach the assessment is not a substitute for the notice. Susquehanna Mut. F. Ins. Co. v. Staats, 4 Pennyp. 313.

h. *Conclusiveness.*

An assessment by a receiver of a mutual insurance company under order of court, made on his application without notice, is not a judicial determination, and is no more conclusive than an assess-

up to them on the books of the company. February 3, 1891, the guarantors rescinded their former action, and ordered all sums paid refunded. January 26, 1891, the board of directors ordered an assessment of 25 per cent upon the gross amount of each deposit not held by the company upon policies in force prior to January 1, 1891, for the purpose of paying losses and expenses. On February 3, 1891, the directors met, and ordered that any moneys paid on account of special assessment of guaranty fund be refunded. At the same time nearly all the guarantors gave notice of their withdrawal from the guaranty pledge, to take effect at that time. At the same meeting the board of directors ordered that a general assignment be made by the company of all its property for the benefit of all its creditors, and on the same day the president and secretary of said company executed an assignment of all the property of the company to James P. Sherman,

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ment made by the directors. Bangs v. Duckinfield, 18 N. Y. 592; Mutual F. Ins. Co. v. Phœnix Furture Co. (Mich.) 2 Det. L. N. 159.

But an assessment upon members of a mutual fire insurance company which a receiver is ordered by the court to make, specifying in detail the exact percentage he shall levy, is held to constitute an adjudication against a member when action against him is brought for the assessment in another state. Lycoming F. Ins. Co. v. Langley, 62 Md. 196.

An order of court authorizing a receiver to levy an assessment upon members of a mutual insurance company, although conclusive as to the amount of the assessment to be levied, does not preclude defenses peculiar to individuals assessed, such as the fact that a person had never been a member of the company. Capital City Mut. F. Ins. Co. v. Boggs, 172 Pa. 91.

i. *Lien.*

The lien on property of a member of a mutual insurance society as security for his liability is dependent on the provisions of the statutes.

A lien upon the property of a member of a mutual insurance company for the assessments made on his deposit note constitutes a legal encumbrance upon the estate in the hands of his administrator, and when the property is worth much more than the assessments it is the administrator's duty to redeem it by payment of them, although a claim against the general funds of the estate has been barred by rejection thereof by a commissioner on failure to take an appeal from his decision. Tuttle v. Robinson, 33 N. H. 104.

A judgment entered for an assessment upon a premium note under the Pennsylvania acts of 1838 and 1843, which are parts of the company's charter, cannot be enforced as a general judgment against any property of the insured, but only as a lien upon the particular property insured. Halfpenny v. People's F. Ins. Co. 85 Pa. 48.

A certificate of discharge in insolvency of a member of a mutual insurance company does not relieve the insured property from liability to a special judgment authorizing a levy of execution upon that property only to enforce a lien for assessments given by Mass. Rev. Stat. chap. 37, §§ 36, 37. Bowditch Mut. F. Ins. Co. v. Jackson, 12 Gray, 114.

A by-law giving the company a right to retain a premium note and such amount remaining unpaid thereon as a board of directors may deem sufficient security for assessments that may be made until the expiration of the policy when paying a loss is sustained in Susquehanna Mut. F. Ins. Co.'s Appeal, 105 Pa. 615, as creating a lien thereon for assessments levied on such premium note during the term of the policy, both before and after the loss which occurred under that policy.

This case also decides that payment of money into court pending the determination of the question of the right of the company to retain out of the proceeds of a policy a sum to secure future assessments during the term of the policy does not defeat the company's right to a lien on a fund for such purpose under a by-law of the company.

And the fact that the company defended an action on a policy on the ground that it was forfeited and void does not estop the company from asserting its right to a lien under its policy upon the amount recovered thereon for assessments that may be made for subsequent losses during the term of the policy.

Also that a judgment for defendant in an action for assessments rendered on the ground that proper notices had not been given does not bar the company's right to a lien under its policy upon the proceeds of the policy in case of loss to secure subsequent assessments for losses during the term of the policy.

As to lien, see also Mutual Assur. Soc. v. Watts, and Mutual Assur. Soc. v. Faxon, 19 U. S. 6 Wheat. 606, 5 L. ed. 342, *supra*, II. b.

j. *Set-off.*

A premium note given to a mutual insurance company, payable at such times as the directors require, cannot be set off against a claim for insurance when no assessment on the note has been made. Hagan v. Merchants' & B. Ins. Co. 81 Iowa, 321.

Against the liability of a member of a mutual fire insurance company to assessment in case of the company's insolvency, he cannot set off any claim for an unearned premium on account of his own policy which is canceled by the insolvency of the company. Com. v. Massachusetts Mut. F. Ins. Co. 112 Mass. 116; Hillier v. Allegheny County Mut. Ins. Co. 3 Pa. 470, 45 Am. Dec. 656.

But a valid claim for a loss by fire which accrued before the insolvency of the company can be set off against a liability of a member after the property of the company is sequestered and placed in the hands of receivers, and the fact that the company holds collateral security for the payment of its claim is immaterial if no other person is interested on either side as debtor or creditor. Com. v. Shoe & L. Dealers' F. & M. Ins. Co. 112 Mass. 131.

On the other hand, it was held in New York that a loss adjusted in favor of a member of a mutual company before the commencement of proceedings to dissolve it cannot be set off against his indebtedness for premiums due upon his policies, as the premiums constitute a fund for the benefit of all creditors. The court considers that the mutual feature in such company distinguishes it from the case of an ordinary insurance company which has no mutual relations and obligations existing among its corporators. In this case, however, the notes were not given for the purpose of assessments, but were for fixed premiums which in the contemplation of the charter should be paid in cash, and the notes could only be received as in lieu of cash. Lawrence v. Nelson, 21 N. Y. 158.

Where the member of a mutual insurance company actually paid the premium on a policy of insurance instead of having his premium note applied thereto, when that was given for advance premiums and security, entitling him to certain compensation, he cannot afterwards and after renewing his premium note in full recover back the renewed note and have the premium which he paid

defendant herein. On the next day said board of directors met, and elected said Sherman as assignee. On the assessment made by the directors between $4,000 and $5,000 was collected. On May 13, 1891, the assignee made a report to the district court, in which he asked that the assessment heretofore made be set aside, and a new one ordered on a basis prepared by him; and an order to that effect was made, without notice to policy holders, and on September 17, 1891, the board of directors made an assessment. Under this order of the court the assignee was collecting assessments and threatening to bring suits against the policy holders, when plaintiffs' bill was filed, upon which, after a hearing, the court, on June 17, 1892, found for plaintiffs, and set aside the orders theretofore made, making assessments, ordering the cancelation of all notes and obligations made by plaintiffs to the company, and enjoining the assignee and the company from suing or col-

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taken out of it. Bone v. Ballin, 1 Sandf. 181. The court says the act of renewing the note in full cannot be regarded otherwise than as a determination to have the benefit of a continuing subscription note with its anticipated benefits of the compensation allowed therefor and the extended credit for premiums which they might incur.

But where a person stood a debtor on the books of a mutual insurance company at the time of its failure for premiums for insurance taken by him, and at the same time the company held his renewal note for a balance due on a note given for premiums in advance and security after deducting earned premiums, it was held that on paying the premiums charged to him he could have them deducted from the note sued upon. Merchants' Mut. Ins. Co. v. Leeds, 1 Sandf. 183. In this case he took the insurance in question after giving the renewal note and made a tender of the premiums to the company after the suit was begun on the note. See also Thropp v. Susquehanna Mut. F. Ins. Co. *infra*, IX. k, 1.

k. *Procedure to enforce.*

1. *In general.*

A premium note payable as the directors may from time to time require is a note for the full amount of its face within the meaning of a provision basing the jurisdiction of a county court upon the amount sued for. Farmers' Mut. F. Ins. Co. v. Marshall, 29 Vt. 23; Washington County Mut. Ins. Co. v. Miller, 26 Vt. 77.

An assessment upon a former member of a mutual insurance company, levied after the expiration of his policy, is to be collected, not by suit upon the premium note, but to recover the amount assessed. Davis v. Sharp, 2 West Law Month. 40 (Walker & Bates, Ohio Dig. vol. 1, p. 657).

An attempt to enforce liability on a premium note by suit in chancery was unsuccessful in M'Culloch v. Indiana Mut. F. Ins. Co. 8 Blackf. 50; Indiana Mut. F. Ins. Co. v. Chamberlain, Id. 150.

In a suit for an injunction to restrain the receiver of a mutual insurance company from assessing premium notes for losses upon policies issued on cash premiums the creditors of the company are necessary parties with an interest adverse to the makers of the premium notes, and have a standing to ask for the setting aside of a judgment granting such an injunction. Hubbard v. Eames, 22 Barb. 597.

Assessments or calls made by virtue of the contract contained in the deposit note of a member of a mutual fire insurance company are not within the provisions of Mass. Stat. 1862, chap. 181, § 1, providing for a bill in equity to examine an assessment or call made by directors, but this remedy is provided only in case of assessments or calls made by authority of statute. Com. v. Dorchester Mut. F. Ins. Co. 112 Mass. 142.

The New York act of 1862, chap. 412, authorizing a reference of any controversy between receivers and members of a mutual insurance company is not unconstitutional as an impairment of the right of trial by jury. Sands v. Harvey, 4 Abb. App. Dec. 147; Sands v. Kimbark, 27 N. Y. 147; Sands v. Tillinghast, 24 How. Pr. 435.

There is nothing in the Constitution of the United States or of the state of Pennsylvania which precludes a member of a mutual insurance company from waiving a trial by jury upon an assessment and agreeing to the specific manner in which a judgment may be entered against him under a statute providing for the speedy collection of assessments. Krugh v. Lycoming F. Ins. Co. 77 Pa. 15.

One who accepts a policy in a mutual company expressly declaring that he has deposited a note subject to assessment at such times as the board of directors may by the act of incorporation require thereby subjects himself to the method of speedy collection of assessments provided by the Pennsylvania act of July 26, 1842. *Ibid.*

A statute providing for the ratification by a court of an assessment upon the members of a mutual fire insurance company upon general notice by publication or otherwise to all parties interested is not unconstitutional, and such proceeding may be made by a case in equity without providing for a jury trial. Hamilton Mut. Ins. Co. v. Parker, 11 Allen, 574.

A judgment rendered against the maker of the note after the insured building had been burned, and the premises transferred by him, is inoperative and void because there is nothing upon which it can attach, when it is entered under the statutory provision as a judgment by confession by virtue of a warrant of attorney. But these statutes do not abridge the power of the company to collect its assessments by ordinary process. Halfpenny v. People's F. Ins. Co. 85 Pa. 48.

An action after the expiration of a policy to recover assessments upon a member of a mutual insurance company is not such a final determination of his liability as to preclude a subsequent action for other assessments to pay losses not adjusted at the time of the prior action but which occurred during the life of his policy. Susquehanna Mut. F. Ins. Co. v. Mardoff (Pa.) 23 Pitts. L. J. N. S. 231.

The refusal by the court of leave to set off a claim for interest and assessments upon a policy holder's premium notes against his judgment recovered on a policy for property destroyed does not bar the right to recover such interest and assessments in a subsequent suit. Thropp v. Susquehanna Mut. F. Ins. Co. 125 Pa. 427.

The right of a receiver to recover costs in an action for an assessment although the amount is less than $100, is sustained in Bacon v. Clyde, 70 Mich. 183, overruling *dictum* in Tolford v. Church, 66 Mich. 449. See also main case of IONIA, E. & B. FARMERS' MUT. F. INS. CO. *v.* IONIA CIRCUIT JUDGE.

2. *Statement and pleadings.*

The subject of pleading is here noticed only so far as it touches matters peculiar to actions against members of mutual insurance companies.

A statement of the president or secretary of a mutual insurance company pursuant to the Ohio act March 27, 1841, is prima facia evidence that the assessment was duly levied and due notice given of the same as against one whose policy has not expired. Davis v. Sharp, 2 West. L. Month. 40 (Walker & Bates, Ohio Dig. vol. 1, p. 657).

lecting the same, and from transferring the same. From this decree the appeal is prosecuted.

2. Appellants insist that plaintiffs cannot maintain this suit in equity, for that they have a plain and adequate remedy at law. This question is first raised in this court. Having failed to make the point below, and by taking issue on the facts alleged in the bill, the defendants have treated the action as properly brought in equity, and are now concluded from claiming to the contrary. If the allegations of the petition did not entitle the plaintiffs to the relief demanded, that point should have been made by demurrer or in answer to the bill. By failing to take issue thereon, the objection must be held to be waived. Code, § 2650; *Linden* v. *Green*, 81 Iowa, 366; *Benjamin* v. *Vieth*, 80 Iowa, 149; *Gould* v. *Hurto*, 61 Iowa, 47; *McVey* v. *Manatt*, 80 Iowa, 135; *O'Brien* v. *Putney*, 55 Iowa, 295. In *Keokuk & N. W. R. Co.*

The oath and a statement required by the Pennsylvania act of July 26, 1842, must be made by the treasurer, and it is not sufficient when made by a receiver to the best of his knowledge and belief on taking the statement from the books of the company. Barker v. Beeber, 112 Pa. 216.

A statement of the condition of a mutual insurance company made in a certain year is not evidence to rebut the correctness of an assessment made two years afterwards under a charter providing that the members shall pay in proportion to the amount of their notes and that the certificate of the secretary specifying the amount shall be prima facie evidence of the amount due. West Branch Ins. Co. v. Macklin, 66 Pa. 34.

A statement of the amount of premiums received and of the manner in which the money had been expended, required by the Pennsylvania act of July 26, 1842, to entitle a mutual insurance company to judgment and execution against a member is not sufficient when it states the losses in a gross sum, but the expenditures must be specifically stated in detail. Barker v. Beeber, *supra*.

A statement filed under the Pennsylvania act of July 26, 1842, pl. 426, § 11, as the basis of a right to execution against a member of a mutual insurance company, purporting to give the amount of premiums received and the amount of moneys expended during the time of his membership, is insufficient to sustain the claim against him when it does not show the premiums received while his policy was in force separate from other moneys, or show that the expenditures were made on claims to which he was liable to contribute. Koehler v. Beeber, 122 Pa. 291.

A statement in an action on a premium note under the Pennsylvania procedure act of 1887, which avers that an assessment for which suit was brought was made by direction of the court and was for losses occurring in the life of the defendant's policy, is not insufficient because it does not give the respective losses. Solly v. Moore, 11 Pa. Co. Ct. 333.

A statement which shows the amount of expenditures of a mutual insurance company stating separately such items as loss and damage by fire, amounts paid for reinsurance, for salary of officers, for clerk hire, for interest and exchange, for services of directors, of special agents, for stationery, printing, etc., is sufficiently itemized to comply with the Pennsylvania statute. Lycoming Ins. Co. v. Bixby, 15 W. N. C. 109.

A declaration on a deposit note assigning as a breach the nonpayment of an assessment required by the directors without alleging that it was made in conformity to the statute and by-laws is insufficient on general demurrer. Atlantic Mut. F. Ins. Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200.

Since a member of a mutual insurance company is liable for his proportionate share of losses only when they occur while he is a member a complaint against him for assessments must show that the losses to be paid occurred during his membership. Manlove v. Naw, 39 Ind. 289.

A complaint for an assessment on a premium note, averring that it is to pay liabilities for losses and expenses, is held sufficient where an exhibit required by statute to be made under oath before making the assessment is made part of the complaint and shows that the assessment was only for liabilities incurred for losses by fire. Bersch v. Sinnissippi Ins. Co. 28 Ind. 64.

Under the New York act of 1849, vesting in the directors of a mutual insurance company the right of deciding what amount or portion of the note shall be paid, where it provides for payment at such times as the directors shall deem necessary for the honorable and prompt payment of the losses and expenses of the company, a complaint in an action upon an assessment need not aver that any losses have been sustained. St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilt. 430.

A complaint by a receiver of a mutual insurance company showing its organization, the giving of a premium note for a policy, assessments on the note, notice and demand for their payment, legal proceedings in which the company's franchises were declared forfeited for insolvency, his own appointment as receiver, with the powers usually and properly conferred on such persons, was held valid against a demurrer for want of sufficient facts, in Whitman v. Hall, 34 Ind. 422; Whitman v. Ammons, Id. 423; Manlove v. Scarce, Id. 423.

An answer and cross-complaint in a suit by a receiver of a mutual insurance company upon a premium note, alleging fraudulent representations of the agent of the company as to matters of law and fact, was held sufficient on demurrer. Whitman v. Meissner, 34 Ind. 487.

3. *Proof.*

The presumptions and burden of proof in case of an assessment are not the same in all jurisdictions or in respect to all matters.

An assessment made in pursuance of a decree of the court, based upon testimony and upon the application of a receiver, is at least prima facie reasonable and correct. Tobey v. Russell, 9 R. I. 58.

The presumption is that all the directors who voted for an assessment, whose duty it was to sign it, did so. Citizens' Mut. F. Ins. Co. v. Sortwell, 10 Allen, 110.

In some cases it is clearly held that the burden is upon a mutual insurance company to show the validity of assessments made upon a premium note. Augusta Mut. F. Ins. Co. v. French, 39 Me. 522; Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray, 279.

And it is said that there are no presumptions in favor of the validity of an assessment upon members of a mutual fire insurance company when the amount thereof has never been determined by the court or the assessment confirmed by the court. Swing v. H. C. Akeley Lumber Co. (Minn.) 25 Ins. L. J. 303.

Other cases, on the other hand, declare that the presumption is that an assessment made by the managers of a mutual company is properly made. Rosenberger, L. & Co. v. Washing Mut. F. Ins. Co. 87 Pa. 207; People's Mut. F. Ins. Co. v. Bergstresser, 11 Pa. Co. Ct. 646, 1 Pa. Dist. R. 771; People's Mut. F. Ins. Co. v. Groff, 154 Pa. 200.

Also that fraud or gross mistake must be shown

v. *Donnell*, 77 Iowa, 225, cited by appellant, the objection was raised in the answer, and the remarks referred to are *dicta*, not being essential to a decision of the question presented.

3. It is urged that this is not a case where suit may be brought by one on behalf of others not named, and in support of the claim it is said that when each may sue alone one cannot sue for others having a like interest in the result of the action. In support of this contention we are cited to *Fleming* v. *Mershon*, 36 Iowa, 413; *Yarish* v. *Cedar Rapids, I. F. & N. W. R. Co.* 72 Iowa, 556. In *Fleming's Case* two members of the court concurred in the holding on this point. One dissented, and another refrained from expressing an opinion, and the decision on another point rendered it unnecessary to determine the question now presented. In *Yarish's Case* the question determined was that, when that part of a petition which set out the

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in an assessment made by the directors of a mutual company to whom the members have submitted themselves as their common representatives in order to defeat the assessment for excessiveness. Hummel's Appeal, 78 Pa. 320.

But the above Pennsylvania cases are to be construed with the decision that the burden of showing that an assessment is invalid for fraud or gross mistake is on the defendant where the charter of a mutual insurance company provides that in an action for recovery of the assessment the certificate of the secretary shall be prima facie evidence of the assessment and the amount due. Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. 492.

But in the absence of such provision in the charter or in the statutes relating to such companies, the company is bound to prove the fact establishing the claim. *Ibid.*

In general the decisions require some proof of the facts to sustain an assessment and do not hold the assessment itself to be prima facie sufficient.

Thus it is necessary to prove losses to justify an assessment upon a premium note of a mutual fire insurance company. Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329, 8 Am. Rep. 132.

Evidence of losses which render an assessment upon a premium note proper is necessary in an action upon a premium note, but plaintiff need not show the particular loss for the payment of which each assessment was made. Merchants' & Mfrs. Ins. Co. v. Linchey, 3 Mo. App. 588.

A receiver of an insolvent mutual insurance company cannot collect an assessment on a premium note without establishing in court the validity of the claims against the company for the payment of which the assessment is made. Downs v. Hammond, 47 Ind. 131; Embree v. Shideler, 36 Ind. 423; Manlove v. Curtis, 38 Ind. 31; Heller v. McCormick, Id. 30; Manlove v. Burger, Id. 211.

Proof that the losses which are to be paid with the proceeds of an assessment occurred during the time the defendant was a policy holder and member of the company must be made by the plaintiff in an action on an assessment. Downs v. Hammond and Embree v. Shideler, *supra;* Manlove v. Naylor, 38 Ind. 424; Manlove v. Naw, 39 Ind. 299; Whitman v. Mason, 40 Ind. 189.

The proof must be clear that an assessment made a month after the cancelation of a policy was for losses sustained before its cancelation. Hochelaga Mut. Ins. Co. v. Girouard, 7 Quebec L. R. 348 (Beryman's Ins. Dig. 164).

In the absence of any proof of any liabilities for which an assessment is necessary, the mere fact of an assessment by a receiver and a mere recital in an order directing an assessment of the fact that liabilities were set out in a petition for an assessment are not sufficient to show any liability of the maker of a premium note on such assessment. Thomas v. Whallon, 31 Barb. 172.

Some evidence of the existence of losses which render an assessment proper is necessary in an action to recover an assessment on a premium note, but a record of losses which a witness proves of his own knowledge to have been made from claims allowed by the company or its receiver, with proof that the assessment was to pay such losses, is sufficient, although the witness cannot specify the particular losses when they appear in such record of losses. Jackson v. Roberts, 31 N. Y. 304. The court says that it will be sufficient to give evidence that would have been conclusive against the company while it was engaged in its proper business.

But a mere statement of the existence of losses in an *ex parte* affidavit of the receiver is insufficient to authorize an assessment and a reference to enforce the same under the New York act 1862, chap. 412. Sands v. Kimbark, 27 N. Y. 147. The court in this case says that upon the trial of an action upon such a note evidence which would have concluded the company while it was engaged in its proper business or notice of a loss and its settlement or allowance or a judgment recovered against the company would be sufficient.

The report of a referee in a general creditor's action to which a receiver and mutual insurance company were parties, in which an account of all the debts and assets of the company was taken, is sufficient prima facie evidence to sustain an assessment on a premium note when it shows that the assets were insufficient to pay the debts and expenses of collection. Sands v. Shoemaker, 4 Abb. App. Dec. 149.

Proof of a loss or assessment is not necessary in order to recover on a note given to comply with the New York act of April 10, 1849, § 5, as part of the original capital of a mutual insurance company. Tuckerman v. Brown, 33 N. Y. 297, 88 Am. Dec. 386. In this case the fact that the note had been withdrawn and destroyed after the organization of the company pursuant to an understanding that it should be done when it had served the purpose of aiding the company to pass the examination required by law did not release the maker's liability, as the transaction was a fraud upon the law.

Under a charter requiring every person insured in a mutual company to pay a cash premium and deposit a written agreement to hold himself liable for an equal amount in the capital stock of the company, to be assessed and collected by the directors in such sums and at such times as they shall deem expedient, which is construed to make such premiums and deposits the absolute funds of the company, it is held that a note thus deposited was subject to collection at any time at the discretion of the directors for the purpose of discharging expenses, debts, and losses of the company, even if they occurred before the insured became a member of the corporation; and in such case it need not be shown what expenses and losses were included in the assessment. Nashua F. Ins. Co. v. Moore, 55 N. H. 48.

A resolution of a board of directors levying an assessment upon premium notes to meet the indebtedness of the company is not of itself sufficient to prove the losses and expenses which authorized the assessment. Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329, 8 Am. Rep. 132; American Ins. Co. v. Schmidt, 19 Iowa, 502.

Where premium notes are by the charter of a mutual insurance company liable to assessment for losses and expenses happening or accruing in and

names of other taxpayers for which plaintiff claimed the right to appear and prosecute the action was on motion stricken out, no appeals lie on part of such persons, and that Yarish, being allowed to prosecute the action in his own behalf, could not appeal for them. In *Brandiff* v. *Harrison County*, 50 Iowa, 166, this court considered the *Fleming Case*, and in an action to restrain the collection of taxes by plaintiffs claiming to be owners in severalty of certain real estate the answer set up a misjoinder of parties and causes of action, "in that plaintiffs have no joint interest in the land in controversy, but own different and distinct portions in severalty." The court held that plaintiffs could maintain a joint bill. In *Palo Alto Bkg. & I. Co.* v. *Mahar*, 65 Iowa, 78, plaintiff brought suit for itself and others, and the right to prosecute the action for the benefit of other persons was upheld. A learned writer expresses the law touching this matter as follows: "The weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there

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to the class in which the property is insured, an assessment must be proved to have been made for losses or expenses in that class only. Great Falls Mut. F. Ins. Co. v. Harvey, 45 N. H. 292.

The plaintiff in an action for an assessment upon a member of a mutual fire insurance company upon a deposit note must prove not only the making of the assessment but that it was in accordance with the act of incorporation and by-laws, and thus establish that the assessment was legal. Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray, 279.

The payees of a deposit note for insurance in a mutual company cannot recover an assessment thereon without proving performance of the conditions required to authorize the issue of the policy. Jones v. Smith, 3 Gray, 500.

Under a statute permitting risks to be classified and policies issued in a particular class when the property to be insured in each class shall amount to a specified sum, it must be shown by the insurance company in order to collect an assessment upon a premium note for insurance in such a class that the risks in each class equaled the sum required by the act. Augusta Mut. F. Ins. Co. v. French, 39 Me. 522.

Under the Michigan statute (Sess. Laws 1873, No. 82, § 17) such an assessment is prima facie evidence of the regularity and correctness of all proceedings up to and including the assessment, but this presumption is not conclusive and may be rebutted by showing that the assessment is excessive. Wardle v. Townsend, 75 Mich. 385, 4 L. R. A. 511.

A certificate of the secretary which is made prima facie evidence of an assessment is not available as evidence thereof after the defendant has filed an affidavit of defense as provided by Pennsylvania act of May 1, 1876, § 56, but in such cases the company must show liabilities which make an assessment necessary and that it was made according to the terms of the charter and by-laws. Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. 492.

The burden of proof is on the insurance company or its assignee for creditors when in an action on a note which had been assessed for its full amount it appears that the losses of the company are about $50,000 and the premium notes $174,000, of which $79,391.27 represents unexpired policies and no explanation is offered of the apparently excessive assessment. Lehigh Valley F. Ins. Co. v. Dryfoos (Pa.) 8 Cent. Rep. 162.

A policy of a mutual fire insurance company is admissible in evidence on behalf of the company under a declaration alleging that in consideration of the policy the member agreed to pay his proportion of the losses and expenses. People's Mut. F. Ins. Co. v. Clark, 12 Gray, 165.

The records of a mutual insurance company are not sufficient proof of the existence of a premium note to sustain an assessment on such alleged note. *Re* Slater Mut. F. Ins. Co. 10 R. I. 42.

4. Statute of limitations.

The statute of limitations does not begin to run against premium notes until an assessment thereon has been made, where they are payable at such times and by such instalments as the directors shall from time to time assess and order. *Re* Slater Mut. F. Ins. Co. 10 R. I. 42; Howland v. Cuykendall, 40 Barb. 320.

This is true of such a note although the assessment is not made until after the expiration of his policy. Smith v. Bell, 107 Pa. 352. S. C. *sub nom.* Smith v. Mercer County Mut. F. Ins. Co. 14 Ins. L. J. 302.

After default in payment of an assessment on a note payable as the directors may require the note becomes payable on demand so that the statute of limitations begins to run against action upon it. Lycoming F. Ins. Co. v. Batcheller & Sons, 62 Vt. 148.

A personal demand for payment was held necessary in one case before the statute of limitations could run against an action for an assessment upon a premium note under the New York act of 1853. Sands v. Annesley, 56 Barb. 598.

But this case was overruled in effect, without mentioning it, by the case of Sands v. Lilienthal, 46 N. Y. 541, holding that a personal demand was necessary only when recovery on the entire note was claimed because of default in payment of an assessment.

A note given to make up the capital stock of a mutual insurance company, although promising to pay as the directors require, is payable on demand so that the statute of limitations runs against it from the time it is given. Howland v. Edmonds, 24 N. Y. 307.

This case in effect overrules Bell v. Yates, 33 Barb. 627, in which it was held that when a premium note given to comply with the New York act of 1849, § 5, as part of the capital stock of a mutual insurance company, is made payable in such portions and at such time or times as the directors may require, although the statute requires it to be payable not more than twelve months from date it is payable absolutely so as to start the running of the statute of limitations at a day not later than the end of twelve months from date, according to its legal import and not according to its form.

A note given for advance premiums by one of the persons organizing a mutual insurance company as a part of the capital and securities on which the company was permitted to begin business is a premium note within the meaning of an injunction against collecting premium notes, and the running of the statute against it is suspended during the existence of such injunction. Sands v. Campbell, 31 N. Y. 345.

A suit by a receiver to recover an assessment upon a member of an insolvent mutual fire insurance company is barred by the lapse of six years after the assessment is made, under How. Stat. (Mich.) § 8713, governing actions of assumpsit or case founded upon any contract or liability, express or implied; and the fact that the assessment was made by the receiver, instead of the board of directors, does not change the rule. Wardle v. Hudson, 96 Mich. 432. B. A. R.

is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." 1 Pom. Eq. Jur. § 269; *Keese* v. *Denver*, 10 Colo. 113; *Carlton* v. *Newman*, 77 Me. 408; *Macon & B. R. Co.* v. *Gibson*, 85 Ga. 1. Our statute provides: "When the question is one of a common or general interest to many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Code, § 2549. It is alleged in the bill that "the questions presented by this petition are of common and general interest to a large number of persons, policy holders in said company on the mutual plan, who have not paid the assessment, amounting in all to more than two thousand persons; that there is a unity of interest of all of them as to the object of this action, and it is impracticable, therefore, to bring them all before the court in this action, or for them to bring separate actions individually; and for this reason this action is brought by plaintiffs for and on behalf of them all as well as for their own individual benefit, and also to prevent a multiplicity of suits," etc. While this allegation is denied, still the testimony is ample to show that nearly 3,000 policy holders are interested in the object and result of this action; that the facts and law applicable thereto would be substantially the same in case these 3,000 persons should bring separate suits. It is manifest, then, that plaintiffs have brought themselves within the provisions of the statute; that it was enacted to prevent a multiplicity of suits, and to obviate the very difficulties which would arise if separate suits were brought. It seems to us that to hold that the section referred to does not authorize the institution of this suit by some of the policy holders in behalf of themselves and others not specifically named would be a practical denial of justice. We hold that the action in that respect is properly brought.

4. A point of contention is as to whether defendant company was organized as a mutual or stock company. The statute recognizes two plans of organizing mutual fire insurance companies. By chap. 4 of title 9 of the Code provision is made for the organization of such mutual companies, and it is required, among other things, that before commencing business they must have entered into agreements with at least 200 applicants for insurance, the premiums upon which must amount to $20,000; of which $5,000 shall have been paid in actual cash, and for the remainder of which notes of solvent parties must have been taken. Other provisions are made touching payment of said notes, the publication of notice, obtaining a certificate from the auditor of state, etc. Code, §§ 1122–1125, 1131, 1132, 1138–1142, 1147, 1151, 1159, 1160. In § 1160 of the same chapter it is provided that "nothing in this chapter shall be so construed as to prevent any number of persons from making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire or death, or loss or damage by tornadoes, lightning, hail storms, cyclones, or wind storms, but such association of persons shall in no case insure any property not owned by one of their own number, except schoolhouses or church buildings, as the said companies deem proper to insure within the territory where they do business . . . nor shall the provisions of this chapter be applicable to such associations or companies." It will be seen that under the statute a mutual insurance company may be organized under said chap. 4 of title 9 of the Code, and in compliance with its provisions, or it may be organized under § 1058 of the Code, for the purpose of carrying on the business of mutual insurance, as is contemplated in § 1160 of the Code. It is conceded by appellants that the defendant company was not organized as a mutual company, under chap. 4 of title 9 of the Code, but it is claimed it was so organized under § 1058 of the Code, to transact the business of mutual insurance as provided in § 1160. Under § 1058 any number of people may become incorporated for the transaction of any lawful business, and possess all the powers usually incident to corporations. Code, § 1059. Such corporations must, before commencing business, adopt articles of incorporation, which must be signed, acknowledged, and recorded in the office of the recorder of the county where its principal place of business is located, and must also be recorded in the office of the secretary of state. Id. § 1060. The article must fix the limit of indebtedness of the company. Id. § 1061. It must publish a notice. Id. §§ 1062, 1063. The by-laws must be posted in its principal place of business. Id. § 1076. By § 1089 it is provided that no body of men acting as a corporation shall be permitted to set up want of legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such a corporation be permitted to set up a want of such legal organization in his defense. In the light of these provisions, and of § 1160, was the defendant company organized and incorporated as a mutual insurance company? In substance, it is clear that all the requirements to organize a cor-

poration under chap. 1 of title 9 of the Code was complied with. In its articles it declared that "we do hereby form an association under the laws of the state of Iowa for the purpose of mutual insurance upon our property and that of all other persons who may become members of this association by the giving of mutual pledges therefor." In article 3 it was provided that the general nature of the business to be transacted "shall be the insurance of the property of its members against loss or damage by fire, lightning, cyclone, tornado, or wind storm." Article 10 provided: "The fund of the association for the payment of insurance losses and the necessary expenses thereof shall consist exclusively of money raised by assessment on mutual pledges given by the members for their insurance. Such assessments shall be made only by the directors or executive committee, and may be limited by the by-laws, and shall always be apportioned *pro rata* among the members insured." Article 11 provided: "All persons insured in this association shall be members thereof during the period of their insurance, and no longer. The notice of the organization and incorporation declared: "The general nature of the business to be transacted by said corporation is mutual insurance by and among its members . . . by mutual obligations of the members of said corporation therefor." Every step taken in connection with the incorporation of this company clearly indicates an intention to incorporate under chap. 1 of title 9 of the Code for the transaction of the business authorized by § 1160 of the Code. It was then properly organized and incorporated as a mutual insurance company, to do the business provided in § 1160 of the Code. That the company, in the transaction of its business after it was thus organized, exceeded its powers, in no way affects the validity or purposes of the organization.

5. It is said that the company was not mutual, because the right to vote and control the management of the company was vested in the members who were guarantors only. As we have already said, plaintiffs, as members of the company, were presumed to know the provisions of the articles of incorporation and by-laws. They knew that by them the power of directing the affairs of the company was reposed in a body to be selected from members who were guarantors. They could waive any right they might have as members to vote. By acquiescing in the management, they did so waive this right. Again, it would seem that plaintiffs understood this provision of the by-laws, and we are justified in presuming that they assented thereto in the absence of any evidence showing any desire or effort on their part to control the affairs of the company by voting or otherwise.

6. It is claimed that the provision for a guaranty fund rendered the company a stock company. Outside of the question of fraud, we do not see that the provision for this guaranty fund in any way affected plaintiffs' liability. It was provided that this fund might be assessed; that any moneys paid from it should be treated as an advancement, to be repaid from the funds of the association as might be ordered by the directors. It was provided that the fund for the payment of insurance and necessary expenses should consist exclusively of moneys raised by assessment on mutual pledges given by the members for their insurance; that the guarantors might, after three years, withdraw from all liability on said guaranty. Manifestly the purpose of this fund was to furnish money to meet losses due when the assessments did not raise a sufficient sum. The provision for repayment shows that it was only intended for temporary relief. Even if it was a valid obligation (a point we do not decide), plaintiffs have no just ground for complaint that it is not resorted to in advance of making an assessment, as at most the guarantors would be mere sureties for the policy holders. *Hope Mut. L. Ins. Co.* v. *Weed*, 28 Conn. 51; *Hope Mut. L. Ins. Co.* v. *Perkins*, 38 N. Y. 404. It is plain, then, that even if the guaranty was valid, and the guarantors were resorted to in the first instance to meet insurance losses, such guarantors could recover the amounts paid of the company; and in a case of a mutual company like that at bar this liability would have to be met by an assessment on the policy holders. So that plaintiffs are in the same situation as if resort had been had to the guarantors, and then an assessment had been ordered to meet the liability of the company to them. Certain it is, there is no express statutory authority for a company organized as this one was to raise a guaranty fund, but, even if such guaranty is valid, it does not operate to change the character of the company into a stock company.

7. As has already been stated, the assessments complained of in this case were made very largely to pay losses suffered by those holding policies issued upon the cash plan; that is to say, their policies were issued to them upon the daily reports of agents of the company, for an all-cash premium. The policy was similar to that issued by stock companies in general, and did not, in terms, make the assured members of the corporation. By its terms the company promised to pay the assured, in case of loss, a certain fixed and definite sum, without reference to assessments. There was, however, a profit-sharing provision in the policy, by which the assured, after a certain number of years, might receive a proportionate share of the profits as a dividend. These "all-cash" payment policies provided for cancelation at short rates, and for a return of the unearned premium. The company established regular rates of insurance on all kinds of property, and issued policies on every description of goods for fixed and determinate rates. An important question in the case is whether it had right to do this under its articles of incorporation and the statutes of this state, or whether the acts of its officers and agents in issuing these "all-cash" premium policies were not *ultra vires* and void; for, if these cash premium policies were not such as the company had power to issue, and were contrary to law, if its officers and agents had no authority to make them, then they were not binding on the company, and the assessments made to pay them would be invalid.

We have held that this company was organized as a mutual association, under the general incorporation laws of the state, for the purpose of doing the business authorized by § 1160 of the Code,—*i. e.*, of making mutual pledges, and giving valid obligations to each other for their own insurance from losses by fire, etc. This statute contains the following provisions: ". . . But such association of persons shall in no case insure any property not owned by one of their number, . . . but such associations or companies shall receive no premiums, nor make any dividends." Section 1159 of the Code provides: "No company organized under the mutual plan shall do business or take risks upon the stock plan neither shall a company organized as a stock company do business upon the plan of a mutual insurance company." The articles of incorporation of the defendant company provided: "That we, James P. Sherman *et al.*, do hereby form an association under the laws of Iowa for the purpose of a mutual insurance upon our property and that of all other persons who may become members of this association by the giving of mutual pledges thereof. . . . The general nature of the business to be transacted by the said association shall be the insurance of the property of its members against loss or damage by fire. . . . The fund of the association for the payment of insurance losses and the necessary expenses thereof shall consist exclusively of moneys raised by assessment on mutual pledges given by the members for their insurance. Such assessments shall be made only by the board of directors or executive committee, and may be limited by the by-laws, and shall always be apportioned *pro rata* among the members insured." The incorporation notice contained this among other statements: "The general nature of the business to be transacted is mutual insurance by and among its members against loss by fire . . . by mutual obligations of the members of said corporation therefor." It will be noticed that the provision we have quoted authorized this company to do business under § 1160 of our Code. It had no right to do other than mutual insurance, and in doing that it could not, by the express terms of the statute, receive premiums or make dividends. The articles of incorporation, into which must also be read the statute of the state, for it is as much a part of them as if specifically set forth, are a part of the contract between the company and the insured, and are the contract between the individual members who make up the association. They are a limitation upon the authority of the officers and agents of the company, and give to the association its vitality, and define and limit its powers. Every person who became a member of the company was charged with knowledge, not only of everything in the articles of incorporation, but of the provisions of the statutes we have quoted as well. *Lucas* v. *White Line Transfer Co.* 70 Iowa, 546, 59 Am. Rep. 449; *Walsh* v. *Ætna L. Ins. Co.* 30 Iowa, 144, 6 Am. Rep. 664; *Simeral* v. *Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; 2 May. Ins. § 552; *Coles* v. *Ionia State Mut. Ins. Co.* 18 Iowa, 431; 2 Wood, Ins. § 538, *Mitchell* v. *Lycoming Mut. Ins. Co.* 51 Pa. 402; *Liscom* v. *Boston Mut. F. Ins. Co.* 9 Met. 205. The articles of incorporation constituted the contract between the constituent members of the association. *American Ins. Co.* v. *Schmidt*, 19 Iowa, 503; *Ferguson* v. *Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Rosenberger* v. *Washington Mut. F. Ins. Co.* 87 Pa. 207. The following authorities hold that the articles of incorporation are a limitation upon the powers of the corporation, its officers and agents: *O'Neill* v. *Pleasant Prairie Mut. F. Ins. Co.* 71 Wis. 621; *Eddy* v. *Merchants' M. & C. Mut. F. Ins. Co.* 72 Mich. 651; Cook, Stock & Stockholders, § 493; Wood, Ins. § 1. That a public statute of the state is a part of the policy of insurance, although not incorporated therein, see: *Port Edwards, C. & N. R. Co.* v. *Arpin*, 80 Wis. 214; *Equitable L. Assur. Soc.* v. *Pettus*, 140 U. S. 226, 35 L. ed. 497; *Webster* v. *Rees*, 23 Iowa, 269; *Van Schoonhoven* v. *Curley*, 86 N. Y. 187; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858. "The question, as to whether a contract of insurance is *inter vires* or otherwise may often arise under policies, and, in determining this question the charter articles of association, and the general laws applicable thereto, are the only touchstones by which the question of authority can be tested and ascertained." Wood, Ins. p. 3. If it be said that the corporation, by its board of directors, authorized this kind of insurance, a sufficient answer to the assertion is that they were not authorized to do so, and the insurance issued pursuant thereto would only be binding upon those members of the company who had knowledge thereof, and assented, or did not object, thereto.

With the propositions of law and of fact before stated settled, and with these for our premises, the conclusion is apparent. The company, its officers and agents, had no authority to issue policies on the "all-cash" plan. It could only accept those who were willing to become members on the plan authorized by the statute and the articles of incorporation. It could not agree to pay those who insured on the all-cash or stock plan a stipulated sum, without reference to the amount which it could raise by assessments. It could only accept memberships upon substantially the plan authorized. Its act in insuring applicants in a specific amount upon payment of a stipulated premium was not authorized. It could not pay dividends, because of the express prohibition of the statute. Even if it had authority to issue policies as a stock company, for an all-cash premium, and thus agree to indemnify persons in specific amounts, it could not compel those who became members of the company under the mutual plan to respond to assessments to pay losses suffered by those who came in on the stock or all-cash plan, for there is no mutuality between them. *Illinois F. Ins. Co.* v. *Stanton*, 57 Ill. 354. Mutuality is of the essence of mutual insurance. It is the principle which lies at its foundation, and gives it its name. May, Ins. § 548. Those holding all-cash or stock policies did not become

members of the company under the mutual plan. They did not agree to take the amount which might be realized from an assessment of the other members. They were in no sense insurers as well as insured, as is required where the company is mutual. 2 Wood, Ins. § 538. The company alone assumed the risk.

It is contended, however, that these plaintiffs, having had the benefit of their insurance, are now estopped from insisting that they should not be assessed to pay losses on policies issued on the "all-cash" or "stock" plan. There would be much force in this position had the plaintiffs had knowledge of the acts of the company in issuing these policies, but there is no evidence that they had such knowledge. For the benefits they have received there is no question but that they are liable to assessments to meet losses suffered by all who were members with them on the mutual plan, and could not now be heard to say that they are not liable for assessments to meet these losses because the company did business with others, not authorized by its charter. Thus far they are estopped by receiving benefits, but no farther.

Again, it is insisted that they suffered no prejudice, because the cash premiums went to reduce the amount of their assessments; that the cash payments were merely assessments paid in advance. To this it may be said: First, that the articles of incorporation provide that the losses and expenses are to be paid exclusively from assessments made upon the mutual pledges of the members. The company had no authority, by the terms of its charter, to apply the cash premiums in payment of losses, and there is no showing that it did in fact do so. And, second, those who paid these cash premiums did not become members of the company, and did not pay their premiums as assessments. They paid their premiums for insurance, for the full term of the policy, and the only rights they had thereafter to them, or any part thereof, was an unlawful agreement to pay dividends from the profits of the business. Those who insured on the all-cash plan are conclusively presumed to have had notice of the articles of incorporation and of the laws of the state with reference to this kind of insurance; and if they suffer it is by reason of their own negligence in not discovering the character of the company with which they were dealing, its powers and authority.

Further, the defendants insist that the plaintiffs are estopped from questioning the corporate character and ability of the company to issue the policies, because they contracted with it as a corporation possessing the power claimed for it. We do not question the rule announced in the authorities cited by appellants, but we think it is not applicable to the questions here presented. The plaintiffs are not questioning the corporate character of the company, and we have found that it was legally authorized under the laws of this state to do a mutual insurance business under Code, § 1160. What they do controvert is the authority of the company to issue the policies, losses under which they were assessed to pay. This proposition is entirely different from the one covered by the authorities cited by appellants. Again, this is a controversy between the assignee, who represents the creditors assured who suffered losses on their policies, who caused or procured the assessments to be made for them, and the plaintiffs, who were holders of policies in the same company; and the rights of the respective parties must be determined by the contracts between them.

It is further contended that the plaintiffs, by their laches, are estopped from questioning the authority of the company to issue the policies for which the assessments have been made. There is no evidence that the plaintiffs had knowledge of the character of the business carried on by the company, except as they would gather it from the articles of incorporation of the company. These, as we have said, contemplated a lawful business, and they were not bound to assume that the officers or agents were conducting the business in an unlawful manner. They had no actual notice, and cannot be estopped by their laches, unless they knew that the company was transcending its authority and permitted it to do so. We are aware that there are a great number of authorities holding that a mutual insurance company may receive all-cash premiums in lieu of assessments, and still be considered a mutual company; but none of these cases were decided under statutes like ours; and in most of them the assured became members of the company, just as those who paid on the assessment plan, the only difference being that they paid their assessments in advance. We base our decision upon the terms of our statute, and upon the nature of the contract entered into with those who paid cash premiums. We do not think those who insured strictly on the assessment plan, and within the terms of the articles of incorporation, ought to be called upon to pay assessments to meet losses suffered by those who insured on the stock or all-cash premium plan. As sustaining our views, see 16 Am. & Eng. Enc. Law, p. 26; *O'Neill* v. *Pleasant Prairie Mut. F. Ins. Co.* 71 Wis. 621; *Eddy* v. *Merchants' M. & C. Mut. F. Ins. Co.* 72 Mich. 651; *Massachusetts Catholic O. of F.* v. *Callahan*, 146 Mass. 391; *Commercial League Asso.* v. *People*, 90 Ill. 166; *Miller* v. *American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765; *Pearce* v. *Madison & I. R. Co.* 62 U. S. 21 How. 441, 16 L. ed. 184; *Pittsburgh, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157; *State, Richards*, v. *Manufacturers' Mut. F. Asso.* 50 Ohio St. 145, 24 L. R. A. 252; *Rockhold* v. *Canton Masonic Mut. Benev. Asso.* (Ill.) 19 N. E. 710; *Rockhold* v. *Canton Masonic Mut. Ben. Soc.* 129 Ill. 440, 2 L. R. A. 420. As the premium notes given by the plaintiffs were lawful and binding as to all who were insured on the mutual plan, and liable for assessments to pay losses suffered by such members of the company, the court erred in canceling these obligations because of want of authority in the company to issue the policies which the assessments were made to pay.

8. Plaintiffs urge that the premium notes given by them do not state on their face that they were given for insurance, as required by § 1146 of the Code. The notes, we think,

do not state this fact as clearly as they should if § 1146 is applicable to them; but § 1160, under which we hold this corporation was doing business, provides: "Nor shall the provisions of this chapter be applicable to such associations orcompanies,"—referring to assessments on the plan of mutual obligations. Section 1146 is found in the chapter referred to, and by the terms of 1160 is not applicable to the notes given in this case.

9. The decree of the district court undertakes to set aside, so far as plaintiffs are concerned, the assessment made by the district court; also the assessment made by the assignee, and by the board of directors, on September 17, 1891. We do not understand that the assessment made by the directors of the company is in any manner assailed by plaintiff's pleadings, nor is any relief asked touching it. Under such circumstances it was certainly error in the court below to set it aside.

10. The only remaining question we need consider is the claim of plaintiffs that the assessment and notes are void by reason of fraud practiced by the officers and agents upon the plaintiffs. There is no evidence whatever that any fraud was practiced upon plaintiffs Metcalf, Nabers, Hedges, Goldsworthy, Slade, Miller, and Nemmers (and as to them the allegations of the bill are not sustained). As to the other plaintiffs, the alleged fraud consisted in representing in its articles of incorporation, in its notice, in printed matter, in reports of the state auditor, and through its agents, that it had a guaranty fund of $50,000 pledged to the prompt payment of losses should the funds from the assessments be inadequate; (2) that it was an Iowa company, composed of Iowa men, for Iowa business alone; (3) that it was regularly incorporated under chap. 4, tit. 9, of the Code; (4) that policies were issued for a term of six years, and subject to cancelation at any time on the payment of the amount due; (5) that assessments were made annually, and were not to exceed the annual rate in any one year. It is evident from what has already been said that the representations numbered 4 and 5 were not false. Representation 2 was not of such a character as to warrant us in relieving plaintiffs from liability. It was an Iowa company, and composed in part of Iowa men, and doing business in Iowa. Besides, we find no evidence showing that the plaintiffs, except Corey, became members of the company in reliance on this representation. As to representation 3, we do not think it of such a character as to avoid plaintiffs' liability. True, the company was in fact incorporated under the general provisions of chap. 1 of title 9, but it was transacting business under provisions found in § 1160 of the Code, in chapter 4 of title 9. Furthermore, as shown by the evidence, the chief reliance of plaintiffs seems to have been based upon the representation touching the guaranty fund. Now, it appears that in the first notice of incorporation it was simply stated that such fund should not exceed $50,000, to be paid as ordered by the directors and as required in the articles and by-laws. In the articles it was expressly provided that payments from this fund should be regarded as an advancement, to be repaid by the association. In the second incorporation notice the fund was referred to as "consisting of limited individual pledges," the guaranty itself providing for the withdrawal of parties to it after three years. In the circulars of the company this fund was referred to as securing the policies, and for the prompt payment of losses should the funds from the assessments be inadequate. The evidence shows that much reliance was placed upon this guaranty fund by some of plaintiffs; that the fact that said fund was not of a permanent character was not always brought to the notice of plaintiffs; that in other instances parties were told that, if guarantors were compelled to pay, they might collect of the company. In view of all the evidence touching this matter, we cannot doubt that plaintiffs Corey, Loomer, Gould, Blowers, Morgan, Kelley & Tannyhill, and Brown were, in taking their insurance in this company, deceived by the representations of its officers and agents, and led to believe that a guaranty fund, absolute in its character, was provided for the payment of losses when the amount raised by the assessments provided for in the policies proved insufficient. Nor do we deem it material, for the purposes of this inquiry, whether the guaranty fund was valid or not. It was held out to these parties as an inducement for them to become members of the company. They had a right, in the absence of knowledge to the contrary, to rely upon the representations made to them in respect to it. The evidence shows that but for such representations they would not have become members of the company. Surely, in such cases, it would be aiding the company in making an attempted fraud effectual to hold that such plaintiffs could not rely upon the representations made. The doctrine is well settled that the insured may defeat a suit for an assessment on the ground of fraudulent representations, whereby he was induced to contract with the company; and, if such fraud is established as we hold in this case as to the plaintiffs we have named, the entire contract upon which the assessment is predicated is void, and no assessment can be made thereon. May, Ins. p. 1278, § 560*a*; *Lycoming F. Ins. Co.* v. *Wright*, 55 Vt. 526; *Lycoming F. Ins. Co.* v. *Woodworth*, 83 Pa. 223; Wood, Ins. p. 1213; *Jones* v. *Dana*, 24 Barb. 395; *Devendorf* v. *Beardsley*, 23 Barb. 656; *Brown* v. *Donnell*, 49 Me. 421; *Rohrschneider* v. *Knickerbocker L. Ins. Co.* 76 N. Y. 216. It may be admitted that if plaintiffs would avail themselves of the fraud they must act promptly on discovering it. It is alleged in the bill that they had no knowledge of the fraudulent character of the representations touching this guaranty fund, until after the assessment was made; and the evidence, we think, establishes that fact. This suit was instituted within a reasonable time thereafter; hence, as to the plaintiffs named, the decree below was proper, except in so far as it set aside the assessment made by the board of directors on September 17, 1891, which, as we have said, is not attacked in the bill.

11. Many other questions are discussed by counsel, but we think those we have considered are decisive of the case. As to the plaintiffs Corey, Loomer, Gould, Blowers, Morgan, Kelley & Tannyhill, and Brown, the decree is affirmed because of the fraud practiced upon them. As to the other plaintiffs named, and all others for whom they sue, upon whom no fraud has been practiced as indicated in the opinion, the decree, in so far as it sets aside the assessment made by the board of directors of date September 17, 1891, will be modified, because of no attack thereon; and that part of the decree which cancels the notes made by all the plaintiffs and enjoins their collection is erroneous as to all except those who were induced to become members of the corporation by false and fraudulent representations. Otherwise the decree is affirmed. Either party may, at his option, exercised within sixty days from the filing of this opinion, have the modified decree indicated by this opinion entered in this court; but, if no such election is made, the cause will be remanded to the district court for a decree in harmony with this opinion.

A petition for rehearing was subsequently filed, after which, on October 21, 1895, **Robinson, J.**, on behalf of the court, delivered the following opinion:

The defendants are the Citizens' Mutual Insurance Company of Waterloo, Iowa, James P. Sherman, as assignee of that company, and other persons who were concerned in its organization and business. The plaintiffs are policy holders of the company. Measures were taken to organize the company in February, 1887. Soon after that time, it commenced to insure property owners against loss or damage by fire, lightning, cyclones, tornadoes, and windstorms, and continued in that business until the latter part of January, 1891. On the 3d day of February, 1891, it made a general assignment for the benefit of its creditors. The notice and articles of incorporation provided for a corporation to do a mutual insurance business, and which should have a guaranty fund of not more than $50,000, to be secured by the obligations of persons who should subscribe to it in such form as the directors should approve. The form of the guaranty for this fund which was adopted is as follows: "For the purpose of the guaranty or pledge fund of the Citizens' Mutual Insurance Company of Waterloo, Iowa, I hereby promise to take the number of shares of said fund set opposite my name at $100 per share, payable on the order of the directors of said association, provided that not to exceed 10 per cent thereof shall be payable in any six months, and provided that the whole amount of my said subscription shall be void at my option after three years from date hereof. Dated this 24th day of February, A. D. 1887." Eighteen persons signed this obligation for shares of the fund amounting in the aggregate to the sum of $50,000, all but one or two of whom are made parties defendant. Two kinds of policies were issued by the company. To obtain one kind, the person who desired insurance signed an application which contained a promise to pay the company a specified sum at such time and by such instalments as the directors of the company should order, pursuant to the articles of incorporation and by-laws of the company, the assessments not to exceed in any one year a sum named; and the assessment for the first year was usually paid in advance. If the policy was desired for the term of six years, and the obligation was for the sum of $60, $10 would be paid in advance, and not more than $10 during each year of the life of the policy. For convenience, policies of that class may be termed "assessment policies." For the other, or cash, policies, the assured paid money in advance, or gave their notes payable in full without condition. More than one half the policies issued by the company were on the cash plan. The assessments on the deposit obligations or notes were made each year in advance, and notice thereof was sent to each policy holder, subject to assessment, thirty days before his assessment matured. The receipts of the company from ordinary sources were not sufficient to pay losses and expenses, and during the year 1890 it incurred debts for money borrowed to meet its liabilities to the amount of about $11,000. On the 23d day of January, 1891, the subscribers to the guaranty fund met and ordered a special assessment of 10 per cent of the amount of each subscription to the guaranty fund. This was the first assessment on account of that fund which had been made. Three days later, the board of directors of the company met and ordered a special assessment of 25 per cent on the gross amount of each deposit note held by the company on account of policies which were in force before the 1st day of January, 1891, for the purpose of paying accrued losses and expenses. It was also ordered that no new policies should be issued until a further order by the board. On the 3d day of February, 1891, the subscribers to the guaranty fund met, and adopted a resolution rescinding the action of January 23d making a special assessment of 10 per cent of the guaranty fund, and directing that the portion of the assessment collected should be refunded. On the same day the board of directors also ordered that the portions of the assessment collected should be refunded. At the same time, notice was received from nearly all of the subscribers to the guaranty fund of their withdrawal from it. The board of directors then took action as follows: "On motion, it was resolved that general assignment of the property and business of this company be, and the same is hereby, made for the benefit of all the company's creditors, in proportion to their respective claims." On the next day the board elected James P. Sherman assignee, and directed the president and secretary to execute all papers necessary to carry out all orders of the board, and papers were executed accordingly. In February, 1891, the assignee obtained from the judge of the proper district court an order which in terms authorized the delivery to any policy holder of his deposit note upon the payment by him of the 25 per cent assessment made by the board of directors on the

26th day of January. Not quite $5,000 were realized from that assessment, and notes upon which the assessments were so paid were surrendered to the makers. In May, 1891, the district court set aside the assessment of January 26, 1891, so far as it applied to the deposit notes upon which it had not been paid, and ordered a new assessment upon all deposit notes in the hands of the assignee, and which he had surrendered upon the payment of an assessment of 25 per cent, as directed by the order of the judge made in February. The new assessment varied according to the time the note upon which it was made took effect, from 9 per cent to 35⅝ per cent. The order provided that parties who had paid the assessment ordered by the board, and taken up their notes, should receive credit for the amounts they had paid. In September of the same year, the board of directors, on the suggestion of the assignee that the assessment of January 26 was not on a legal basis, and at his request, set it aside, and made a new assessment, in most if not all respects identical with that made by the district court. The money which the last assessment made by the court and by the board of directors was designed to raise was to be used in paying expenses of the company and losses, including those sustained by the holders of cash policies. It is probable that more than one half the losses were under policies of that class. The indebtedness of the company seems to have exceeded the sum of $35,000, and, to pay it, there has been collected only about $5,000.

The plaintiffs, who are makers of deposit notes which were assessed by the district court in May, 1891, and by the board of directors in September of that year, claim that the organization of the company was not made according to law; that it is not a mutual insurance company; that business transacted by it was not authorized by law; that it was procured by fraud; that the assessments in question are illegal; that an assessment of the subscriptions to the guaranty fund should be made and enforced, and the proceeds used to pay the losses and expenses of the company, before the deposit notes should be assessed. The plaintiffs further allege that the questions presented by their petition are of common and general interest to more than 2,000 persons, policy holders in the company on the mutual plan, who have a unity of interest in the object of this litigation; that it is impracticable to bring them all before the court in this action, or for each one of them to bring separate actions; and that this action is brought for the individual benefit of the plaintiffs, and to prevent a multiplicity of suits, for all who are similarly interested. The district court found for the plaintiffs, and ordered and adjudged that the assessment made by the court in May, 1891, and by the board of directors in September, 1891, be set aside and canceled; that the notes made by the plaintiffs, or any of them, to the company, and held by the assignee, be canceled, and held to be illegal and void; and that the defendants be restrained from collecting or attempting to collect or transfer any of such notes. This cause has been submitted to us twice. On the first submission an opinion was filed, but a rehearing was granted, and the cause is again submitted for our determination.

1. The appellants contend that the district court did not have jurisdiction to hear and determine this cause, for the reason that the plaintiffs had a plain, speedy, and adequate remedy in the ordinary course of the law. This question was not raised by the pleadings, nor presented to the district court, but the defendants insist that the objection that the court has no jurisdiction to try a cause may be presented at any time, and that the court will on its own motion, without objection by any party to the action, refuse to consider it on the merits for lack of jurisdiction to do so. That is undoubtedly true of a court which lacks jurisdiction of the subject-matter of an action, but does not apply in this state where an action triable as at law is begun in equity, and there prosecuted to a final determination, without objection by either party. Section 2514 of the Code provides that "an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket." An error of that kind may be corrected by the plaintiff, or the defendant may have the correction made at or before the filing of his answer. Code, §§ 2515, 2516. Section 2519 contains the following: "An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter." If the petition shows that the court has no jurisdiction of the person or subject-matter of the action, the defendant may demur; and, if the want of jurisdiction is not so shown, it may be set out in the answer; but, if the objection is not so taken, it shall be deemed waived. Code, §§ 2648, 2650. It is contrary to the policy of the statutes of this state to dismiss an action or defeat a recovery on the mere ground that the plaintiff has erred in selecting the proceedings to obtain the relief to which he is entitled. When a mistake of that kind has been made, it should be corrected by an appropriate change in the proceedings, if a correction is desired. We do not hold that a failure to object to the jurisdiction of a court will confer jurisdiction, nor that a court can determine on its merits a cause where it has no jurisdiction of the subject-matter of the litigation. But district courts of this state have both law and equity jurisdiction. Courts of equity frequently grant relief which might have been obtained at law, as, in some cases where jurisdiction has been acquired for certain purposes, it will be retained after those purposes have been accomplished, to prevent vexatious and unnecessary delays, to simplify the proceedings, and to grant complete relief. It may be that the plaintiffs in this case could have successfully defended in actions founded on their deposit notes, but they allege fraudulent practices on the part of the company to procure such notes, and courts of equity have power to set aside contracts procured by

fraud. The plaintiffs allege that the assessments in question were illegal for various reasons, and courts of equity have power, in proper cases, to restrain attempts to collect illegal claims and the instituting of vexatious and useless litigation. The plaintiffs show an interest in the affairs and property of the company, and claim that its guaranty fund shall be resorted to before the assessments in question are enforced, and ask that an assessment on account of the guaranty fund be made. It is clear that the petition of the plaintiffs showed an apparent right to relief which a court of law could have granted, and which, especially in the absence of objection, authorized the district court, as a court of equity, to hear and determine the cause. *McVey* v. *Manatt*, 80 Iowa, 135; *Gould* v. *Hurto*, 61 Iowa, 47; *O'Brien* v. *Putney*, 55 Iowa, 295; *Tugel* v. *Tugel*, 38 Iowa, 350; *Van Orman* v. *Merrill*, 27 Iowa, 480. See also *Niles* v. *Williams*, 24 Conn. 279; *Hine* v. *New Haven*, 40 Conn. 478; *Tubb* v. *Fort*, 58 Ala. 277; 1 Beach, Mod. Eq. Jur. § 4; 1 Dan. Ch. Pr. p. 550, note 3; 1 Pom. Eq. Jur. §§ 129, 130. We are aware that in *Keokuk & N. W. R. Co.* v. *Donnell*, 77 Iowa, 225, it was said that "in the absence of any pleading raising the objection based upon the want of jurisdiction by reason of the fact that there is a plain, adequate, and complete remedy at law, or the absence of objection in any form based upon this fact, this court will itself, *sua sponte*, raise the objection." But what was thus said was not applicable to any question presented by the record in the case, and must not be regarded as authority. We do not decide that the relief to which the petition shows the plaintiffs to be entitled could have been obtained at law, but conclude that, even if it could have been thus obtained, the objections now made to the jurisdiction of this court to determine the case on its merits cannot be sustained, for the reasons shown.

2. The appellees affirm, and the appellants deny, that this action may be maintained, not merely for the plaintiffs, but also for the benefit of other policy holders whose interests in the matters in litigation are like those of the plaintiffs. Section 2549 of the Code is as follows: "When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." The majority are of the opinion and hold that the plaintiffs have brought themselves within the provisions of that section, and that this action is not only for the benefit of the persons named as plaintiffs, but also for the benefit of all policy holders unnamed, whose interests in the matters in controversy are similar to those of the plaintiffs named. The writer does not express any opinion in regard to that question, for the reason that it is his judgment that the relief granted by the district court was limited to the plaintiffs named, and they do not appeal.

3. It is important to determine the authority under which the company was organized, and its powers with respect to the business it attempted to transact. The appellees contend that it was not a mutual but a stock company; while the appellants insist that it was a mutual company, organized to transact business authorized by § 1160, under the provisions of chap. 1 of title 9 of the Code. All parties agree that it was not organized as a mutual company, as provided by §§ 1122–1125, inclusive, which are a part of chap. 4 of title 9 of the Code. Section 1160 is of the same chapter, and contains the following: "Nothing in this chapter shall be so construed as to prevent any number of persons from making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire, or death, or loss or damage by tornadoes, lightning, hailstorms, cyclones or wind-storms, but such associations of persons shall in no case insure any property not owned by one of their own number, except such schoolhouses and church buildings as the said companies deem proper to insure within the territory where they do business; . . . nor shall the provisions of this chapter be applicable to such associations or companies. . . . And such companies organized under this sction shall pay the same fees for annual reports as are now paid for stock companies, but such associations or companies shall receive no premiums nor make any dividends; but the word 'premiums' herein shall not be construed to mean policy and survey fees, nor the necessary expenses of such companies." This section authorizes the organization of mutual insurance companies which shall not be subject to other provisions of the chapter in which it is found. See *State, Auditor*, v. *Iowa Mut. Aid Asso.* 59 Iowa, 133. Section 1058 of the Code authorizes the incorporation of any number of people for the transaction of any lawful business, and following sections of the same chapter prescribe the method of organization and the powers and liabilities of such corporations. The articles of incorporation of the defendant company recite that the persons therein named "do hereby form an association under the laws of Iowa for the purpose of mutual insurance upon our property and that of all other persons who may become members of this association by the giving of mutual pledges thereon;" that "the general nature of the business to be transacted by the association shall be the insurance of the property of its members against loss or damage by fire, lightning, cyclone, tornado, or wind-storms;" that "the fund of the association for the payment of insurance losses, and the necessary expenses thereof, shall consist exclusively of money raised by assessment on mutual pledges given by the members for their insurance. Such assessments shall be made only by the directors or executive committee, and may be limited by the by-laws, and shall always be apportioned *pro rata* among the members insured; that "all persons insuring in this association shall be members thereof during the period of their insurance, and no longer, and the charges for such insurance and membership shall be regulated by the board of directors of the association." The articles were duly signed and acknowledged by the incorporators, and

were recorded in the office of the recorder of Blackhawk county, and in the office of the secretary of state, and a notice of the incorporation was duly published. By-laws were adopted, and the requirements of chapter 1 of title 9 of the Code in regard to the organization of corporations seem to have been fully complied with.

It is claimed, however, that certain provisions of the articles of incorporation and by-laws make the corporation a stock, and not a mutual, company. Those provisions relate to the guaranty fund, and to the privileges and duties of the guarantors. The articles of incorporation provide that the affairs of the association shall be conducted by a board of directors, who shall be chosen by the guarantors or shareholders from among their members; that the guaranty fund shall not exceed $50,000, and shall consist of shares of $100 each, transferable among the members upon the books of the association, and not otherwise; that the fund may be increased by vote of two thirds of the holders thereof at any regular meeting, and that each share shall be entitled to one vote upon all questions affecting the interests of the association; that the articles of incorporation "may be amended at any regular or called meeting of the shareholders by two-thirds vote thereof." Article 7 relates to the guaranty fund, and is as follows: "The said fund shall be secured by the obligations of the holders thereof, to be known as 'fund' or 'guaranty,' in such form as the directors shall approve, and shall be subject to assessment by the board of directors, not exceeding 10 per cent in any six months, for the purpose of meeting losses and expenses for which the association may be liable on its certificates of insurance, but only when there is not sufficient money raised from assessments or pledges of members to pay such losses when due; and all moneys so paid from the guaranty or obligation fund shall be regarded as advancement, which shall be repaid from the funds of the association as may be ordered by the directors." Article 8 exempts the private property of members and the subscribers to the guaranty fund from the corporate debts, "except to the extent of their respective obligations to the association on account of such subscriptions." And article 9 requires the directors to elect from their own number or from the guarantors a president, a vice president, secretary, treasurer, and executive committee. The by-laws are in harmony with the articles of incorporation with respect to the guarantors and the guaranty fund, and provide that the fund shall not be liable to assessment for the payment of insurance losses, "except in emergency and by majority vote of the directors." We do not think these provisions are sufficient to establish the character of the corporation as a stock rather than a mutual insurance company. The guaranty fund was not designed to be any part of the working capital of the company, but was to be drawn upon only in case of emergency, when the money raised from assessments should be insufficient to pay losses when due; and all money obtained from the guaranty fund was to be regarded as a mere temporary advancement or loan, to be refunded on the order of the directors. It was held in *Berry* v. *Anchor Mut. F. Ins. Co.* (Iowa) 62 N. W. 681, that it is not unlawful for a mutual insurance company to provide a guaranty fund by means like those adopted in this case. The company under consideration in the *Berry Case* was organized under chapter 4 of title 9 of the Code; but much that was said in that case and the conclusion reached in regard to such a fund are applicable in this case. The articles of incorporation of the defendant company show that its object is to do a mutual insurance business, insuring only the property of its members. The articles contain no authority to insure the property of anyone who is not a member. Whether the provisions which are designed to give the subscribers to the guaranty fund absolute control of the corporation are valid we need not determine. No objection appears to have been made prior to the commencement of this action to their enforcement, and, if invalid, the legal existence of the company and the obligations of the plaintiffs on their deposit notes are not thereby impaired. We conclude that the company was organized under the provisions of chapter 1 of title 9 of the Code, to insure the property of its members on the mutual plan, as authorized by § 1160 of the Code, and that it cannot be regarded in any sense as a stock company.

4. It is claimed by the appellees that their deposit notes are not collectible, because they do not state on their face that they were taken for insurance, as required by § 1146 of the Code. If we understand the record, it shows that the notes in question recite that they were given in consideration of a policy of insurance, which is described; but, if this were not so, the notes would not be invalid on that ground, for the reason that the section specified is a part of chapter 4 of title 9 of the Code, and therefore is not applicable in this case.

5. It is claimed by the appellants that the cash policies were not issued on the stock plan, but were a part of the mutual insurance business which the company was authorized to do. It is said, in effect, that the chief difference between the holders of the cash and the assessment policies is that the former pay in advance what the latter pay as assessed, and that it would be grossly unjust to hold that the policy holders, having the benefit of time in which to make payments, cannot be compelled to contribute for the payment of the losses sustained by those paying in full for their policies when issued. As we have seen, the company was authorized by its articles of incorporation and by § 1160 of the Code to insure the property of its members only. The funds for the payment of its losses and expenses were to consist exclusively of moneys "raised by assessment on mutual pledges given by the members for their insurance," provision being made for borrowing temporarily from the guaranty fund. The by-laws provide for the acquiring of membership as follows: "Every person wishing to become a member of this association shall, previously to being insured, deposit his application, together with his

mutual obligation or pledge, upon which he shall pay ——— per cent, which shall be indorsed thereon at date of the policy; and, if said application and obligation be approved by the directors or executive committee, the policy of insurance shall bear date at noon, unless otherwise directed by the applicant." It is true that one of the articles of incorporation states that "all persons insuring in this association shall be members thereof during the period of their insurance, and no longer; but this cannot be construed to create a membership excepting as authorized by the statute and by the articles of incorporation. The company could not have transacted business on both the stock and the mutual plan. We have found that it was empowered to transact the business authorized by § 1160 of the Code, and that permits insurance on the mutual plan only; but, if the business of the company were not governed by that section, it would fall within the provision of the other sections of the same chapter, and among them is § 1159, which prohibits companies organized upon the mutual plan to take risks upon the stock plan, and also prohibits companies organized upon the stock plan to do business upon the plan of a mutual insurance company. An examination of the policies issued by the defendant company shows that the assessment policies were issued on the application of the persons who desired the insurance, and that appended to each application was an obligation by which the applicant promised to pay to the company a specified sum of money at such time and in such instalments, not exceeding one sixth of the gross amount in any one year, as the directors of the company should assess and order. When the policy was issued on such an application, the insured became a member of the company by virtue of its articles of incorporation and the statute which authorized them. Provision was made in the by-laws of the company and in the policies for the cancelation of the policies and the surrender of the obligation of the insured upon the payment of all sums for which they were liable. The assured under a cash policy was not required to sign an application nor an undertaking of any kind. The policy he received provided for its cancelation and a refund of the premium received, after deducting therefrom the short rates, and also provided that in case the policy had been in force one year or in case of its cancelation by the company, the assured should be entitled to a proportionate share of the benefits of the company during the time his policy should have been in force, but a cancelation by him forfeited his right to dividends. Some reliance is placed upon the last provision, but it is in violation of § 1160 of the Code, which prohibits the payment of dividends by companies organized under it. A section of the by-laws provides that "the association will make insurance for the term not exceeding six years, and the amount to be deposited in cash and obligation for the insurance of any buildings or other property shall be according to the hazard of such risk, and all circumstances affecting such risk." The deposit in cash referred to is that part of the obligation which was to be collected in advance. The company, in issuing assessment policies, required the payment of one assessment when the policy was issued. That practice was authorized by the section of the by-laws quoted, and was important and proper to provide funds for the current necessities of the company, and to prevent insuring property without compensation, and was not a violation of the law which required it to do a mutual business. The obligation of the assured remained subject to assessment, and the mutuality of the pledges of the holders of the assessment policies was not in any manner affected by the payment of the first assessment.

Whether money might be deposited as a pledge under § 1160 of the Code is a question we need not determine, for the reason that neither the articles of incorporation and the by-laws of the company nor its practice warrant the claim that the cash payments were designed to be mere pledges. There was no pretense that the money so paid was to be drawn upon from time to time by means of assessments, and that the portion, if any, remaining at the end of the term of insurance, was to be refunded. The payments were absolute, without condition, excepting in case of cancelation. We conclude that the cash policies were issued on the stock plan, and therefore without authority.

6. The fraud with which the company is charged in procuring the deposit notes in question is alleged to have been committed substantially as follows: In February, 1887, James P. Sherman published a notice to the effect that he and his associates would organize the company, and that "the guaranty fund or capital stock shall not exceed the sum of $50,000, which shall be paid as ordered by the directors and as required in said articles and by-laws." The articles of incorporation we have already considered were adopted, and the company was organized. A notice of incorporation was published, which contained the following: "The said corporation, by its articles of incorporation and by-laws, authorizes and provides for a guaranty fund, not to exceed $50,000, consisting of limited individual pledges made by certain of the incorporators and other members, which shall be paid as ordered by the directors and as required in said articles and by-laws." The notice and articles described the business of the corporation as that of a mutual company. Circulars, folders, and other advertisements were issued by the company, which contained various representations calculated to inspire confidence in the plans and methods of the company, and stated that the guaranty fund was pledged to the prompt payment of the losses should the funds from the assessments be inadequate, thus affording double security to policy holders. The guaranty fund was always described as a part of the assets of the company, and sometimes as permanent and as designed to protect policy holders against an assessment of more than one sixth of the amount of their deposit notes in any one year. There were also representations to the effect that the company was a corporation of this state,

composed of people who resided in it, and that it was designed to transact business only in this state. Other claims were also made, which are shown to have been well founded.

We do not think the alleged fraud on the part of the company furnishes sufficient ground upon which to relieve the plaintiffs from liability on their deposit notes. They knew that the company claimed to do business on the mutual plan, and, when they gave their obligations and received their policies, they became members of it. It is well settled that the members of a mutual insurance company are presumed to have knowledge of its articles of incorporation and by-laws. *Hobbs* v. *Iowa Mut. Ben. Asso.* 82 Iowa, 112, 11 L. R. A. 299; *Walsh* v. *Ætna L. Ins. Co.* 30 Iowa, 144, 6 Am. Rep. 664; *Simeral* v. *Dubuque Mut. F. Ins. Co.* 18 Iowa, 319. See also *Lucas* v. *White Line Transfer Co.* 70 Iowa, 546, 59 Am. Rep. 449; May, Ins. § 552; 2 Wood, Ins. § 538. The articles of incorporation and by-laws showed conclusively that the guaranty fund was not designed to relieve the makers of deposit notes from the assessments to which they were liable by their terms, and there was nothing in the representations of which they complain which could have misled them to their prejudice. Many of them were mere expressions of belief or opinion, and should have been treated as such by the plaintiffs if they knew of them. The notice published by James P. Sherman was not required by law. The notice of incorporation stated that the guaranty fund consisted of limited individual pledges, and as to that was of a nature to provoke inquiry. Very few of the false representations are shown to have influenced the plaintiffs or to have been known by them. They had constructive knowledge, at least, of the provisions contained in the articles of incorporation and by-laws in regard to the funds which were to be used in the payment of expenses and losses, and they had actual knowledge of the obligations they signed. Most of the representations in regard to the guaranty fund were in fact true, and it had an existence in the form of the obligation of the subscribers to it when the policies of the plaintiff were issued, and until the day of the assignment. The plaintiffs had no reason to believe that the guaranty fund would be used to relieve them permanently from any part of the assessments to which their obligations made them liable, and they have no just ground for complaint if they are not required to pay more money in any year, nor to pay more in the aggregate than their contracts warrant. The provisions in the subscription to the guaranty fund for the termination of the liability of the guarantors may not have been known to the plaintiffs, and they are not shown to be chargeable with knowledge of it, but that provision in no manner affects their liability on the deposit notes in question. It may be that representations made by officers and agents of the company to some of the plaintiffs, and statements contained in some of the advertising matter circulated in its interests, if relied upon by them, would have authorized a court of equity to cancel their contracts on the ground of fraud, upon a showing that the plaintiffs were in fact ignorant of the actual contents of the articles of incorporation and of the contents of the by-laws and of the condition of the guaranty fund, had timely application for that relief been made. It is evident that the security to the assured for loss he should sustain, and the value of his policy, would have been greater had there been a guaranty fund which was available at all times when the money from assessments was insufficient to pay losses, and which could not have been destroyed at the option of the guarantors even after a term of years. But the plaintiffs have had the benefit of the insurance during the time for which they are sought to be held liable, and have not been prejudiced by the fraud of which they complain. It would be unjust to their associates in the company, who necessarily relied upon their obligations, as well as those of the other members, for security, to deprive them of it, —especially in view of the fact that the plaintiffs did not ask to be relieved from liability until the company had ceased to do business and had assigned its property for the benefit of creditors.

7. It is claimed that the plaintiffs have shared the benefits which inured to the company from the business which was conducted on the stock plan, and that it would be equitable to require them to aid in paying the losses sustained under cash policies. There is nothing in the record to show which class of policy holders was most benefited by the doing of business on both the stock and mutual plans. The money received from all the business transacted appears to have been used as a common fund from which to pay expenses, and also losses, without regard to the kind of policy under which they occurred. The cash policies were issued largely on property outside the state for short terms. Which kind of insurance produced the largest revenue, and which had the most losses, are facts not shown. It is certain that some of the plaintiffs knew the company was issuing policies for cash premiums, but they do not appear to have been responsible for that plan of doing business, and did nothing which should estop them to deny liability on account of the business so done. We have found that it was not authorized, and that the plaintiffs should not be compelled to contribute to pay the losses sustained by it.

8. The appellees have urged various objections to the organization and proceedings of the company, and the validity of the assignment and assessment, which appear to have been of minor importance. Some of them relate to a failure to observe a part of the requirements of chap. 4 of title 9 of the Code, and are disposed of by what we have already said, and others do not appear to have any foundation in the record.

It is claimed that the by-laws were not properly adopted. The records of the proceedings of the company are shown to be incomplete, but it appears that by-laws were published, and in all respects treated by the company and its officers as in force. We find no reason to conclude that they were not properly adopted.

The claim that the assignment was fraudulent, and that the company was not insolvent when it was made, is not supported by the evidence. The guaranty fund was not, strictly speaking, assets of the company for the purpose of determining its solvency, and would not have been had the subscribers not terminated their liability, for the reason that the company was required to refund all money obtained from it. It is clear that the company was insolvent when the assignment was made, and that it was made in good faith, for a sufficient cause.

The insolvency of the company and its assignment for the benefit of creditors did not have the effect to terminate the obligation of the plaintiffs to contribute to the payment of losses which had occurred prior to the assignment. On the contrary, their liability to pay assessments made to meet such losses and expenses remained unimpaired, for the reason that until that time the contract of insurance was in all respects in force. See *Iowa State Ins. Co.* v. *Prossee*, 11 Iowa, 115; *Com.* v. *Massachusetts Mut. F. Ins. Co.* 112 Mass. 120; *Doane* v. *Millville Mut. M. & F. Ins. Co.* 43 N. J. Eq. 531; May, Ins. §§ 593, 594.

The articles of incorporation and by-laws do not require that notice of assessments be given before they are made, and no notice of that kind was required to be given by the court. See *Wardle* v. *Cummings*, 86 Mich. 395; May, Ins. § 593.

9. Our conclusion is that the deposit notes of the plaintiffs are valid obligations subject to assessment for losses covered by assessment policies which occurred prior to the assignment of the company for the benefit of creditors, and for expenses, but that the assessments can be made and collected only according to the terms of the obligations. By the statutes of this state, the assignee is at all times subject to the order and supervision of the proper court and judge, and, subject to such order and supervision, has as full power and authority to receive, sue for, and recover property of the estate of the assignor, and to dispose of it as the latter had at the time of the assignment. Code, §§ 2123, 2127. The power of the assignor to control and dispose of the property signed is transferred by assignment to the assignee, subject to the order and supervision of the court and judge, and subject to the regulations prescribed by law. It is therefore proper for the court to ascertain what assessments are required, and to order them made as needed and as authorized by the obligations assessed. The assessment made by the court in May, 1891, was on an erroneous basis, and was therefore properly set aside; but the court below erred in deciding the obligations of the plaintiffs to be void, and that they be canceled, and in enjoining all attempts to collect, enforce, or transfer them. The petition did not ask relief in regard to the assessment made by the board of directors in September, 1891, and the court therefore erred in setting it aside, although we do not hold that it was legal. The cause will be remanded, with directions to the district court to proceed in harmony with this opinion.

The decree rendered by it is reversed.

Granger, J.:

I concur in the conclusions in this case, but I do not wish to be understood as concurring in a holding, under § 2549, that a party may appear for another having similar interests, unless such appearance is in some way authorized.

Kinne, J., dissenting:

I cannot concur in the result reached in this case, nor am I content with the view of the sixth division of the opinion touching the question of the fraud practiced upon plaintiffs. The question is there treated as though the fraud pleaded and relied upon to avoid the obligations of plaintiffs have been practiced upon them after they in fact became members of the company. Such is not the case. The fraud relied upon was prior to the time they became members of the company. It is claimed to have been by reason of the alleged fraudulent representations that plaintiffs were induced to become members of the company. Now, as to such fraud, no presumption arises or obtains that plaintiffs had knowledge of the articles and by-laws, and they are in no manner concluded or bound thereby; therefore the cases cited have no application. The rule contended for by the majority only applies as to fraud practiced after plaintiffs had become members of the company. Such are not the facts in this case.

Deemer, J., concurs with **Kinne**, J., in what is said regarding the sixth division of the opinion.

ALABAMA SUPREME COURT.

STATE of Alabama, *ex rel.* Shirley BRAGG, *Appt.*,
v.
C. P. ROGERS, Jr., *et al.*

(.....Ala.....)

1. A statute reconstructing or reforming an existing board of revenue is not invalid because its title is "An Act to Establish a Board of Revenue."

2. A statute original in form and in itself intelligible and complete, although in some respects it modifies and changes existing statutes which are not recited at length, does not violate a constitutitional provision against reviving or amending a law without re-enacting or publishing it at length.

NOTE.—The constitutional requirement that courts shall be kept open is considered also in Union Cent. L. Ins. Co. v. Chowning (Tex.) 24 L. R. A. 504; and a somewhat similar constitutional provision that justice shall be administered freely and without purchase is considered in Henderson v. State, Stout (Ind.) 24 L. R. A. 469.

3. A statute requiring a county board of revenue to act in private when passing on any claim or awarding a contract does not violate a constitutional provision that courts must be open, since in such matters it is not in the exercise of judicial power.

(July 30, 1895.)

APPEAL by relator from a judgment of the Circuit Court for Lowndes County in favor of defendants in a quo warranto proceeding to determine defendant's right to act as a board of revenue for Lowndes County. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Cook & Gordon** for appellant.

Messers. **J. C. Richardson** and **Charles A. Whitten** for appellees.

Brickell, Ch. J., delivered the opinion of the court:

This was an information in the nature of a quo warranto, and its real purpose is to test the legality of the present organization of the board of revenue for the town of Lowndes. The board is organized in conformity to the provisions of an act of the last general assembly, entitled "An Act to Establish a Board of Revenue for Lowndes County, and Define the Powers and Duties of Said Board of Revenue." Pamph. Acts 1894-95, p. 186. The 1st section declares the board of revenue for the county shall be so changed as to consist of five members, to be elected at the biennial election for state and county officers, and relieves the judge of probate from all official connection with the board. The 2d section declares the board, as changed, shall have and continue in the exercise of all the powers and duties now conferred or hereafter to be conferred on them by law, and that the board "is in nowise changed from what it is now, except as herein provided." The 3d section declares that the four members of the board elected at the preceding August election shall remain members, and that C. P. Rogers, Jr., shall constitute the fifth member. The term of office and compensation is fixed, and vacancies are to be filled by the appointment of the governor. The 4th section requires the board, as changed, to hold its first meeting on the 22d of December, 1894, at the office of the circuit clerk of the county, and fixes that as their general place of meeting. At such meeting, a chairman of the board was to be elected, holding office during the term of the board; vacancies in the chairmanship to be filled by the board. The 5th section declares the clerk of the circuit court of the county clerk of the board, and prescribes his duties and compensation. The 6th section requires the sessions of the board to be held at the time appointed by the existing law, and makes provision for extraordinary meetings. The 7th section declares that claims against the county may be passed on, or contracts for the payment of money entered into, only at the regular meetings; and at least three members must concur in the allowance of a claim or the making of a contract. If there be division, the clerk is required, as part of the proceedings of the board, to record the vote; and the last clause is: "Nor shall any claim be passed on, or any contract awarded, save when the said board and their clerk are in private." The 8th section relates to the issue of warrants for the payment of claims, the payment of jury certificates, and other matters not now of importance.

The primary insistence is that the whole act is unconstitutional and void, because offensive to the clause of the 2d section of the 4th article of the Constitution, which, with exceptions it is not necessary to enumerate, requires that "each law shall contain but one subject, which shall be clearly expressed in its title." The unity of the subject of the act is not and could not be doubted. The insistence is that the title does not fairly indicate or express it,—that it expresses the purpose to originate or create a board of revenue, while there is no more than a reconstruction or reformation of the existing board,—and that, of consequence, the title is deceptive and misleading. The history and purposes of this constitutional mandate are so well known and understood, and the principles of interpretation which control in determining its application and operation have been the subject of such repeated judicial consideration and decision, that there is no room or reason for further discussion or elucidation of them. In considering whether a legislative enactment is violative of this requirement, the courts proceed upon the presumption which obtains when considering whether any other limitation of the Constitution has been violated. The presumption is that the legislature has not exceeded its powers, and unless it be clear that there has been a substantial departure from the Constitution the validity of the legislative act must be supported. *People, Rochester,* v. *Briggs,* 50 N. Y. 558. Until 1861, in this state, following the common law, the title of an act was not considered a part of it. It did not control the words of the body of the act, however foreign or diverse to the title they may have been. If, in themselves, the words were ambiguous or of doubtful import to aid in their construction resort was had to the title. *Bartlett* v. *Morris,* 9 Port. (Ala.) 266. The Constitution of 1861 was the origin of constitutional requirements relating to the titles of statutes. The words of the requirement were: "Each law shall embrace but one subject, which shall be described in its title." And in this form it passed into the Constitution of 1865. The phraseology was changed by the Constitution of 1868 to the present form. The difference in phraseology has not caused any change or difference of construction, each clause being deemed significant of the same purposes, and each having the same operation. *Montgomery Mut. Bldg. & Loan Asso.* v. *Robinson,* 69 Ala. 416. In the first of our cases interpreting or construing this constitutional requirement (*Ex parte Pollard,* 40 Ala. 98), it was said by Walker, Ch., J.: "The Constitution requires that only one subject should be embraced and that it should be described in the title. 'Subject' is a very indefinite word. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. The subject of laws with such titles as the following: 'To adopt a penal code,' 'To adopt the common law of England in part,' 'To adopt a code of laws,' 'To ratify the by-laws of a corporation,'—would be expressed in a very general way, and very little knowl-

edge of the specific provisions of the laws could be gleaned from the title; yet it would nevertheless be true that the subject was described in the title. . . It is impossible to prescribe any standard of particularity for the legislature. The Constitution has not attempted to do so. It exacts from the legislature an announcement in the title of the subject, but does not dictate any degree of particularity. This is a matter left to legislative discretion. . . . The object of the constitutional provision was to prevent deception by the inclusion in a bill of matter incongruous with the title. The evil contemplated was not the generality and comprehensiveness of titles. Those faults do not tend to mislead or deceive." Again: "The question must always be, whether, taking from the title the subject, we can find anything in the bill which cannot be referred to that subject. If we do, the law embraces a subject not described in the title. But this conclusion should never be attained except by argument characterized by liberality of construction and freedom from all nice verbal criticism." The illustrations employed by the learned chief justice may or may not be in all respects correct, but the principle asserted that the constitutional requirement is not directed against the generality and comprehensiveness of titles, and that all its purposes are satisfied when the law has but one general object which is fairly indicated in its title, underlies all our numerous decisions upon this question. Because of the generality and comprehensiveness of the title, if the general subject of the enactment is fairly indicated, sentence of nullity has not been pronounced. It is only when matter foreign to or incongruous with the title has been introduced that the title has been declared misleading and deceptive, and the enactment pronounced void. Nor is it necessary that the legislature adopt that which the courts may regard as the most appropriate or expressive title. The courts do not subject the title to the rules of a nice verbal criticism, or legislative action, as it has been properly said, would often be frustrated, without fulfilling the intention of the framers of the Constitution. It may be conceded the title of the present act would be appropriate as the title of an act originating and creating a board of revenue. It is the title of the act originating and creating the board of revenue for the county of Lowndes. Pamph. Acts 1875–76, p. 383. But this does not involve the concession that the title is so inappropriate as to offend the Constitution, when it is employed as indicative of the subject of the reconstruction, reformation, or reconstitution of an existing board. The insistence hinges on the use of the word "establish," which seems to be supposed incapable of proper use when employed in this connection, or of any other signification than "to found and set up." Yet it is as often employed to signify the putting or fixing on a firm basis, of putting in a settled or efficient state or condition, an existing legal organization or institution, as it is to founding or setting up such organization or institution. The one meaning is as little recondite, abstruse, or obscure as the other. In *People, Drake*, v. *Mahaney*, 13 Mich. 481, which is regarded in all courts as a leading and controlling authority in the exposition and application of the constitutional requirement, the title of the act was, "An Act to Establish a Police Government for the City of Detroit." It was said by Cooley, J.: "The general purpose of this act is 'to establish a police government for the city of Detroit.' It would be difficult to express it better or more concisely than it is expressed by the title. To accomplish this general object, officers are authorized to be appointed, who shall take upon themselves certain duties before performed by other officers, as well as certain new duties now created, and who are authorized to appoint and govern a force. The act with great particularity prescribes how this police government shall be rendered effectual; but this particularity cannot possibly be objectionable so long as it introduces nothing foreign and incongruous, but is confined to the means supposed to be important to the end indicated." The argument in support of the insistence of the appellant proposes to deflect judicial inquiry from its appointed sphere—the consideration whether the title of the present act fairly indicates the one subject to which the act is devoted—to the consideration whether a more appropriate and expressive title could not have been selected; and this involves nice criticism of the meaning of the word "establish." The discretion of the legislature in the selection of titles is to be invaded, and the presumption in favor of the validity of legislative acts is to be foregone and repelled.

The next insistence is that the act offends the clause of the same section and article of the Constitution which provides that "no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length." The act is in form original, and is in itself intelligible and complete. In some respects it modifies and changes the existing statutes from which the board of revenue of the county derived organization and existence. The more material of the changes is relieving the judge of probate from official connection with the board, devolving on a chairman, of the selection of the board, and on the clerk of the circuit court the duties the judge had been required to perform. This clause of the Constitution, like the preceding clause relating to titles, has been the subject of frequent judicial construction. Its purposes and scope were explained by Cooley, J., in *People, Drake*, v. *Mahaney*, *supra:* "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section, which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the

Constitution wisely prohibits such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision and cannot be held to be prohibited by it without violating its plain intent." In *Ex parte Pollard*, *supra*, it is said: "It was never intended by the Constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate. The constitutional provision reaches those cases where the act is strictly amendatory or revisory in its character. Its prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which, without the presence of the original act, are usually unintelligible. If a law is in itself complete and intelligible, and original in form, it does not fall within the meaning and spirit of the Constitution." All the purposes of the present act could doubtless have been accomplished by an act strictly and in form amendatory,—by setting out the existing statutes, amending and re-enacting them; but it is obvious the amendatory act would have been cumbersome, and not more intelligible than is the present act, whether an amendatory act or an original act should be employed was matter of legislative judgment and discretion, which the courts cannot control. In *People, Washington Park Comrs.* v. *Banks*, 67 N. Y. 575, it is said: "It is not necessary in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared, or burden imposed by the special statute; but the enforcement of the right or duty, and the final imposition of the burden, are directed to be in the form and by the procedure given by the other and general laws of the state. Reference is made to such laws, not to affect or qualify the substance of the legislation or vary the terms of the act, but merely for the formal execution of the law. The evil in view in adopting this provision of the Constitution was the incorporating into acts of the legislature, by reference to other statutes, of clauses and provisions of which the legislators might be ignorant, and which, affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law which would not receive the sanction of the legislature if fully understood."

The remaining objection to the validity of the act is directed to the last clause of the 7th section: "Nor shall any claim be passed on, or any contract awarded, save when the said board and their clerk are in private." The contention is that this clause is offensive to the declaration of the Bill of Rights "that all courts shall be open." If the contention was colorable, it would perhaps be a duty to pass it with the observation that it cannot be said the present record raises the question of the validity of the act in this respect, and until it was shown that the board had assembled in private, excluding from its presence some citizens having or claiming the right to be present, the question could not arise. But the contention is not colorable, and to quiet the controversy we have concluded to pass on it. In the making of contracts, and in the audit and allowance or rejection of claims, the board is not in the exercise of judicial power, nor sitting as a court. It is of peculiar Constitution. It has powers which are in their nature judicial, other powers which are in their nature legislative, and other powers—the powers of most frequent exercise—which are purely administrative or executive. It is in the exercise of mere administrative power in the making of contracts and in the allowance or rejection of claims. *Board of Revenue* v. *Barber*, 53 Ala. 589; *Clarke* v. *Jack*, 60 Ala. 271; *Jeffersonian Pub. Co.* v. *Hilliard*, 105 Ala. 576. Then it bears a close resemblance to the board of aldermen of a municipal corporation, or of directors of private corporations. It would, in the absence of the statute, rest in its discretion whether, in the making of contracts and the audit of claims, its deliberations should be private or public. As the pecuniary interests of the citizens and of the county are brought into antagonism, there may be, often, manifest propriety in their deliberating in private, free from all interference and from all extraneous influences. The act, it will be observed, affords no opportunity for avoiding responsibility for official action. It is only at the regular terms of the board that contracts may be made or claims allowed. A majority must concur in the making of a contract or allowance of a claim. The making of a contract or the allowance of a claim is a matter which will appear of record. If there is division in the board, the clerk records the vote of each member. The records of the board are public records, at all suitable times open to the inspection of any citizen of the county. While the act compels the board to deliberate and act in private, it equally compels publicity of the result of the deliberations, securing official responsibility to the constituency of the board.

For the reasons we have given, we are satisfied that the act is constitutional, and that the board of revenue is legally constituted and organized.

The result is the judgment of the Circuit Court must be affirmed.

CALIFORNIA SUPREME COURT.

Patrick F. RYAN, *Respt.*,
v.
LOS ANGELES ICE & COLD STORAGE COMPANY, *Appt.*

(.....Cal.....)

1. **Tightening up the nuts on the generator of a refrigerating machine** without reducing the pressure, when there is an ammonia pressure of about 120 pounds which is increasing, is a dangerous work at which a carpenter employed as a general laborer or handyman, but unfamiliar with and uninstructed as to the danger or the mode of operation necessary to preserve an equal strain on all parts of the generator, cannot be set without rendering the employer liable to him for injury resulting from an explosion caused by his lack of skill.
2. **The explosion of the generator of a refrigerating machine** a minute or two after tightening nuts to stop a leak, under an ammonia pressure much less than that which had been sustained the day before, is not necessarily the result of an unforeseen and unaccountable cause not chargeable to any negligence, when the nuts were tightened by inexperienced men, and the equality of the strain upon the parts may have been disturbed in tightening them.
3. **Instructing the jury to find for plaintiff** or for defendant in case they find the existence of certain enumerated facts which are within the issues, on which evidence has been given, does not violate a constitutional provision against charging with respect to matters of fact.
4. **An engineer in charge of a refrigerating machine** under the direction of the superintendent and general manager of a corporation when he is present, and in sole charge during his absence, with the same power to control workmen that the superintendent had when present, is not at such a time a fellow servant of a workman under his control who is injured while obeying his orders in a dangerous service.

(April 1, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Wells & Lee** and **Calvin Edgerton,** for appellant:

This was an accident, and it arose from an unforeseen and unaccountable cause, the consequences of which cannot with certainty be traced to the negligence of the defendant, and the court is powerless to render relief.

Cahill v. *Hilton,* 106 N. Y. 512; *Milwaukee & St. P. R. Co.* v. *Kellogg,* 94 U. S. 469, 24 L. ed. 256; *Goshen & S. Turnp. Co.* v. *Sears,* 7 Conn. 86; *Phillips* v. *Dickerson,* 85 Ill. 14, 28 Am. Rep. 607; *Hart* v. *Allen,* 2 Watts, 116.

If in a particular case the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability.

Henry v. *Southern P. R. Co.* 50 Cal. 183; *Cahill* v. *Hilton, supra;* Wood, Mast. & S. 345, 346.

A master is not liable for an unforeseen accident to the servant when he is not shown to have failed in the exercise of ordinary care.

Sjogren v. *Hall,* 53 Mich. 274; *Wabash, St. L. & P. R. Co.* v. *Locke,* 112 Ind. 404; *Loonam* v. *Brockway,* 28 How. Pr. 473; *Iron-Ship Building Works* v. *Nuttall,* 119 Pa. 158; *Atlas Engine Works* v. *Randall,* 100 Ind. 298, 50 Am. Rep. 798; *Hickey* v. *Taaffe,* 105 N. Y. 26; *Burke* v. *Witherbee,* 98 N. Y. 562; *Buckley* v. *Gutta Percha & R. Mfg. Co.* 113 N. Y. 540; *Kean* v. *Detroit Copper & B. Rolling Mills,* 66 Mich. 277; *Schroeder* v. *Michigan Car Co.* 56 Mich. 135; *Sanborn* v. *Atchison, T. & S. F. R. Co.* 35 Kan. 292.

Plaintiff cannot maintain this action against defendant because if the accident came from tightening the nuts, as he testifies, then he assumed the risk, even though it was outside of his regular employment.

Wormell v. *Maine C. R. Co.* 79 Me. 410; *Leary* v. *Boston & A. R. Co.* 139 Mass. 587, 52 Am. Rep. 733; *Prentiss* v. *Kent Furniture Mfg. Co.* 63 Mich. 478.

Defendant was not bound to guard or warn plaintiff against any peril unknown to defendant, or against unforeseen and unanticipated accidental injury to plaintiff, but plaintiff assumed the risk of such peril and accidental injury.

Clark v. *Barnes,* 37 Hun, 389; *Hickey* v. *Taaffe, Buckley* v. *Gutta Percha & R. Mfg. Co., Atlas Engine Works* v. *Randall, Sanborn* v. *Atchison, T. & S. F. R. Co.* and *Kean* v. *Detroit Copper & B. Rolling Mills, supra; Palmer* v. *Harrison,* 57 Mich. 182; *Prentiss* v. *Kent Furniture Mfg. Co. supra.*

Employers are only bound to give such instructions as are reasonably necessary to guard employees against danger.

Ciriack v. *Merchants' Woolen Co.* 146 Mass. 182; *Russell* v. *Tillotson,* 140 Mass. 201; *Melzer* v. *Peninsular Car Co.* 76 Mich. 94; *Foley* v. *Pettee Mach. Works,* 149 Mass. 294, 4 L. R. A. 51; *Coffey* v. *Chapal,* 19 N. Y. S. R. 61; *Berger* v. *St. Paul, M. & M. R. Co.* 39 Minn. 78; *Goodnow* v. *Walpole Emery Mills,* 146 Mass. 261.

One who enters the service of another takes upon himself the ordinary risks of the employment.

Ingerman v. *Moore,* 90 Cal. 421.

Messrs. **E. H. Lamme** and **Anderson & Anderson,** for respondent:

As the machinery is admitted to have been properly made, and was being used by a skilled engineer for its ordinary purposes, and in the ordinary way except as to tightening the bolts,

NOTE.—As to liability for negligence causing explosions of gas, see *note* to Ohio Gas Fuel Co. v. Andrews (Ohio) 29 L. R. A. 337.

As to negligence in the manufacture and storage of explosives, see *note* to Judson v. Giant Powder Co. (Cal.) 29 L. R. A. 718.

See also 34 L. R. A. 293.

the presumption must be that the explosion was caused by the manner in which or the means by which the nuts were being tightened.

Madden v. *Occidental & O. S. S. Co.* 86 Cal. 448.

This machine had just been brought on the premises, had never been subjected to ammonia pressure at any time, and the very first time that it was heated up, those inexperienced men were directed to do this work, under conditions highly dangerous, with an implement that greatly enhanced the danger, without a word of warning of the danger or instructions from the employer as to the caution and care necessary to safely do the work.

When the employee is injured as a consequence of this work, without negligence on his part, the employer is liable.

Ingerman v. *Moore*, 90 Cal. 421; *Baxter* v. *Roberts*, 44 Cal. 187, 13 Am. Rep. 610.

Haynes, C., filed the following opinion:

Action to recover damages for personal injuries, and this appeal is from the judgment and from an order denying defendant's motion for a new trial. The injury occurred March 20, 1890. Plaintiff was a carpenter by trade, and some two years prior to the accident was employed by the defendant in that capacity alone, but after the completion of the buildings he was used in making alterations and repairs when necessary, and as a general laborer, roustabout, or handyman. He was not an engineer, or machinist, or familiar with machinery at the time he entered defendant's service, nor afterwards, and prior to the accident, except so far as his general employment may have given opportunity for observation. A new still or generator had been put in place, and was first attempted to be used the day of the accident. This generator consisted of a wrought iron shell about 2 feet in diameter, and was made in two sections, each about 10 feet long, connected at the center by a cast-iron drum, and each end closed with a heavy cast-iron head, kept in place by iron rods running from end to end on the outside of the shell and through the heads, and secured by nuts on the outside of the heads, by which they could be drawn and secured against the ends of the shell. These heads were rabbeted to the depth of $\frac{5}{8}$ of an inch, corresponding to the ends of the shell or cylinder, the groove being nearly filled with lead, so that the ends of the cylinder were drawn partially into the grooves against the lead, the object being to make a tight joint. Within the generator or cylinder were a system of steam pipes, connected with the boiler in the engine room, for the purpose of heating the aqua ammonia, with which the generator was filled to about two thirds of its capacity, the steam not escaping into the generator, but passing through it within the pipes. The ammonia being thus heated produces a gas which fills the remaining space in the generator in the same manner that steam fills the vacant space in a boiler, and the pressure of the gas thus generated increases rapidly as the heat of the ammonia is increased. The steam, being confined within pipes, does not add to the pressure of the gas except as it operates in heating the ammonia. According to Mr. Troutwein, a witness for defendant, the proper working steam pressure is 45 to 50 pounds, and that produces an ammonia pressure of 180 to 235 pounds to the square inch. On the day of the accident the generator had been charged with ammonia for the first time. The steam pressure being used at the time of the accident appears to have been 20 pounds, and the ammonia pressure is variously stated at from 117 to 120 pounds, as shown by the gauge. A working pressure had not yet been reached, but at this stage it was discovered that the generator was leaking at the drum in the center of the generator, and the plaintiff and another employee, who had no more knowledge or experience, were called upon by the engineer, according to plaintiff's testimony, "to get a socket wrench and a bar, and set up on those bolts or nuts and stop that leak," and while they were doing so, or had just ceased work on it, the generator exploded, and the plaintiff was seriously injured. The jury returned a general verdict for the plaintiff, and also answers to certain special issues submitted to them. It is not claimed, however, that the special issues required a different judgment, but it is strenuously insisted that the evidence does not justify the verdict. It would require more space than can be devoted to this opinion to discuss fully and in detail the many points made by counsel for appellant on this branch of the case. The controlling questions only can be noticed.

It is urged that plaintiff's employment was general; that he worked at anything he was called upon to do, and that this included the work of tightening up the nuts on the generator, and that he was not inexperienced in that particular work. Conceding that, in a sense, his employment in course of time became general, the evidence is uncontradicted that he was wholly inexperienced in the operation of machinery, except so far as he may have acquired it during his employment by the defendant; but there is no evidence tending to show that he understood or appreciated the expansive force of steam, or of the gas generated from ammonia, or the principles involved in the construction of generators, or the care required to preserve an equal strain upon all its parts. Whether he had, prior to the time of the accident, assisted in this particular work, is a matter about which the evidence is strongly conflicting; but the jury found upon one of the special issues that "the explosion was caused by allowing inexperienced men to tighten up on the nuts on the bolts with an increasing ammonia pressure." Even if plaintiff had before this been required to tighten such bolts under similar circumstances, the operation being conceded to be dangerous unless skillfully done, his skill and experience would not thereby be necessarily established. These qualifications require something more than knowing how to handle a wrench. He must be able to determine where the pressure is least, and when he has secured an equal pressure upon all the bolts, then, if further tightening is required, he may turn each uniformly a little, so as not to disturb to any appreciable extent the equal pressure secured. If he is simply told to turn each a little, and go round the whole number, he may commence where the bolts are tightest, and thus increase the already unequal pressure while

strictly obeying instructions. Whether the plaintiff had ever tightened the bolts before is disputed. Richards, one of the engineers, says he did not set plaintiff and Richmond at work tightening the bolts, but saw them at work at it. Dempsey, another of the engineers, testified that he did not exactly remember whether he set the men at work at it or not; that he saw them at work at it; that he did not pay any particular attention to how they proceeded. "Of course, they understood how to do it. They had been instructed before. Every man that had ever tightened had always been instructed to turn the nuts first one some and then others, and keep going round and round." It is not clear from defendant's testimony that they received any instructions at that time; and whether the plaintiff had ever received instructions as to the mode of doing the work must depend upon whether he had ever done it before. Plaintiff denied that he had done so while the generator had pressure on. It is clear that he was not an engineer, and was not employed as such. The work was dangerous, and required skill, and should have been performed by the engineers. No man, however skilled and experienced, can tell where the bolts are slack or tight, unless he has hold of the wrench, and therefore cannot tell whether the work is being properly and safely performed, though standing by and directing it; for, though the tension of the rods or bolts may have been equal before heat was applied, it is by no means certain that the expansion of them, when heated, would be equal. Whether the tightening could be done with reasonable safety without first reducing the pressure was strongly controverted in the evidence, but there was no controversy that doing it without reducing the pressure required care and skill.

Appellant also contends that the accident occurred from an unforeseen and unaccountable cause, which cannot with certainty be traced to the negligence of defendant, and that therefore no relief can be granted the plaintiff. In one aspect of the evidence the explosion seems difficult of satisfactory explanation. The generator was manufactured at Carbondale, Pa., and was there tested with water pressure, and also with air pressure, up to 350 pounds to the square inch, and was calculated to sustain a pressure five times greater than the working pressure required of it. The day before the accident, according to the testimony of Engineer Richards, they subjected it to an air pressure of 160 pounds, and according to the testimony of Mr. Hendrick, 130 pounds. Just before the explosion the gauge showed a pressure of 120 pounds, according to Richards. A given number of pounds pressure, whether produced by gas or condensed air, would make no difference in testing the strength of the cylinder or generator, though possibly, if a break occurred, the expansive qualities of the gas might produce more serious results. If, therefore, the generator were in all its parts in the same condition at the time of the accident that it was in the day before when tested with a greater pressure, it would seem impossible that it should have given way. The solution must therefore be found in what was done to the generator at the time of the explosion. All the expert evidence shows that the danger of doing such work while the generator is under pressure lies in disturbing the equality of the strain upon the parts; that is, in making one part sustain more than its just proportion of the pressure; but as to whether it is prudent or reasonably safe to do the work in question while there is a pressure, there is a serious conflict. It is true, as appellant contends, that the mere happening of an accident, the attending circumstances being unknown, is not evidence of negligence on the part of the owner of the machinery or appliance; but in this case, the tightening of the nuts and the explosion concurring in point of time, we are not authorized to say that the jury could not properly infer that the procuring cause of the explosion was the tightening of the nuts. The explosion did occur. A cause—the tightening of the nuts—which might have produced it, if unskillfully done concurred; while the prior tests to which the generator was subjected would seem to exclude all other supposable causes. It is said, however, that the tightening of the nuts and the explosion did not concur in point of time; that plaintiff and Richmond had completed their work. But this statement is not quite accurate. It is true that, after they had been at work some time in tightening the nuts, they stopped, and stepped aside, to see whether the work they did affected the leak, and that at that moment the explosion occurred. But the fact that they were not at work turning up the nuts at the moment, or within a minute or two or three minutes, of the explosion, does not affect the question. The steam had not been turned off the pipes, nor had the steam pressure reached its working point, so that the heating power of the steam was increasing, and the pressure of the gas generated by the heat was also increasing; but this small increase in the pressure could not have affected the generator had it been in the condition it was in the day before, when it sustained a much greater pressure; and hence this extremely short interval between the suspension of the work and the explosion does not affect the theory adopted by the jury that the explosion was caused by the tightening of the nuts by inexperienced men.

But counsel for appellant in their very able brief further contend that, in order to establish negligence upon the part of the defendant, it must not only appear that the explosion was caused by the agencies and in the manner above indicated, but that such result should reasonably have been foreseen by the defendant; "that a party is not to be held responsible for injuries which could not reasonably have been foreseen or expected as a result of his misconduct." There was evidence tending to show that it was unsafe for a skilled engineer or machinist to tighten up these nuts while the pressure was on, though it may be conceded that the preponderance of the evidence was that it could be done by skilled men with reasonable safety; but there was little conflict in the evidence tending to show that it was dangerous for unskilled or inexperienced men to do it. In order to fix the liability of the master, it is not necessary that he should know that injury will inevitably follow, for that would exhibit express malice, or intent to in-

jure; nor that he knew or believed that it would probably occur, for that would be recklessness scarcely less criminal. This court in *Ingerman* v. *Moore*, 90 Cal. 421, 422, quoted with approbation the following from *Jones* v. *Florence Min. Co.* 66 Wis. 277, 57 Am. Rep. 269: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part." The instructions given plaintiff by the engineer have already been considered; but, in addition to what has been said, it may be added that it nowhere appears that he was informed that the work was dangerous, or that his safety in any degree depended upon the manner of doing it, or the care with which it was done.

What has been said covers appellant's first and second points. Its third point is that the verdict is against law; but, if we are right in our conclusions upon the propositions above discussed, this contention cannot be sustained. In support of it, however, appellant calls attention to the special finding No. 8. That question and the answer of the jury thereto are as follows: "Did plaintiff and Richmond tighten on one nut, and then pass to the next, tightening a little on each nut as they went along? If not, what does the proof show in respect to tightening the nuts? State how they tightened. A. Yes, but was ignorant of the manner in which the same should be tightened." What has been said heretofore in reference to these instructions, and the manner in which the work should be done, is sufficient to show the meaning of the answer given by the jury.

It is also claimed by appellant that the first and second instructions given by the court of its own motion, and instructions 1 and 3 given at plaintiff's request, violate that provision of the Constitution which declares that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Article 6, § 19. The objection to these instructions is not well taken. The court instructed the jury that, if they found by a preponderance of the evidence that certain enumerated facts existed, they should find for the plaintiff; but that, if the plaintiff failed to prove any of said facts by a preponderance of the evidence, their verdict should be for defendant. The enumerated facts were within the issues as to which evidence had been given. No reference was made to the evidence as sustaining or tending to sustain any fact.

It is also insisted that the court erred in refusing to give certain instructions requested by defendant. These instructions were to the effect that Richards and Dempsey, the engineers, were fellow servants of the plaintiff; that, if defendant had exercised proper care in selecting them, and the plaintiff was injured through their negligence, they and the plaintiff being engaged in the same general business, the defendant was not liable. The facts did not justify such an instruction. E. E. Hendrick was superintendent and general manager of the corporation defendant. He testified that Richards "was an engineer, and had charge of the refrigerating machine under my direction when I was there, and had sole charge of running the refrigerating machine in my absence, and hired and discharged men under my direction." Mr. Hendrick had been at the works, directing the starting up of the refrigerating machine,—the generator of which exploded,—and was engaged about it until about half an hour before the explosion, when he left, and went up town for some fittings, and did not return until after the explosion. The testimony of Richards and Dempsey, the engineers, was not clear as to which called the plaintiff to do the work, but it is clear that Richards saw him and Richmond doing the work, and did not object; while the plaintiff testified that it was Richards who called them to do the work. Richards, therefore, had the same power to control the men in Hendrick's absence that Hendrick had when he was present.

The remaining instructions requested by defendant are fully covered by the general discussion, and were properly refused, and the motion for a nonsuit was properly denied. The judgment and order appealed from should be affirmed.

We concur: **Belcher,** C.; **Britt,** C.

Per Curiam: For the reasons given in the foregoing opinion, *the judgment and order appealed from are affirmed.*

Re Jo. E. HASKELL.

(.....Cal.....)

1. **Discrimination between merchants having fixed places of business** in the municipality and also persons "selling to the trade" on the one hand, and retail dealers who have no regular place of business on the other hand, is not unlawful for the purpose of license taxes.
2. **An unlawful discrimination as to hawkers** and peddlers will not invalidate a wholly independent provision in the same ordinance, as to persons selling goods at retail outside and those conducting regular places of business.
3. **A license of $50 per quarter** for retailing goods outside of regular places of business is not unreasonable and oppressive as an attempt to prohibit business, although it is heavier than

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NOTE.—As to discrimination between residents and nonresidents of a municipality all of whom reside in the same state, see Sayre v. Phillips (Pa.) 16 L. R. A. 49.

As to the lawful limit of the amount of license fees, see *note* to State, Toi, v. French (Mont.) 30 L. R. A. 415.

that imposed upon mercantile business at fixed places.

4. Municipal ordinances are not within a constitutional provision as to the entitling of statutes.

(April 14, 1896.)

PETITION for a writ of habeas corpus to obtain the discharge of petitioner from custody to which he had been committed for selling wearing apparel without a license in violation of the provisions of the charter of the City of Chico. *Denied.*

The facts are stated in the opinion.

Messrs. **D. E. Alexander** and **Isaac Joseph,** for petitioner:

The amount charged against the business pursued by the prisoner is so great in comparison to the amounts of license charged against other merchants, that it is apparent that such rate of license was established for the purpose of prohibiting the prisoner and others similarly situated from doing business in the city of Chico, which is contrary to the general laws, in this:

(1) It is oppressive; (2) it is unreasonable; (3) it contravenes common right; (4) it restrains trade; (5) it is partial; and (6) it is against public policy.

Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; *Ex parte Thomas,* 71 Cal. 204.

The board of trustees have a right to levy a license for a revenue, but the grant of authority to impose fees for the purpose of revenues would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose.

Ex parte Burnett, 30 Ala. 461; *Craig* v. *Burnett,* 32 Ala. 728; *Burlington* v. *Putnam Ins. Co.* 31 Iowa, 102; *Kitson* v. *Ann Arbor,* 26 Mich. 325; *Mason* v. *Lancaster,* 4 Bush, 406; *Kniper* v. *Louisville,* 7 Bush, 601.

The board of trustees, besides having the right to levy a license for a revenue, have the right also to levy a license for regulation, but in such case a much narrower construction is to be applied, and it must be such a fee only as will legitimately assist in the regulation. It should not exceed the necessary or probable expense of issuing the license.

Ex parte Frank, supra; Freeholders of Essex County v. *Barber,* 7 N. J. L. 78; *Kip* v. *Paterson,* 26 N. J. L. 298; *State, Benson,* v. *Hoboken,* 33 N. J. L. 280; *Boston* v. *Schaffer,* 9 Pick. 415; *Com.* v. *Stodder,* 2 Cush. 562, 48 Am. Dec. 679; *Mobile* v. *Yuille,* 3 Ala. 137, 36 Am. Dec. 441; *Bennett* v. *Birmingham,* 31 Pa. 15; *Cincinnati* v. *Bryson,* 15 Ohio, 625, 45 Am. Dec. 593; *Mays* v. *Cincinnati,* 1 Ohio St. 268; *Collins* v. *Louisville,* 2 B. Mon. 134; *Ward* v. *Maryland,* 79 U. S. 12 Wall. 429, 20 L. ed. 452; Dill. Mun. Corp. § 609.

Haskell is a "merchant."

Nashville v. *Althrop,* 5 Coldw. 559; *Ex parte Siebenhauer,* 14 Nev. 365.

And he is entitled to do business in the city of Chico upon the same terms as other merchants.

Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; *Graffty* v. *Rushville,* 107 Ind. 502, 57 Am. Rep. 128; *Benjamin* v. *Webster,* 100 Ind. 15.

The ordinance in question here discriminates against Haskell because he does not reside in Chico, because he does not sell to the trade, and also because he has no fixed place of business in said Chico, and is void.

Const. art. 1, § 21; *Lassen County* v. *Cone,* 72 Cal. 387; *Ex parte Frank, supra; El Dorado County* v. *Meiss,* 100 Cal. 273; *Nashville* v. *Althrop, supra; Budd* v. *State,* 3 Humph. 483, 39 Am. Dec. 189; *Wally* v. *Kennedy,* 2 Yerg. 554, 24 Am. Dec. 511; *Officer* v. *Young,* 5 Yerg. 320, 26 Am. Dec. 268; *Jones* v. *Perry,* 10 Yerg. 59, 30 Am. Dec. 430; *Tugman* v. *Chicago,* 78 Ill. 405; *Shreveport* v. *Levy,* 26 La. Ann. 671, 21 Am. Rep. 553.

The ordinance is not reasonable either in its provisions or its penalties. It does not harmonize with the general laws of the country or of this state, the Federal or state Constitutions, or with the principle of the common law, and it is therefore void.

Ex parte Kearny, 55 Cal. 225; *Ex parte Hodges,* 87 Cal. 162; *Ex parte Whitwell,* 98 Cal. 73, 19 L. R. A. 727; *Ex parte Sing Lee,* 96 Cal. 357; 17 Am. & Eng. Enc. Law, p. 250.

This ordinance also contravenes common right in this, that it prevents the citizens of this state from freely trading with the people of Chico upon the same terms as they trade among themselves, and for this reason it is contrary to public policy; and it is an elementary principle of law that ordinances of municipalities must not contravene the common right.

Dill. Mun. Corp. § 325; *Ex parte Frank,* 52 Cal. 606, 28 Am. Rep. 642.

It is a regulation of trade and the city of Chico has no power to regulate trade.

Brennan v. *Titusville,* 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658; *Emert* v. *Missouri,* 156 U. S. 319, 39 L. ed. 437, 5 Inters. Com. Rep. 68; *McCall* v. *California,* 136 U. S. 104, 34 L. ed. 392.

Mr. **F. C. Lusk** for respondent.

Van Fleet, J., delivered the opinion of the court:

The city of Chico is a municipal corporation of the fifth class, having power, as such, to license, for purposes of regulation and revenue, all and every kind of business transacted or carried on in such city, and to fix rates of license tax upon the same, and provide for its collection. It has an ordinance which, among other provisions thereof relating to the revenue, has the following: "Persons, outside of those conducting regular places of business, selling different articles of apparel, dry goods, fancy goods, notions, jewelry, cutlery, groceries, harness, pianos, organs, machinery of all kinds, vehicles, hardware, tinware, mill products, or merchandise of any class or character, to persons not regularly engaged in or carrying on such lines of business, whether by sample or otherwise, shall pay a license of fifty dollars per quarter." Haskell, a traveling salesman for a shirt house in Oakland, was arrested and is held by the marshal of Chico upon a warrant issued from the recorder's court of said city, upon a complaint which charges Haskell with a misdemeanor, in vending within said city wearing apparel—to wit, shirts—by sample, without a license therefor, in violation of the provision of said ordinance above quoted. The petitioner asks that Haskel be discharged

on habeas corpus, upon the ground that the ordinance is void and of no effect, for various alleged reasons, and so furnishes no competent authority for his detention.

It is urged, in effect, that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. But we are unable to regard it as open to either or any of these objections. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs,—within the law, of course,—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof. That the ordinance in question violates any such right, we are unable to perceive.

It is said that the provision is unreasonable and oppressive because the license charged against the business pursued by Haskell is so disproportionately great, in comparison with the rates charged against other classes of merchants, as to make it apparent that the amount was fixed with a view and purpose of prohibiting Haskell, and others pursuing the same calling, from doing business in the said city,—a result which is in restraint of trade, and against public policy. This contention is based upon the fact that elsewhere in the same article the ordinance provides for licensing those engaged in trade within said city "who at a fixed place of business sell any goods, wares, or merchandise," etc., of the same general character, and divides such into classes according to the amount of their monthly sales, and fixes rates of license based upon such classification somewhat less, perhaps, in proportion than the license tax charged against the business as carried on by Haskell. But we cannot say that the ordinance is either oppressive or unreasonable by reason of this difference. The very power to license for purposes of regulation and revenue involves the right to made distinctions between different trades, and between essentially different methods of conducting the same general character of business or trade. And that is all that is done here. While it may be true, as suggested by petitioner, that Haskell is, in a sense, a merchant, equally with those having a fixed place of business, it is nevertheless true that the manner in which he conducts and carries on his business is so distinct from that of the merchant of the latter class as to make it essentially a different business. And we are not at liberty to say that this difference does not constitute a just ground for the discrimination which the ordinance makes between the two. The tax imposed is not, upon its face, necessarily unreasonable; and to say that it is so simply because the legislative body of the city has seen fit to impose a heavier license upon the business when so conducted, than where carried on in a different way, is as suggested in *Ex parte Hurl*, 49 Cal. 558, "to argue that, because the common council, in fixing the rates for licenses, have discriminated between the several business pursuits which they were regulating, and have imposed a larger license tax upon one pursuit than upon any other, the ordinance is oppressive and unreasonable. But to argue thus is to forget that the authority of the common council to fix the rates of license is a branch of the taxing power,—which is, in itself, the power to discriminate as to the objects upon which burdens are to be imposed —but which, not being taxation, pure and simple, is as yet untouched by the constitutional requirement of uniformity." It may well be that, to the knowledge of the city council, the profits of such itinerant business, by reason of the fact that there are no rents, taxes, insurance, or other municipal charges to pay in its pursuit, are so much greater, proportionately, over the some amount of business done at a fixed place, as to fully justify the difference in the tax imposed. Indeed, the right to make such discriminating distinctions, based upon like grounds, is amply sustained by authority and in many cases involving a much greater disparity between the rates charged than is exhibited here.

In *Warren* v. *Geer*, 117 Pa. 211, where the town passed an ordinance requiring every person canvassing from house to house, soliciting orders for books, pictures, gentlemen's shirts, etc., to take out a license, and the license for selling shirts was $3 a day, it was held that this ordinance was not unreasonable, nor in conflict with the Constitution of the United States, or that of Pennsylvania, the court saying: "The effect of the ordinance would seem to be to subject persons who would otherwise pay no license for the privilege of doing business within the borough, to the duty of paying something for the privilege, when they undertake to exercise it without incurring the expense as a mercantile license. There is surely nothing unreasonable in such a requirement." In *Cherokee* v. *Fox*, 34 Kan. 16, it was held that an ordinance requiring itinerant hawkers, peddlers, etc., to pay a license fee of $2.50 per day is neither class legislation or unjust discrimination, nor partial or oppressive, nor inconsistent with public policy, as being in restraint of trade. The same principle is involved in *Ex parte Heylman*, 92 Cal. 492 (decided by this court), upholding a license passed by the board of supervisors of the city and county of San Francisco for peddling meats or fish from wagons or baskets, where the license charged was $75 a quarter for a meat peddler, and only $10 a quarter for peddlers of fish, vegetables, fruit, game, or poultry, and where the amount charged for vending meat by this method was a different and higher license from that charged for selling meat at a fixed place of business. In that case it is said: "The validity of such an ordinance is not now an open question here." See also *Amador County* v. *Kennedy*, 70 Cal. 460; *Ex parte Felchlin*, 96 Cal. 360.

Nor is the provision in question unlawfully discriminating. It may be conceded that if it could be said to discriminate in favor of residents of the city of Chico, by requiring such

license only from nonresidents engaged in the line of business pursued by Haskell, it would be bad; or if it discriminated against residents of the state, or against merchandise from without, or not the product of the state, that it would be void, as being, in effect, a regulation of interstate commerce,—something entirely within the power of Congress. *Ex parte Maier*, 103 Cal. 484. But it does neither of these. In the contention that it does so discriminate against nonresidents of the municipality, counsel has evidently confused this provision with another in the same ordinance, relating to hawkers and peddlers, who carry their goods with them, which last may be, in its terms, open to such objection. But the latter provision is a wholly independent one, relating to a different class, and in no way affects the construction of the feature under consideration. The fact that one portion of an ordinance, or a portion of the same section, may be void for any reason which does not necessarily affect the whole, does not invalidate another part, unless the two are so interblended or dependent that the vice of the one must be held to vitiate the other. *Ex parte Christensen*, 85 Cal. 211. The provision here involved is general in terms, and applies alike to all—residents and nonresidents equally— who do not maintain "regular places of business" in the city, and who sell to "persons not regularly engaged in carrying on such lines of business." It in no way discriminates, as to the class against which it is directed, between those living within the city and those without, but is broad enough to include all of such class, wherever residing. It does put into a class by themselves those who prosecute their business by the method therein specified, and discriminates in the amount of license as between such class and merchants having their business located in the municipality, and also as between such class and persons "selling to the trade," as is expressed, such as regular drummers and traveling salesmen for commercial houses, who go from place to place soliciting orders from merchants and traders. But such discrimination is lawful, and has been uniformly upheld, upon the principle that, although the different classes are engaged in the same general business of selling merchandise, it is in the several instances carried on under such different circumstances, and by methods so essentially dissimilar, and with such widely different facilities for profit as to furnish just and reasonable ground for such discrimination. See cases cited above, and also *East St. Louis* v. *Wehrung*, 46 Ill. 394; *St. Louis* v. *Sternberg*, 69 Mo. 301; *Howe Mach. Co.* v. *Gage*, 100 U. S. 679, 25 L. ed. 755. There is nothing in *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, necessarily opposed to this view. In that case the attempted discrimination was made to depend, not upon the fact of any essential difference in the methods of carrying on the business, or the profits to be derived therefrom, but solely upon the question whether the merchandise, at the time of sale, was or was not within the corporate limits of the city, or in transit thereto. This was held to constitute no just or proper ground for the discriminating difference in amount of license imposed in the two instances, and as being, therefore, partial, unjust, and in restraint of trade.

Within the principles of *Ex parte Miller*, 89 Cal. 41, we discover no merit in the objection that the ordinance is void by reason of the penalty imposed, even if such objection can properly arise before conviction. See *Ex parte Mansfield*, 106 Cal. 400. Nor is there anything in the further point that the ordinance is void because embracing more than one subject and that not expressed in its title. The provision of the Constitution as to the requirement, in that respect, of acts of the legislature, is not made applicable in terms to municipal ordinances, and was evidently not intended so to apply. Its application would practically put an end to the practice of many cities and towns in the state, prevailing before, at the time, and since the adoption of that instrument, of codifying the ordinances of the municipality, as in this instance, into a compact and convenient form, in a single ordinance. A similar requirement of the Constitution of Missouri was held not to apply to city ordinances, in the absence of an express provision of the statute making it so. *Tarkio* v. *Cook*, 120 Mo. 1.

We discover nothing in the provision of the ordinance under consideration which renders it invalid under the objections made.

The writ is denied, and the prisoner remanded.

We coucur: **Harrison, J.**; **Garoutte, J.**; **McFarland, J.**; **Henshaw, J.**

I dissent: **Temple, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

Nicolangelo POMPONIO, Admr., etc., of Germaio Pomponio,

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Appt.*

(66 Conn. 528.)

1. The duty of using due care not to injure those rightfully on one's premises is the same whether they are there as licensees or upon invitation.

2. A railroad company making a flying switch at a crossing which it has kept planked many years, between shops of a corporation located on both sides of its road, for the use of workmen therein, when it knows that this constitutes practically the only entry to the shops on one side of the track and is used by the workmen in crowds at stated hours of the day,

NOTE.—For negligence of a railroad company in respect to flying switches and detached cars moving by their own momentum, see Kentucky C. R. Co. v. Smith (Ky.) 18 L. R. A. 63.

See also 33 L. R. A. 496.

must exercise reasonable care towards them, whether they are to be regarded as licensees or as using the track by invitation.

(July 19, 1895.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Kellogg & Kellogg,** for appellants:

While an invitation, express or implied, imposes the duty of ordinary care upon a person in control of premises, a license, which is inferred where the object is the mere pleasure or benefit of the person enjoying it, imposes no such duty.

Hargreaves v. *Deacon*, 25 Mich. 1; Beach, Contrib. Neg. § 51.

An invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.

Bennett v. *Louisville & N. R Co.* 102 U. S. 584, 26 L. ed. 237; Campbell, Neg. ¶¶ 43, 44; 16 Am. & Eng. Enc. Law, p. 414.

It must be found from the evidence that there was no invitation, either express or implied, according to the meaning which that word has in the eye of the law.

The deceased had no technical right to the crossing in question as against the railroad company. He was there simply with the permission and by the sufferance of the railroad company. But to require a greater degree of care or warning from the railroad company than that contended for by the defendant would be to require from it at this crossing, where the deceased had acquired no legal rights against the company, the same degree that it is bound to exercise at highway crossings which the public has exactly the same legal right to use as the railroad.

Nicholson v. *Erie R. Co.* 41 N. Y. 526; *Sutton* v. *New York C. & H. R. R. Co.* 66 N. Y. 243.

A naked license to pass over premises does not create any obligations, upon the part of the licensor, to provide against danger or accident to the licensee.

Morgan v. *Pennsylvania R. Co.* 7 Fed. Rep. 78.

One who enters the yard of a railroad company under a mere license is held to assume the risk of all dangers which are caused by a natural and proper use of the tracks and trains.

Richards v. *Chicago, St. P. & K. C R. Co.* 81 Iowa, 426; *Hogan* v. *Chicago, M. & St. P. R. Co.* 59 Wis. 139; *Illinois C. R. Co.* v. *Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Spicer* v. *Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385; *McClaren* v. *Indianapolis & V. R. Co.* 83 Ind. 319.

The deceased did not do all that is required as a matter of law from those approaching any crossing of a railroad, and especially one in which the deceased had no actual legal right other than that of a mere licensee.

Pierce, Railroads, 343; *Woodard* v. *New York, L. E. & W. R. Co.* 106 N. Y. 369; *Hinckley* v. *Cape Cod R. Co.* 120 Mass. 257; *Elliot* v. *Chicago, M. & St. P. R. Co.* 5 Dak. 523, 3 L. R. A. 363; *Owens* v. *Pennsylvania R. Co.* 41 Fed. Rep. 187; *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Peck* v. *New York, N. H. & H. R. Co.* 50 Conn. 392.

Mr. **Charles G. Root,** for appellee:

If there were any duty whatever toward the deceased, imposed upon the defendant, then the question of negligence ought to be left to the trier.

Nolan v. *New York, N. H. & H. R. Co.* 53 Conn. 461; *Hanks* v. *Boston & A. R. Co.* 147 Mass. 495; *Taylor* v. *Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446.

The crossing was practically a highway crossing at noon and the defendant recognized it as such by giving the highway signals on that occasion.

Berry v. *New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Murphy* v. *Boston & A. R. Co.* 133 Mass. 121; *Chenery* v. *Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575; 4 Am. & Eng. Enc. Law, p. 915, § 10, and notes.

The only attempt on the part of the defendant's servants to warn the person struck or to prevent the accident was made by a brakeman on the top of the box car at its rear and was futile as should have been foreseen by the defendant's servants. This was clearly negligence.

4 Am. & Eng. Enc. Law, pp. 935, 936, and a large number of cases cited in the notes; *Brown* v. *New York C. Railroad*, 32 N. Y. 597, 88 Am. Dec. 353; *Ferguson* v. *Wisconsin C. R. Co.* 63 Wis. 145; *French* v. *Taunton Branch Railroad*, 116 Mass. 537; *Howard* v. *St. Paul, M. & M. R. Co.* 32 Minn. 214; *Pennsylvania R. Co.* v. *State*, 61 Md. 108; *Grethen* v. *Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609.

Contributory negligence is a question of fact, and the trial court finds that the deceased did not, at the time of the accident, fail to make reasonable use of his senses, and did not by such failure or otherwise in any manner by his own negligence or want of care, contribute to his injury, thus announcing that the deceased was entirely free from it.

Nolen v. *New York, N. H. & H. R. Co.* 53 Conn. 475; *Bates* v. *New York & N. E. R. Co.* 60 Conn. 269; *Lutton* v. *Vernon*, 62 Conn. 1; *Beisiegel* v. *New York C. R. Co.* 34 N. Y. 622, 90 Am. Dec. 741.

Torrance, J., delivered the opinion of the court:

This is an action brought to recover damages for injuries claimed to have been inflicted by the defendant upon the plaintiff's intestate, causing his death. The court below, upon the facts found, rendered judgment for the plaintiff, and the defendant appealed.

The following is the substance of the finding: The intestate, Germaio Pomponio, was, when injured, working for Holmes, Booth, & Hayden, a corporation, in Waterbury. The shops of said corporation are located upon both sides of the defendant's railroad, and extend for a considerable distance parallel with it. Germaio was employed in that portion of the

works lying easterly of the tracks, and on the 30th of May, 1892, a few minutes before 1 o'clock in the afternoon he was returning to his work, and in doing so was passing over the tracks of the defendant's railroad, at a crossing leading from one of the streets in Waterbury to one of the two regular entrances to the easterly portion of the works of his employer. On both sides of this crossing was a wooden gate, and a house for a gate tender, belonging to and maintained by Holmes, Booth, & Hayden. This crossing was regularly prepared for the purpose of access to said works, and was regularly used by 300 or 400 of the employees in going to and from their work, as well as by teams and others having business with said corporation. It was the rule of said corporation that these employees should go through the gate at the easterly terminus of this crossing, in going to and returning from their work. None others than said employees, and those having business with the corporation were permitted to enter at said entrance without a pass obtained from the office. This crossing has been thus maintained and used for over thirty years, and said use has always been open, notorious, and well known to all the world and to the defendant. During all this period the defendant has kept this crossing planked and in condition for travel to said shops; and the planking for such purpose has generally been furnished by the defendant, but at times by said corporation. The layout of defendant's road, in 1848, antedated by a few years the erection of these shops, and the establishment of this crossing. It was well known to the defendant that a few minutes before the morning starting, at the noon closing, the 1 P. M., starting, and the evening closing hours, the employees of said works passed in or out in large numbers, over this crossing, while during the other hours of the day it was comparatively little used. South of the crossing were two side tracks, used principally for the storage of cars for the shops. Thirty-four feet north of the crossing was the south end of an iron truss bridge of the defendant over the Naugatuck river. It was 105½ feet long. Its main trusses were 24 inches wide. Its overhead supports were of iron of the various sizes usual in such a bridge, and it was not otherwise enclosed. The defendant was accustomed to switch over this crossing from its freight yard north of the bridge, in order to place its cars on the side tracks south of the crossing. In switching cars upon the more northerly of the two sidings, flying switches were customarily made. This switching could only be done during the intervals between the passing of regular trains, and one of these intervals was between 11:15 A. M. and 1:10 P. M. At the time Germaio was injured the defendant was making a flying switch over this crossing, in order to put a box car from the freight yard onto one of the two side tracks south of the crossing. Said car, having been got under headway, was, near the north end of the bridge, cut off from the engine, which then sped on, at about 12 or 15 miles an hour, until it passed the crossing, and the switch about 150 feet south of the crossing. Upon the engine were the engineer and fireman in the cab, the yard conductor on the forward footboard, and two brakemen on the rear footboard of the tender. Upon the box car, which followed some distance behind, and which was upon the bridge when the engine passed the crossing, was a single brakman, on top of the car at the rear, where the brake was. As the engine approached the crossing the whistle was blown and the bell rung, and Germaio and Loughlin, a fellow workman, observed its approach, and halted for it to pass at a distance of between 6 and 15 feet from the tracks. After it had passed, Loughlin looked up and down the track. He did not see the car coming, being prevented from doing so either by the bridge, or by escaping steam, smoke, or flying dust, or both combined, and proceeded on his way. Germaio advanced at the same time. As they were upon the planking between the tracks, the silently advancing car, going at the rate of from 6 to 8 miles an hour, struck both Loughlin and Germaio, causing the latter the injuries from which he died a few days later. It did not appear in evidence that anyone observed, or was in a position to observe, Germaio, to see whether or not he looked up the track before starting to cross, after the engine passed, and there was no direct evidence upon this point. As the engine passed the deceased, none of the men upon it gave any warning of the approaching car, or did anything to attract his attention to it. When the brakeman upon the box car saw that an accident was imminent, he shouted, but was not heard by the crossers, as the circumstances rendered it little probable that he would be, or that, if heard, the intended warning would be of any avail. He also began to apply the brake, but with no effect in diminishing the speed of the car until the accident occurred. When Germaio started across the tracks, after the engine passed him, the box car was somewhere on the bridge, and it was more or less concealed from his view by the bridge. From any point in the line of said crossing, between defendant's west rail and the gate house, the view to the northward was unobstructed, save by the bridge; and standing in said line, within a distance of 5 feet from said rail, one had a clear view through the bridge. Between 6 and 8 or 9 feet from said rail the trusses and supports of the bridge seriously interfered with the view of objects on the bridge, so that a box car upon it "would be largely obscured from sight." At no point, however, would such a car be wholly hidden from sight. The finding concludes thus: "I find from the evidence as follows: (*a*) That the deceased was upon the crossing at the time of the accident by the implied invitation of the defendant. (*b*) That the defendant failed to exercise due and reasonable care towards the deceased in the premises, and was negligent towards him, whereby he received his injuries. (*c*) That the defendant failed in its duty to the deceased, and did not exercise reasonable care for his safety, under the circumstances, although he was upon said crossing as a mere licensee only, and that the defendant was therefore guilty of negligence directly causing said injuries to the deceased. (*d*) That the deceased did not, at the time of the accident, fail to make reasonable use of his

senses, and did not, by such failure, or otherwise, in any manner, by his own negligence or want of care, contribute to his injury."

Upon the trial below the defendant claimed that the deceased was upon the crossing as a mere licensee, that the defendant at the time owed to him no duty as such licensee, that the defendant was not guilty of negligence, that the deceased was guilty of contributory negligence and that judgment should be rendered for nominal damages only. The court rendered judgment for substantial damages. The defendant claims that the court below, upon the facts found, erred in holding it guilty of negligence towards the decedent, and also in holding that the decedent was not guilty of contributory negligence.

We think the question involved in this last claim, as to the contributory negligence of the decedent, is disposed of by the finding as one of fact, and is not open to review upon this appeal. The general question whether the decedent was guilty of contributory negligence involves these two subordinate questions: First. What were the nature and extent of the duty to avoid injury resting upon the decedent under the circumstances? Second. Did he fully perform that duty? The first question is one of law, and is answered by saying that whether the decedent was upon the crossing as a trespasser or a licensee, or was there by implied invitation, it was his duty to use such measures to avoid danger and injury to himself as a man of ordinary prudence would have used under the same circumstances, and this was all the law required of him. The other question, whether his conduct in avoiding the dangers incident to his situation was that of a man of ordinary prudence, is clearly a question of fact, to be answered by the trior from the facts proved by the evidence. The conclusion of the trior upon this point, if he committed no error of law in reaching it, is final, and cannot be reviewed by this court upon this appeal. *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239. Now, the claim of the defendant, that the court below erred in holding that the decedent was not guilty of contributory negligence may mean that the court erred with reference to this question of law, or this question of fact, or both. But the record does not disclose that the court erred with reference to either question. It nowhere appears that it took an erroneous view of the nature or extent of the decedent's duty, or that it held him to a duty less in any degree than the law imposed on him; and it nowhere appears that, in coming to the conclusion that he had fully performed his duty, the court below committed any error of law. Upon this part of the case, then, the record fails to show that the court below committed any error of law, and this disposes of the defendant's claim upon the question of contributory negligence.

The next question is whether the court erred in holding that the defendant was guilty of negligence towards the decedent. Upon this part of the case the questions relate principally to the nature and extent of the defendant's duty towards the decedent, rather than to its performance of that duty; and the extent of the duty, it is said, depends largely upon the relation which the parties sustained to each other at the time; that is, whether the decedent was upon the crossing as a licensee, or was there upon the implied invitation of the defendant; and these questions are, upon this record, properly questions of law.

The principle upon which the courts distinguish a case of implied license from one of implied invitation, in the technical sense, seems to be this: Speaking generally, where the privilege of user exists for the common interest or mutual advantage of both parties, it will be held to be a case of invitation; but if it exists for the mere pleasure and benefit of the party exercising the privilege, it will be held to be a case of license. Beach, Contrib. Neg. § 51; Campbell, Neg. §§ 43, 44. "It is sometimes difficult to determine whether the circumstances make a case of 'invitation,' in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license." *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 577, 584, 26 L. ed. 235, 237. The defendant contends that the decedent was upon the crossing as a mere licensee, and consequently that its duty towards him was a more limited one than if he had been there upon its implied invitation.

As a general statement, it is undoubtedly true that an owner in charge of land owes a more limited duty to a mere licensee than he does to a party invited, in the technical sense of that word. A licensee must take the premises as he finds them, and the owner is not, as to him, bound to use care and diligence to keep the premises safe, while he does owe such a duty to one using his premises upon invitation. "It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who come there by his invitation, express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees." *Plummer* v. *Dill*, 156 Mass. 426, 427. This distinction between the case of a licensee and that of a party invited, in respect to the duty of keeping the premises safe for their use, is recognized in the following cases, and in many others: *Nicholson* v. *Erie R. Co.* 41 N. Y. 526, 532; *Barry* v. *New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Byrne* v. *New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512; *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Gordon* v. *Cummings*, 152 Mass. 513, 9 L. R. A. 640. But, while this is so, it is also true that the landowner must not himself, by what has been called "his own active negligence," injure either the licensee, or the party invited, while they are upon his land. This is a duty due to both equally. Towards both, in this respect, he is bound to exercise the same amount of care. Both are upon his premises, not as wrongdoers, but by his permission; and, in respect to the duty in question, we know of no good reason why the nature and extent of it should not be the same in cases of license as in cases of invitation.

In a Massachusetts case it appeared that the plaintiff, being sent by his mother upon an errand, passed through a passageway upon the defendant's premises, over a portion of which way a roof had been constructed, and that it was the defendants' habit to supply ale to their

workmen, who were accustomed to throw the empty ale kegs out of a window, down upon this roof, from which, from time to time, the kegs were taken away. Just as the plaintiff, in going through the passageway, emerged from under this roof, one of the workmen threw a keg so carelessly that it fell off the roof and injured the plaintiff. It was held that the defendants were liable, and that it made no difference whether the way was public, and thus the plaintiff was traveling upon it as a matter of right, or whether it was private, and he was traveling upon it merely by permission. The court said: "Even if he were there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing and in fact injured him." *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577, 96 Am. Dec. 685. In another Massachusetts case the court says: "The licensor has, however, no right to create a new danger while the license continues. *Oliver* v. *Worcester*, 102 Mass. 489, 502, 3 Am. Rep. 485; *Corrigan* v. *Union Sugar Refinery, supra*; *Corby* v. *Hill*, 4 C. B. N. S. 556. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied." *Stevens* v. *Nichols*, 155 Mass. 472, 475, 15 L. R. A. 459.

In a New York case the court said: "There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant, in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The ground of liability in this case is negligence and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was there simply by the defendant's implied permission." *Barry* v. *New York C. & H. R. R. Co.* 92 N. Y. 289, 293, 44 Am. Rep. 377.

In this view of the matter, we think it makes no difference whether we hold the case at bar to be one of license or invitation; for the duty which the defendant is here charged with violating is not the duty to keep its premises safe for use, but the duty of using due care not to injure by its own act those rightfully on its premises, and that duty is the same whether those persons are on the premises as licensees, or upon invitation, in the technical sense of that word.

Furthermore, upon the somewhat peculiar and exceptional state of facts disclosed by the record, we think this is a case of invitation, as that word is used in many of the cases, as pointed out in *Plummer* v. *Dill*, 156 Mass. 426, 430. In that case the court says: "There is a class of cases to which *Sweeny* v. *Old Colony & N. R. Co. supra*, and *Holmes* v. *Drew*, 151 Mass. 578, belong, which stand on a ground peculiar to themselves. They are where the defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation, in these cases, is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may be expected to be protected. The liability in such a case should be coextensive with the inducement or implied invitation." We think the case at bar, *quoad* these work people using this crossing at the stated hours, is a case of invitation, rather than of license, within the principle laid down in the above case of *Plummer* v. *Dill*, and the cases therein referred to, and in other cases which might be cited. See also our own case of *Crogan* v. *Schiele*, 53 Conn. 186, 207, 55 Am. Rep. 88. But after all, whether the decedent is to be regarded as a licensee, or as one invited to use the crossing, is of no practical importance in this case. He was certainly either the one or the other, and the defendant's duty towards him, so far as the present complaint is concerned, was the same in either case; and, upon the facts found, we think the court below was justified in holding that the defendant failed to perform that duty. As before intimated, the facts in this case are somewhat peculiar and exceptional. For more than thirty years the defendant has kept this crossing planked, and in condition for the use of these 300 or 400 work people, and for the teams of their employer. It was specially prepared and adapted for this purpose, and, practically speaking, the employees were compelled to use it in coming to and going from their work. It was used during every working day by 300 or 400 people. It adjoined a public street, and it was the principal, and practically the only, entry to the shops east of the tracks. It was used by these people, in crowds at a time, at certain stated hours of the day. And all of this was well known to the defendant and its servants. The decedent was one of these workmen, and when he was injured he was using the crossing in returning to his work at one of the stated times when it was customary for the employees to use the crossing for such purpose. The defendant was engaged in making what is known as a "flying switch,"—a dangerous operation anywhere, but more especially over a crossing, public or private; and it selected an hour to do this when it might reasonably be anticipated that it would result in

injury to some of these people, unless care proportionate to the danger was taken to avoid such a result. Under these circumstances, the defendant was clearly charged with the duty to use reasonable care towards those using this crossing, whether they used it under a license or under an implied invitation; a care proportionate to the danger to be reasonably anticipated from the act done, and reasonably adequate, under the circumstances, to prevent injury from that act to those who at that time would probably be rightfully using the crossing. *Taylor* v. *Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446; *Barry* v. *New York C. & H. R. R. Co. supra; Byrne* v. *New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512. Whether the defendant at this time used such care was, in this case, as it ordinarily must be, a question to be determined by the trior as one of fact. The trior decided it against the defendant and the record does not disclose that in deciding it any error of law was committed, either with respect to the relation which these parties sustained towards each other, or as to the duties which they owed to each other, or as to any other matter.

There is no error.

The other Judges concur.

William A. BEERS and Wife, *Appts.*,
v.
BOSTON & ALBANY RAILROAD COMPANY.

(67 Conn. 417.)

A railroad company receiving from another carrier and transporting trunks under the mistaken supposition, induced by checks on the trunks, that they belong to passengers who have bought tickets over its road when in fact the owners of the trunks traveled by another route but supposed their trunks were rightly checked, is not liable, on the ground of mere negligence, for the loss of the trunks by the fall of a railroad bridge.

(March 26, 1896.)

APPEAL by plaintiffs from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to recover the value of trunks and their contents which were delivered to defendant for transportation and lost by it. *Affirmed.*

Plaintiffs were at Saratoga, intending to go to New Haven. Defendant had a contract with the Delaware & Hudson River Railroad Company and the New York, New Haven, & Hartford Railroad Company for through transportation over the three lines from Saratoga to New Haven. Plaintiffs purchased tickets at Saratoga which entitled them to go by the Delaware & Hudson River Railroad Company's trains to Albany, thence by boat to New York, thence by the New York, New Haven, & Hartford Railroad to New Haven, and they applied for checks for their baggage and received checks marked New Haven and Saratoga *via* B. &. A and N. Y., N H. & H. The trunks went forward according to directions on the checks on the Boston & Albany Railroad instead of by the boat. During the journey a bridge which formed a part of defendant's track gave way, resulting in the wreckage of the train and loss of the baggage. Plaintiffs claimed that they were informed by the person who gave them the checks for the baggage that their tickets gave them the right to have the trunks go by rail over defendant's road, and that they caused the trunks to be checked in that way, relying upon such statement, under the belief that he had authority to make it from the fact that he had possession of the checks.

Further facts appear in the opinion.

Messrs. **Lyman E. Munson** and **E. P. Arvine,** for appellants:

The defendant is bound by the act of its agent performed within the general scope of his authority.

The first of several connecting carriers bound together by a through traffic agreement is the agent of the others, and the others are bound by the acts of its employees, performed within the general scope of their authority.

Hartan v. *Eastern R. Co.* 114 Mass. 44; *Pennsylvania C. R. Co.* v. *Schwarzenberger*, 45 Pa. 208.

The road actually carrying the baggage at the time of the injury is the principal, and is answerable in suit brought against it directly by the owner of the baggage.

Harp v. *The Grand Era*, 1 Woods, C. C. 184; *Chicago & R. I. R. Co.* v. *Fahey*, 52 Ill. 81, 4 Am. Rep. 587; *Packard* v. *Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *Conkey* v. *Milwaukee & St. P. R. Co.* 31 Wis. 619, 11 Am. Rep. 630; *Halliday* v. *St. Louis, K. C. & N. R. Co.* 74 Mo. 159, 41 Am. Rep. 309; *Young* v. *Pennsylvania R. Co.* 115 Pa. 112; *Pennsylvania R. Co.* v. *Connell*, 112 Ill. 295, 54 Am. Rep. 238.

Uncommunicated instructions do not affect parties dealing with an agent.

Gelvin v. *Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273; *Deming* v. *Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267; *Pruitt* v. *Hannibal & St. J. R. Co.* 62 Mo. 527; *Harrison* v. *Missouri P. R. Co.* 74 Mo. 364, 41 Am. Rep. 318.

Where baggage was delivered to the baggagemaster, who checked it contrary to the rules, which provided that a ticket must be presented, the railroad was held liable for its loss through negligence to one who had neither purchased a ticket nor paid fare.

Lake Shore & M. S. R. Co. v. *Foster*, 104 Ind. 293, 54 Am. Rep. 319.

Similarly, where a baggagemaster checked a trunk of jewelry, knowing its contents, the company was held to the same liability as though it had been ordinary baggage.

Jacobs v. *Tutt*, 33 Fed. Rep. 412; *Hannibal & St. J. R. Co.* v. *Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

Where baggage reached its destination at night and the baggagemaster at the request of the owner took charge of it until morning, when it was to be delivered to another car-

NOTE.—As to liability of a railroad company for the acts of a person employed by another corporation where he is claimed to be a common agent of several corporations, see also Hilary v. Great Northern R. Co. *ante*, 448, and Scott v. Cleveland R. Co. (Ind.) *ante*, 154.

rier with whom the defendant carrier had no contract or traffic arrangement, the defendant was held to be bound by the act of the baggagemaster and liable for its loss.

Ouimit v. *Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Smith* v. *Nashua & L. Railroad*, 27 N. H. 86, 59 Am. Dec. 364; *Lake Shore & M. S. R. Co.* v. *Pierce*, 47 Mich. 277.

The checking was clearly within the general scope of the agent's authority.

Brennan v. *Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Wilton* v. *Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11.

A check is evidence of the receipt of baggage.

Denver, South Park & P. R. Co. v. *Roberts*, 6 Colo. 333; *Chicago, R. I. & P. R. Co.* v. *Clayton*, 78 Ill. 616.

An authority to check baggage is to be inferred from the possession of the checks.

Illinois C. R. Co. v. *Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Isaacson* v. *New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142; *Ouimit* v. *Henshaw*, *supra*.

The defendant is liable as a bailee by virtue of the receipt of the baggage.

Schouler, Bailm. & Carr. 2d ed. §§ 9, 28; *Nolton* v. *Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; note to *Waterbury* v. *New York C. & H. R. R. Co.* 17 Fed. Rep. 674; *Smith* v. *Nashua & L. Railroad*, *supra*.

The service performed by the defendant was not necessarily gratuitous. It had a right to charge freight and to exercise the right of lien.

Schouler, Bailm. & Carr. 2d ed. § 668; *Rumsey* v. *Northeastern R. Co.* 14 C. B. N. S. 641; *Wilson* v. *Grand Trunk Railway*, 56 Me. 60, 96 Am. Dec. 435, 57 Me. 138, 2 Am. Rep. 26; *Graffam* v. *Boston & M. R. Co.* 67 Me. 234; *Flaherty* v. *Greenman*, 7 Daly, 481.

Even if the service was gratuitous the defendant was liable for at least gross negligence.

Lemon v. *Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Skelley* v. *Kahn*, 17 Ill. 170; *Flint & P. M. R. Co.* v. *Weir*, 37 Mich. 111, 26 Am. Rep. 499; *Gray* v. *Missouri River Packet Co.* 64 Mo. 47; *McCauley* v. *Davidson*, 10 Minn. 418.

The liability of a carrier is imposed by law. It exists although there has been no payment of fare or agreement to pay fare.

Buffett v. *Troy & B. R. Co.* 40 N. Y. 168; *Gordon* v. *Grand Street & N. R. Co.* 40 Barb. 546; *Russ* v. *Steamboat War Eagle*, 14 Iowa, 363; *Green* v. *Milwaukee & St. P. R. Co.* 41 Iowa, 410; *Woods* v. *Devin*, 13 Ill. 746, 56 Am. Dec. 483.

The defendant is liable for at least gross negligence, on the broad, general ground that it had the custody of the property.

Schouler, Bailm. & Carr. 2d ed. § 3. 4 Lawson, Rights, Rem. & Pr. § 1695; Story, Bailm. 9th ed. § 59; *Phelps* v. *People*, 72 N. Y. 334; *Newhall* v. *Paige*, 10 Gray, 366; *Wilson* v. *Chesapeake & O. R. Co.* 21 Gratt. 654; *Fairfax* v. *New York C. & H. R. R. Co.* 73 N. Y. 167, 29 Am. Rep. 119; *Flaherty* v. *Greenman*, 7 Daly, 481.

If passengers are on board through mistake, they may recover in case of injury through the carrier's negligence.

Austin v. *Great Western R. Co.* L. R. 2 Q. B. 442; *Bogges* v. *Chesapeake & O. R. Co.* 37 W. Va. 297, 23 L. R. A. 777; *Cincinnati, H. & I. R. Co.* v. *Carper*, 112 Ind. 26; *Lewis* v. *Delaware & H. Canal Co.* 145 N. Y. 508; *Columbus, C. & I. C. R. Co.* v. *Powell*, 40 Ind. 37; *Robostelli* v. *New York, N. H. & H. R. Co.* 33 Fed. Rep. 796; *Great Northern R. Co.* v. *Harrison*, 10 Exch. 376; *Rice* v. *Illinois C. R. Co.* 22 Ill. App. 643; Shearm. & Redf. Neg; 3d ed. § 263; *Brennan* v. *Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Wilton* v. *Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Hamilton* v. *Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *Texas & P. R. Co.* v. *Best*, 66 Tex. 116; *Raines* v. *Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L. R. A. 226; Shearm. & Redf. Neg. 3d ed. § 264; *Toledo, W. & W. R. Co.* v. *Beggs*, 85 Ill. 80, 28 Am. Rep. 613. *Collins* v. *Boston & M. R. Railroad*, 10 Cush. 506

In order that a carrier be liable it is necessary to have the goods in his custody and know that he has them, so that he may know that care is required, and of what nature.

Barbour v. *New Haven & N. Co.* 51 Conn. 143, 50 Am. Rep. 12; *Planz* v. *Boston & A. R. Co.* 157 Mass. 377, 17 L. R. A. 835.

Every person owes a duty not to negligently injure another.

Raines v. *Chesapeake & O. R. Co.* and *Brennan* v. *Fair Haven & W. R. Co. supra.*

Defendant was guilty of gross negligence.

Ray, Negligence of Imposed Duties, 665; Deering, Neg. §§ 5, 11; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 382, 21 L. ed. 641.

Any negligence of any common carrier using so powerful an agent as steam may well be called gross.

Philadelphia & R. R. Co. v. *Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502.

That the cars ran off the track is prima facie evidence of negligence.

Feital v *Middlesex R. Co.* 109 Mass. 395, 12 Am. Rep. 720; *Van Horn* v. *Kermit*, 4 E. D. Smith, 453.

The circumstances attending the delivery of the checks, the receipt of the trunks, the forwarding of merchandise and trunks over their own and connecting lines of railroads, the interchange of car and railroad facilities, the adjustment of balances growing out of railroad transportation, all point to the question of agency and contractual relations between the corporations, and the public who have dealings with them.

These questions justify the court in reversing the judgment of the court below and remanding the case for trial.

Swift, Dig. 389; Shelford, Railways, 722–733; *Williams* v. *Grant*, 1 Conn. 491, 7 Am. Dec. 235; *Hickox* v. *Naugatuck R. Co.* 31 Conn. 284, 83 Am. Dec. 143; *McArthur* v. *Sears*, 21 Wend. 190; *Wilson* v. *Grand Trunk R. Co.* 57 Me. 138, 2 Am. Rep. 26; *Chicago, R. I. & P. R. Co.* v. *Clayton*, 78 Ill. 616; Story, Bailm. 8th ed. 454-463, 466; 3 Wood, Railway Law, ed. 1894, §§ 427, 428, 430, 441; 2 Wood, Railway Law, §§ 290, 299, pp. 1049, 1095, 1219, 1224, 1225, 1246, 1526; Wood's Brown, Carr. 148, 150, 154, 156, 163, 166, 478; 2 Wood, Railroads (Minor's ed.) 1004, 1049, 1095; Wood's Field, Corp. 750, 751; 2 Rorer, Railroads, 955, 991, 996, 999, 1003.

Messrs. **George D. Watrous** and **Edward G. Buckland,** for appellee:

The right of action in this case is governed by the law of the place where the accident occurred, *viz.*, Massachusetts.

Cooley, Torts, 471; *Le Forest* v. *Tolman*, 117 Mass. 109, 19 Am. Rep. 400; *Mostyn* v. *Fabrigas*, 2 Smith, Lead. Cas, 9th Am. ed. 964; Addison, Torts, 28, 29; *Dennick* v. *Central R. Co.* 103 U. S. 18, 26 L. ed. 441.

In *Dunlap* v. *International S. B. Co.* 98 Mass. 371, it was held that Stewart could recover nothing; that there was no contract between him and the company to carry his baggage; and therefore the company was not bound to use even the smallest degree of care, and was not liable for gross negligence.

Wright v. *Boston & A. R. Co.* 142 Mass. 296; *Planz* v. *Boston & A. R. Co.* 157 Mass. 377, 17 L. R. A. 835.

The person who put the checks on the trunks at Saratoga was not the agent of the defendant.

Merely because the man at Saratoga had checks in his possession does not of itself constitute him the agent of the defendant even to check the baggage of its passengers. *A fortiori* it would not make him his agent to check trunks for persons who neither were nor intended to become its passengers.

Whart. Ev. § 1316; Best, Ev. § 357; *Short* v. *Lee*, 2 Jac. & W. 464; *Coon* v. *Gurley*, 49 Ind. 199; *First Nat. Bank* v. *Council Bluffs Waterworks Co.* 56 Hun, 412; *Morgan* v. *Farrel*, 58 Conn. 426.

Since no relation of agency between the man who made the representations as alleged and the defendant appears from the record, and none can be presumed, the alleged good faith and belief of the plaintiffs cannot charge the defendant with any liability.

Talcott v. *Wabash R. Co.* 66 Hun, 462.

Negligence presupposes the existence of a duty, which is alleged to have been broken.

Where no duty is owed there can be no negligence.

Shearm. & Redf. Neg. § 8, and cases; Cooley, Torts, *660; *Nolan* v. *New York, N. H. & H. R. Co.* 53 Conn. 461; *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 246; *O'Neil* v. *East Windsor*, 63 Conn. 153.

In the absence of any duty created by a contractual relation with the plaintiff, the defendant owed only the absolute duty which binds every man to refrain from wilful and wanton injury to the property of another.

Dunlap v. *International S. B. Co.* 98 Mass. 371; *Wright* v. *Boston & A. R. Co.* 142 Mass. 296; *Planz* v. *Boston & A. R. Co.* 157 Mass. 377, 17 L. R. A. 835; *Gardner* v. *New Haven & N. Co.* 51 Conn. 143,50 Am. Rep. 12; Austin, Jurisp. 194; *Toledo, W. & W. R. Co.* v. *Beggs*, 85 Ill. 80, 28 Am. Rep. 613; Lawson, Cont. § 229; *Becher* v. *Great Eastern R. Co.* L. R. 5 Q. B. 241; *Fairfax* v. *New York C. & H. R. R. Co.* 5 Jones & S. 516; *Talcott* v. *Wabash R. Co.* 66 Hun, 462; *Blumenthal* v. *Maine C. R. Co.* 79 Me. 550; *Belfast & B. R. Co.* v. *Keys*, 9 H. L. Cas. 573.

When a person is deceived in taking a thing into his possession, no contract of bailment can arise unless he so elects after knowing the truth.

Story, Bailm. §§ 59, 155, 372, 381; *Lloyd* v. *West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 581; *Coggs* v. *Bernard*, 2 Ld. Raym. 909; Sheldon Amos, Roman Civil Law, 197, 199, 216.

A contract for the carriage of baggage as baggage is included in the contract for the carriage of the passenger, and is inseparable from it.

Hickox v. *Naugatuck R. Co.* 31 Conn. 284, 83 Am. Dec. 143; *Smith* v. *Boston & M. Railroad*, 44 N. H. 332, and cases; 3 Wood, Railroads, §§ 400, 403; *Hannibal & St. J. R. Co.* v. *Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

Baldwin, J., delivered the opinion of the court:

If the defendant came under any obligation to make good the plaintiffs' loss, it must have been either by virtue of some contract between them, or of actionable negligence. No such contract is alleged, unless one can be implied from the reception by the defendant at Albany of their luggage, so checked as to indicate that it was to be transported over its railroad to Springfield. It is not averred that the person from whom they obtained the checks was an agent of the defendant, or had any authority to act or speak in its behalf, nor even that he was an agent of the Delaware & Hudson Canal Company, with which the defendant was in contract relations. His statements, therefore, and the plaintiffs' reliance upon them, are of no importance, except as evincing their good faith in the transaction. On the other hand, the effect of the reply was to admit that the defendant received the luggage under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and so that its transportation on its railroad had been duly paid for. Had trunks marked as destined to Springfield been received by the defendant without any particular contract or understanding in regard to their transportation, it would have assumed, simply from its position as a common carrier, an obligation to transport them safely, and have had a right to a proper compensation when the service was performed. But an express contract existed between it and the Delaware & Hudson Canal Company, under which it was bound to receive the personal luggage of passengers who held tickets entitling them to pass over both roads between Saratoga and Springfield, and the defendant was led by the checks to suppose that the trunks of the plaintiffs were luggage of that character. It did not, therefore, receive them under such circumstances as to create such an implied contract with their owners. An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract Such an intent may be implied, although it be certain that it never actually existed, but not unless the parties are in such relations that each ought to have had it. In the case at bar the facts not only do not justify, but absolutely exclude, such an implication. The plaintiffs did not intend to pay the defendant for the transportation of the trunks. They supposed that they had already paid for this, in purchasing tickets to New Haven by way of the Hudson river. The defendant did not intend to make any charge for

their transportation. It supposed that compensation for this had been made already, under, and as an incident of, an express contract, made in its behalf by the Delaware & Hudson Canal Company, for the transportation of the owners, as passengers, over its railroad. The plaintiffs and the defendant were alike misled by appearances. It is one of those cases where a loss must be sustained by one or the other of two parties who are equally innocent of wrong, but one of whom placed it in the power of a third person to do the act which caused the injury. The plaintiffs acted in good faith in accepting the checks in question from some one in Saratoga, and causing them to be placed on their trunks; but it was this that induced the Delaware & Hudson Canal Company to deliver the luggage to the defendant at Albany, and the defendant to receive it as belonging to those whose right it was to have it transported over its line to Springfield. The plaintiffs could not in this way force the defendant into a contract relation which it certainly would never have intentionally assumed.

The defendant, having taken the plaintiffs' property into his possession for transportation over a railroad which it operated as a common carrier, was not free from all responsibility for its safe-keeping, notwithstanding it accepted its custody without any contract, express or implied. It is admitted by the pleadings that not only did the defendant run the train, in which the property was, upon a bridge which was, and long had been, so defective that it could not sustain such a burden, but also that no one was stationed there to give any warning of the danger, or signal the train to stop, and that the luggage was destroyed by reason of its gross negligence in these respects, but "without any wilfulness, malice, or intentional wrong, or anything equivalent or amounting thereto." The defendant did not receive the trunks in the capacity of a common carrier of goods for hire. They were delivered to it, and accepted by it, in the capacity of a common carrier of passengers for hire. In fact, there were no passengers to be carried, to whom they belonged; but this, whether then known or unknown to the defendant, would be no excuse for any wilful or intentional injury to property actually in its possession. We think, however, that it was a sufficient excuse for the negligence which it confessed. Actionable negligence is the neglect of a duty. What duty did the defendant owe to the plaintiffs? Simply that of abstaining from anything amounting to wilful or wanton injury to their property in its possession. *Gardner* v. *New Haven & N. Co.* 51 Conn. 143, 150, 50 Am. Rep. 12. That cannot be deemed a wanton exposure of it to destruction which consisted only in running a train of cars upon an unsafe bridge, by which its own property, as well as theirs, was involved in a common loss. "Negligence signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it." *Pitkin* v. *New York & N. E. R. Co.* 64 Conn. 482, 490. It is true that this definition might not exclude the liability, in some instances, of a principal, on the ground of negligence, for damage consequent upon a direct act of violence or trespass on the part of servants, but this is not a case of that description. The gross negligence with which the defendant was chargeable consisted wholly of omissions. There was no wilful wrong, nor yet such reckless misconduct as can be deemed its equivalent. Had the defendant voluntarily assumed the position of a "depositary" (taking this term in its strict meaning of a bailee without reward), it would not have been bound under the rules of the Roman law (which have become a part of the common law) to treat the plaintiffs' property with any more care than it gave to its own. *Coggs* v. *Bernard*, 2 Ld. Raym. 909; Dig. 16, 3. *Depositi vel Contra.* Good faith would have been the measure of its obligations. Dig. 16, 3, 20. He who intrusts his property to a careless man, if loss ensues, must lay it to the account of his own imprudence in putting it into such hands. Inst. 3, 15, "*Quibus Modis Re Contrahitur Obligatio*," 3. But in the case before us the elements of a bailment are wanting, for there was no contract, express or implied, between the parties. 2 Kent, Com. *780. The defendant's obligations, not being contractual, were less than those attaching to bailees of any class. No man can have the care of another's property thrust upon him, without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection. He might be bound to refrain from acts of direct injury. This is a mere negation of wrongdoing. A man acts at his peril; but he is never liable for omissions, except in consequence of some duty voluntarily undertaken. Holmes, Com. Law, 82. Had the defendant wilfully thrown the plaintiffs' trunks from the bridge into the stream below, a liability would have been incurred; but this would have been an act of violence, not an absence of care. Gross negligence is not actionable where not even slight care was due. *Dunlap* v. *International S. B. Co.* 98 Mass. 371, 379. However blameworthy, it is still essentially different from international wrongdoing. *Magna negligentia culpa est, magna culpa dolus est.* Dig. 50, 16. *De Verborum Significatione*, 226. Had the checks indicated that the trunks were to be sent over the river route, their reception by the defendant for carriage over its route would have presented a very different question. *Fairfax* v. *New York, C. & H. R. R. Co.* 73 N. Y. 167, 170, 29 Am. Rep. 119.

The ruling on the demurrer, with which the pleadings under the original complaint were closed, was in conformity to the views which we have expressed. It is therefore unnecessary to inquire whether, had there been error, it would not have been waived by filing a substituted complaint.

There is no error in the judgment appealed from.

Joseph H. MURRAY
v.
LEHIGH VALLEY RAILROAD COMPANY *et al.*, *Appts.*

(66 Conn. 512.)

A railroad company is liable to a passenger on its train for negligence of the servants of another railroad company over whose track such train is running under a contract between the companies whereby the train is to be run subject to the orders and signals given by servants of the owner of the track, since they become thereby the servants of the owner of the train for the purpose of its management.

(*Baldwin and Torrance, JJ., dissent.*)

(July 19, 1895.)

APPEAL by defendants from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been received by plaintiff while a passenger on defendant's road. *Affirmed.*

The facts are stated in the opinions.

Messrs. **George D. Watrous** and **Edward D. Buckland,** for appellants:

A carrier of passengers is held to a high degree of care and is liable for a failure to exercise such a high degree of care.

2 Wood, Railroads, § 296.

From the nature of the accident the burden of proving negligence is upon the plaintiff.

2 Wood, Railroads, § 325*a*; *Curtis* v. *Rochester & S. R. Co.* 18 N. Y. 534, 75 Am. Dec. 258.

The plaintiff has not shown that the Lehigh Company was negligent and the Lehigh Company has shown that it used due care.

The court erred in instructing the jury that the persons operating the Central train were the servants of the Lehigh Company so as to make it liable for their acts in threatening a collision.

Wright v. *Midland R. Co.* L. R. 8 Exch. 137; *Sprague* v. *Smith*, 29 Vt. 426, 70 Am. Dec. 424.

The plaintiff knew before entering upon the defendant's train that this train was to be carried over other roads where the defendants had no exclusive control. He must then look to the company having the control of those by whose negligence he was injured.

2 Wood, Railroads, § 324, and note; 2 Redf. Railways, § 189, and note; 2 Harris, Damages by Corp. § 844.

The doctrine that the Central Company and its servants were the servants of the Lehigh Valley Company is most startling.

Cooley, Torts, 623.

The court erred in striking out the testimony of John H. Robinson as to declarations made by the persons on the Central engine at the time of the approach of the engine and the threatened collision.

Pinney v. *Jones*, 64 Conn. 549; Reynolds, Ev. § 7; *Enos* v. *Tuttle*, 3 Conn. 250; 1 Greenl. Ev. 145, and note *b*; *Hanover R. Co.* v. *Coyle*, 55 Pa. 396.

The court erred in excluding the testimony as to the declarations of Mr. Freck, train master of the Central Company.

1 Greenl. Ev. § 180; Bradner, Rules of Ev. 103, 109.

If true that the train was late it has no tendency to establish negligence, and a verdict based on that evidence only would be preposterous.

Button v. *Frink*, 51 Conn. 342, 50 Am. Rep. 24; *O'Brien* v. *Miller*, 60 Conn. 214.

Mr. **Tilton E. Doolittle** for appellee.

Andrews, Ch. J., delivered the opinion of the court:

The controlling question presented by the appeal in this case arises on the charge of the court to the jury. That being disposed of, the other assignments of error become unimportant. And in the charge that question is narrowed to this: Was the court correct in saying to the jury that the servants of the Central Railroad Company, while operating its trains on that portion of its track used in common by that company and this defendant, might, for the purposes of this case, be regarded as the servants of this defendant? A recurrence to the duties which the law imposes on every railroad company as a carrier of passengers will serve to make the answer to this question more distinct.

A railroad corporation, by the contract for a passage over its road, assumes the obligation to exercise the highest practicable degree of human skill to carry the passenger in safety, and undertakes absolutely to protect him against any injury or wilful misconduct of its servants in the performance of its contract; and the obligation in these respects continues until the contract is fully performed. *Dwinelle* v. *New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L. R. A. 224. Every carrier of passengers for hire —although not, like a common carrier of goods, an insurer against everything but the act of God and the public enemies—is bound to use the utmost care which is consistent with the nature of the business to guard the passenger against all dangers, from whatever source arising, which may reasonably and naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons with whom the passenger will be brought in contact. The carrier must provide safe, sufficient, and suitable vehicles for transportation, and must provide such servants for the management of the same, and make all such reasonable arrangements therefor, as the highest care of a prudent man would suggest as necessary to a safe passage. *Hall* v. *Connecticut River S. B. Co.* 13 Conn. 319; *Fuller* v. *Naugatuck R. Co.* 21 Conn. 557; *Flint* v. *Norwich & N. Y. Transp. Co.* 34 Conn. 554; *Simmons* v. *New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Palmeri* v. *Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136; *Pendleton* v. *Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922. This duty is imposed by law; and this measure for its performance rests upon a railroad corporation to its full extent. A railroad corporation is a carrier of passengers by

NOTE.—The above decision as to the liability of a railroad company to a passenger for defects in the track of another company over which its train was running is one for which there are but few direct precedents, but a similar decision is found in Littlejohn v. Fitchburg R. Co. (Mass.) 2 L. R. A. 502.

virtue of the franchise granted to it by its charter, a franchise intended to be used for the public good. By asking for and receiving the franchise, the corporation comes under the obligation to answer in damages to every one who may be injured by any negligence in the use of the privilege it has so received. And public policy will not permit the corporation to relieve itself from this obligation by any contract with others. A railroad company entering into contract relations with another company, by which the safety of its own passengers may be affected, is held to have made the other company in this respect its own agent. It is held to the exercise of due care for the safety of all persons, while exercising its franchise, whether on its own road or that of another company. This duty was imposed by law when it received its charter, and this duty holds good at all times and in all places. If the company operates its trains over the road of another company, it must see and know that the track is in good and safe condition, and that the trains of the other company are so ordered as not to interfere with the full discharge of its own duty to its own passengers, because such trains would be a danger against which it would be bound to provide. If a railroad company permits another company to run its trains upon its track, it is liable for any want of care of its lessee, and may be sued therefor, the same as though the trains were its own. If a railroad company leases its entire road and all its rolling stock to another company, it remains liable for all the laches and neglect of its lessee (except in cases where the lease is approved by the legislature), as fully as if it was itself operating its road; on the theory that the lessee, whether a lessee of a part or of the whole is the agent of the lessor. *Driscoll* v. *Norwich & W. R. Co.* 65 Conn. 230; *Lakin* v. *Willamette Valley & C. R. Co.* 13 Or. 436, 57 Am. Rep. 25; *Virginia Midland R. Co.* v. *Washington*, 86 Va. 629, 7 L. R. A. 344; *Whitney* v. *Atlantic & St. L. R. Co.* 44 Me. 362, 69 Am. Dec. 103; *Stearns* v. *Atlantic & St. L. R. Co.* 46 Me. 95, 116; *Wyman* v. *Penobscot & K. R. Co.* Id. 162; *Nugent* v. *Boston, C. & M. Railroad*, 80 Me. 62; *Nelson* v. *Vermont & C. R. Co.* 26 Vt. 717, 721, 62 Am. Dec. 614; *Clement* v. *Canfield*, 28 Vt. 302; *McElroy* v. *Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794; *Illinois C. R. Co.* v. *Barron*, 72 U. S. 5 Wall. 90, 104, 18 L. ed. 591, 594. And on the other hand, if one railroad company runs its trains over a portion of the road of another company, pursuant to a contract whereby it is agreed that its trains, while on such leased road, shall be under the control and direction of the servants of the lessor company, then the servants of the lessor company at such place, and for the time being, are the servants of the lessee company, and it will be liable for any injury to a passenger caused by the negligent act of such servant, as though he was its own employee.

The case of *Wabash, St. L. & P. R. Co.* v. *Peyton*, 106 Ill. 534, 540, 46 Am. Rep. 705, is an application of this rule. That was a case almost exactly like the one now before us. That case was an appeal. In the lower court the appellee had recovered judgment. It was shown that the appellant, by a lease of a portion of the road of the Chicago & Western Indiana Railroad Company, was permitted to run its trains over a portion of the track of the latter company near to a station, to and from which its trains ran and departed. By the terms of the lease, the lessor company had the control of the passenger train of the appellant while on that portion of track, and its servants directed and controlled the trains of the appellant in coming to and going from that station. The appellee was injured while a passenger on a train of the appellant, by the negligence of the yard master of the lessor company. The court said: "The controlling question of the case . . . is whether the appellant is freed from liability by placing, by the lease or agreement, its employees and trains, at the place where the injury occurred, under the control of the road master of the other road. Appellant did so as a matter of interest or choice, and not from overpowering necessity. When the charter was granted the corporation became a carrier of persons and property, and the law imposed the duty of common carrier, with all the liabilities incident to the occupation, and the responsibility was assumed by the corporation, and imposed on it by law. Nor can the corporation exonerate itself from the duty and responsibility by contract with others, nor in any wise escape or free itself from the liability, unless released by the general assembly. Appellant voluntarily placed its engine and cars, at that place, under the control and direction of the employees of the other road, and for the time being, and for that purpose, the road-master of the other road became the servant of appellant. The engine and train belonged to appellant; the engine driver, the fireman, the conductor and brakeman on board of the train were its servants, under its control; and the yardmaster, under the agreement, *pro hac vice*, for the time and place, was its servant. Had the agreement not been made he would not have controlled the starting of the train. Appellant, by the agreement, authorized him to act as its yardmaster, and to act for it at that time and place, and it must be held responsible for his acts. The company cannot escape by saying he was employed and controlled by the other road. He was, as we have seen, the servant of appellant, to the full extent he acted, in this case." *Oil Creek & A. R. R. Co.* v. *Keighron*, 74 Pa. 316; *Vary* v. *Burlington, C. R. & M. R. Co.* 42 Iowa, 246; *Laugher* v. *Pointer*, 5 Barn. & C. 547, 559; *Eaton* v. *Boston & L. R. Co.* 11 Allen, 500; *Abbott* v. *Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572; *St. Louis, W. & W. R. Co.* v. *Curl*, 28 Kan. 622; *Balsley* v. *St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784; *Eureka Springs R. Co.* v. *Timmons*, 51 Ark. 459.

The plaintiff was a passenger on the railroad of the defendant from Allentown to Jersey City. He was entitled to be carried in safety, and it was the duty of the defendant to so carry him the entire journey, whether it carried him over a track owned by itself or over a track hired of another. If the defendant, for its own convenience, chose to carry him a part of the journey over a hired track, it was its duty to make the track hired as safe as the track owned. If, by reason of being carried on a hired track, the plaintiff was exposed to a danger from which he would have been free

had the track been owned by the defendant, and suffered injury therefrom, then for such injury the defendant is liable to him. Pierce, Railroads, 283. The case shows that, in the use of the portion of track owned by the Central Railroad Company, this defendant was bound by its agreement with that company to obey the orders and signals given by the servants of that company. The case shows, then, that to the extent of that agreement, and for the purposes included in it, this defendant had, by the terms of that agreement, made the servants of that company its own servants, and as the case further shows that the train on which the plaintiff was a passenger was upon this portion of track, and was being operated in obedience to the orders of those persons who, by the agreement, were the servants of this defendant, we think the charge was fully justified.

The verdict having established that the danger of collision to which the train of the defendant was exposed was caused by the negligence of the defendant's own servants, the several rulings in respect to the admission of testimony became immaterial. This fact being settled, it matters not whether the men on the trains were friendly or unfriendly to one another, nor whether the train of the defendant was behind time, or the train of the Central Company ahead of time, nor what any person on the rear train may have said, or omitted to say.

The motion for a new trial on the ground that the verdict is against the evidence must be denied. In considering the evidence, the jury was bound to accept the charge of the court as correct; and, in the light of the charge, there was abundant evidence to support the verdict. Indeed, the jury could not well have reached a different result. There is no error.

A new trial is denied.

Fenn and **Hamersley, JJ.**, concurred.

Baldwin, J., dissenting:

If the apparent danger of collision, which induced the plaintiff to jump from the car, was due to the negligence of the Lehigh Valley Railroad Company, or its servants, there was a good cause of action against it; but there was none, in my opinion, if the accident was due to the wilful act of a servant of the Central Railroad Company, outside of the scope of his employment. The Lehigh Valley Railroad Company claimed, upon the trial, that it was due to such a wilful act, on the part of those in control of the locomotive of the Central Railroad Company. In support of this claim, it offered testimony from its division superintendent that, on the day in question, there was a strike on its road, and its trains were being operated by nonunion men, while the Central Railroad trains were being run by union men; that there was ill feeling on the part of these union men towards the nonunion men; that, in consequence thereof, the accident occurred which resulted in the damage to the plaintiff for which the suit was brought; and that a certain remark was heard by John M. Robinson, the rear brakeman of the car on which the plaintiff was, from a person on the engine of the Central Railroad Company, "at the time of the approach and stopping of said engine, threatening a collision." The exclusion of all this testimony constitutes, in my opinion, sufficient ground for maintaining the appeal.

The finding shows that the plaintiff's evidence tended to prove that a train of the Central Railroad, upon a dark and foggy night, was pushed up within 10 or 15 feet of the car in which he was riding, and was apparently about to crash into it, when he jumped off to save his life. The Lehigh Valley Railroad Company, in explanation of this dangerously near approach to its train of the train behind it, offered to show that it occurred in consequence of unfriendly feeling on the part of those controlling the Central Railroad train towards those controlling the train ahead of it. Such a consequence, from such a cause, could only have been occasioned by a wilful and wrongful abuse of the power intrusted by the Central Railroad Company to its servants for managing the course and speed of the train in question. If the union men on the Central Railroad engine were apparently intending to use it as a catapult, or were threatening to do so, in order to intimidate the nonunion men in charge of the Lehigh Valley Railroad train, it was a malicious tort, so far outside the scope of their employment as to exonerate even their own employer from any liability for such damage as might be occasioned. *Crocker* v. *New London, W. & P. R. Co.* 24 Conn. 249, 265. It would be "an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders." Pierce, Railroads, p. 279. "If the servant, under guise and cover of executing his master's orders, and executing the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purpose, does an injury, then the master is not liable." *Cohen* v. *Dry Dock, E. B. & B. R. Co.* 69 N. Y. 170, 174.

The trial court has found that "no testimony was offered to prove that any person in control of the Central Railroad train was, in fact, actuated in this affair by any feeling of hostility, or did any intentional act which sprung from that motive." The evidence, however, was at the same time certified up at length by the court, for our consideration upon the motion for a new trial, on the ground that the verdict was against the evidence. In the evidence thus certified appears that of John M. Robinson, the rear brakeman of the car upon which the plaintiff was riding. He testified that a stop signal was given by the Lehigh Valley Railroad train, the customary answer to which was two whistles; that the engineer of the Central Railroad train did not give this answer, but continued right on, and, as he neared them, blew a long, shrill whistle; and that some one on the latter's engine, just as it finally slackened speed, a short distance behind the rear car of the train ahead, shouted to the witness, "You scab sons of bitches!" ("scab" being a word of reproach used by union men in referring to nonunion men). The court ruled that these words might have been a mere expression of vexation at finding the Lehigh Valley train on the track, and behind time, and struck out the testimony regarding it. The only reference to the particular nature

of this testimony in the finding prepared for the purposes of the appeal is that which I have previously mentioned; and whether in that finding the words "threatening a collision" can be understood as characterizing the remark which was excluded is quite doubtful. It might with perhaps more propriety be read as referring to the engine, or the approach and stopping of the engine. Be this as it may, both parties have argued this exception as if the remark in question had been duly incorporated in the finding, and it would seem to me a sacrifice of substance to form to disregard it, in view of the passage which I have quoted from the finding, to the effect that no testimony was offered to prove any intentional act of malice on the part of the union men in charge of the Central Railroad train. The reason given by the trial court for ordering Robinson's testimony about this remark to be stricken out shows that that order was based on the opinion that, as the words used might have indicated mere vexation, they ought not to be allowed to go to the jury as evidence of hostility or hostile acts. In my judgment, this ruling proceeded upon a mistaken view of the law which, under the special circumstances of this case, may and should be taken into account by us in determining the true meaning and effect of the finding. *Styles* v. *Tyler*, 64 Conn. 432, 439. What this language, heard by Robinson, meant, what disposition it evinced, who said it, and what light it threw on the accompanying acts, were all questions, it seems to me, proper for the consideration of the jury. *Ritchie* v. *Waller*, 63 Conn. 155, 27 L. R. A. 161.

The act of running one train almost into another, which was ahead of it on the same track, in disregard of the customary signals, was one of an unusual nature. The circumstances attendant on the strike seem to offer a possible, if not a probable, explanation. Coupled with the insulting and indecent remark hurled after the receding train, they might well have led the jury to conclude that the threatened collision was in the nature of a wanton and malicious assault by servants of the Central Railroad Company, not in their master's service, nor in the execution of any authority which had been confided to them. An act of doubtful meaning can often be explained by the word that went with it, or the circumstances under which it was done. I think that the passage above quoted from the finding, to the effect that no evidence was offered of hostile acts, should be read as if it stated that none was offered unless the testimony of the division superintendent and the rear brakeman could be considered such; and, therefore, that a new trial should be granted for errors in the exclusion of that testimony.

I concur with the court in the opinion that, under the testimony admitted and instructions given, the verdict was not against the evidence in the cause. I dissent from the opinion so far as it holds that the verdict cures any errors in excluding testimony. The jury, upon the evidence before them, were called upon to consider no other question than that as to whether the conduct of the Lehigh Valley Railroad Company or the acts of those in charge of the second train were negligent or not. They have found these acts to have been negligent; but, had they had the excluded evidence before them, they might have attributed to them a different character.

The jury were, in effect, told that, for the purposes of this case, they might consider the servants of the Central Railroad Company, in charge of the rear train, as the servants of the Lehigh Valley Railroad Company. I think this was not a correct statement of the law, in view of the claim made by the latter company that the plaintiff's injury was due to the wilful and wrongful acts of servants of the other company, done wholly outside the scope of their duty; and, furthermore, that it would not have been had it been undisputed that the injury was due to the negligence of those in charge of the rear train. The Lehigh Valley Railroad Company was permitted, by contract, to run its trains over a part of the Central Railroad Company's road, subject to the rules and orders of the latter company; and this is all the record discloses as to the nature of that contract. Under such an arrangement, and, so far as the plaintiff was concerned, this part of the Central Railroad track should undoubtedly be considered, *pro hac vice*, the track of the Lehigh Valley Railroad; and the servants of the Central Railroad Company, of whose services the Lehigh Valley Railroad Company actually or necessarily made use, in running its trains over it, were, *pro hac vice*, the servants of the latter. But, in my opinion, those servants of the Central Railroad Company, of whose services the Lehigh Valley Railroad Company did not make use for this purpose, either actually or necessarily, were not in law, and as a matter of course, to be regarded as its servants. For example, the Lehigh Valley Railroad Company may be said to have necessarily made use of the track repairers of the Central Railroad Company to keep this part of the track in good order; and their negligence in this matter would be the negligence of the Lehigh Valley Railroad Company, because they are for that purpose, *pro hac vice*, its servants. So, too, for a similar reason, the man at the signal tower might properly be regarded as the servant of the Lehigh Valley Railroad Company, because it necessarily made use of his services in running its trains upon this portion of the track. It may be also true that in the management of all the necessary switches and signals and other things of a like nature, appurtenant to this common track, the servants of the Central Railroad Company who performed these duties were the servants of both companies, because they were engaged in doing things necessary to the running of the trains of both over the same roadbed. The Lehigh Valley Railroad Company might be held responsible for any injuries resulting from a failure to make due provision in the contract under which it made use of the track in question for the admission of trains upon it only at proper intervals, and under proper conditions for securing the safety of the passengers it might carry. But the servants of each company, who only managed the trains of each, and who performed no sort of service for the other, were not, I think, in law, the servants of that other, but remained throughout the servants only of the company whose trains they managed. In the present case, the Lehigh

Valley Railroad Company had no occasion for, and made no use whatever of, the services of the men in charge of this rear train, and they had no connection of any sort with the running of its trains.

According to the principles laid down in the cases of *Wright* v. *Midland R. Co.* L. R. 8 Exch. 137, and in *Sprague* v. *Smith*, 29 Vt. 421, 426, 70 Am. Dec. 424, I think the court below should have instructed the jury substantially as requested, that, if the injury was wholly due to the negligence of those in charge of the rear train, the Lehigh Valley Railroad Company was not liable. I therefore dissent also from the opinion of the court as to the propriety of the charge to the jury.

Torrance, J., concurred.

NORTH CAROLINA SUPREME COURT.

Frank HANSLEY
v.
JAMESVILLE & WASHINGTON RAILROAD COMPANY, *Appt.*

(115 N. C. 602; 117 N. C. 565.)

1. **The right to bring an action ex delicto** does not of itself authorize the allowance of smart money.
2. **A railroad company is not liable for punitive damages** on account of its failure from inability to run a train on the return trip at the stipulated time merely because it sold a return ticket for that trip, when it had but two engines, one of which was in the shop for repairs and the other was not in good condition, and its roadbed and equipment had been used for a considerable time in a dilapidated condition, although the earnings of the road were all applied to its improvement.
3. **The bad, dilapidated, and ruinous condition of a railroad,** and the old, worn, and bad condition of its two engines, render the company liable for compensatory damages to a passenger whom it was unable to carry in accordance with its contract on a return trip because one of its engines had broken down while the other was in a shop for repairs, although the company was poor and struggling for existence and expending all its earnings and more on the road.
4. **Punitive damages cannot be recovered** for failure to transport a passenger on a

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NOTE.—*Liability to passenger for default or delay in running railroad train.*

Some decisions upon the question of the liability of the owner of a vessel for default or delay in the performance of this contract, while not strictly within the scope of this note, tend to throw light on the state of the law, and are therefore inserted here.

In case of the sale of tickets from a certain port to another by a vessel at a certain time, if the vessel does not arrive at the initial port at the time designated the purchaser of tickets may demand a return of the money paid for them. Cobb v. Howard, 3 Blatchf. 524.

In case of the sale of a ticket direct from one port to another, the purchaser may recover the purchase money if the vessel makes a deviation to deliver cargo without his consent which delays him six days in his passage. De Colange v. The Chateau Margaux, 37 Fed. Rep. 157.

If after taking money for a voyage the carrier decides to change his course and puts his passengers on shore at a place not designated in the contract without accommodations and with no means of getting to their destination, the carrier will be liable for the damage. West v. The "Uncle Sam," McAll. 505.

The owner of a steamship line may be held liable for a detention even beyond his own route, if he has contracted to carry the passenger through to his destination. Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469.

If a carrier breaks his contract by refusing to carry the passenger further the latter may recover back the money paid and his expenses while at the point to which he was carried and in returning to his home. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Ward v. Vanderbilt, 34 How. Pr. 144, 4 Abb. App. Dec. 521.

A person contracting for the transportation of passengers is liable for damages arising from unreasonable delay along the route occasioned by the fault or negligence of those legitimately engaged in the line of transportation. Van Buskirk v. Roberts, 31 N. Y. 661, Overruling Bonesteel v. Vanderbilt, 21 Barb. 26.

In case a vessel is advertised to sail on a particular date and money is paid for passage upon it, if it does not do so the intending passenger may embark on another vessel and recover back the deposit money. Cranston v. Marshall, 5 Exch. 395.

If after a passenger has paid a portion of the passage money the vessel sails without him, prior to the appointed date, the vessel will be liable for the amount so paid, the loss of time in procuring other passage, and the cost of passage upon the other vessel. The Zenobia, Abb. Adm. 80.

Duty of railroads as to punctuality.

Most of the cases in which the question has been raised either decided or assumed that a railroad is liable for injury to a passenger from delay or default in the running of its trains if caused by its wilful act or negligence.

A railroad company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injuries from such failure for the damages actually sustained by him as a direct and necessary result thereof. Savannah, S. & S. R. Co. v. Bonaud, 58 Ga. 180.

It is the duty of the carrier upon receiving a passenger and starting upon the journey to carry him to his destination with all reasonable diligence. Weed v. Panama R. Co. 17 N. Y. 362.

In Wibert v. New York & E. R. Co. 12 N. Y. 253, Hand, J., says no one will contend that a railroad company will be justified in leaving a passenger midway on his journey because it has not sufficient cars.

In Burke v. Great Western R. Co., cited in 2 Wood, Railway Law, p. 1176, the court said that at common law the duty of the carriers was to use all reasonable means to convey passengers to their destinations in the reasonable time which the passengers to a particular place desire, without specifying any time. But that railroad companies have fixed their own times of arrival and thereby

railroad because an engine was broken down, where there was no personal insult, indignity, or intentional wrong to him.

(December 11, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Beaufort County in favor of plaintiff in an action brought to recover damages for defendant's failure to furnish plaintiff with transportation according to its contract. *Reversed.*

The facts are stated in the opinions.

Messrs. **J. H. Small** and **W. B. Rodman** for appellant.

Mr. **Charles F. Warren** for appellee.

Per Curiam:

We are of the opinion that the plaintiffs in the above cases are not entitle to punitive damages. An opinion will be filed hereafter.

New trial.

Avery, J., delivered the opinion of the court:

As this controversy grows out of an admitted failure on the part of the railway company to perform its agreement with a passenger to carry him to and from a particular place within a given time, and involves especially the question whether the testimony warranted the court in instructing the jury that they were at liberty to add exemplary damages to the estimated loss actually sustained by reason of the delay, it is not improper to state in the outset several leading principles of the law governing the relative rights and duties of carriers and passengers, and the rules generally applicable in the assessment of damages in such cases. The contract of carriage begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with the purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket. The relation, once constituted, continues until the journey expressly or impliedly contracted for has been concluded, and the passenger has left the carrier's premises, or has been allowed a reasonable time to leave such premises. 2 Am. & Eng. Enc. Law, pp. 742–

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fixed what are reasonable times, and if they fail from want of diligence to perform their contracts they are liable for the loss thereby caused.

In case an excursion train is stopped before reaching its destination, a person who has paid for a ticket through may recover the price of the ticket and the value of the time lost by the delay. Eddy v. Harris, 78 Tex. 661.

An advertisement of the time of arrival and departure of the trains imposes upon the carrier the obligation of using due care and skill to have the trains arrive and depart at the times indicated. But it does not make the company warrantor and liable for delays not due to its fault but to mere accident. Gordon v. Manchester & L. Railroad, 52 N. H. 596, 13 Am. Rep. 97.

An action against a carrier for failure to stop and take a passenger on board is founded upon a tort for violation of the general duty to the public and not for breach of a special contract with the passenger. Heirn v. M'Caughan, 32 Miss. 17, 66 Am. Dec. 588.

If a train goes on another road than that advertised, so that a passenger is not carried to his destination but is compelled to walk some distance to his home, he may recover damages for the personal inconvenience but not for sickness caused by the exertion and exposure. Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111.

If a railroad company advertises in the public newspapers the hours at which its trains will start, it cannot change the hour by merely posting notices in its stations and cars without being liable to one who has purchased tickets with reference to the advertised time, and who is inconvenienced by the change. Sears v. Eastern R. Co. 14 Allen, 433, 92 Am. Dec. 780.

In case a car is cut off and left standing on the track without notice to passengers in it the carrier will be liable for compensatory damages to them. Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 20 L. R. A. 817.

But in Martin v. Columbia & G. R. Co. 32 S. C. 592, where a train passed a station without stopping, resulting in a suit by intending passengers, the court affirmed a nonsuit, saying there was no evidence of any pecuniary damages or of any personal injuries resulting in any loss whatever to any of the parties.

And in case of the failure of the carrier to carry out his contract for a Sunday excursion no damages can be recovered for breach of the public duty for failure to carry, and the only damages will be compensatory under the special contract. Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23, 24 Am. Rep. 376.

The carrier is not liable for delays caused by floods. Fitzgerald v. Midland R. Co. 34 L. T. N. S. 771.

And the fact that a train is behind time when wrecked by an overturn which does not extend to the section of the road where the train would have been had it been on time will not render the company liable for the damages resulting from the accident. McClary v. Sioux City & P. R. Co. 3 Neb. 44, 19 Am. Rep. 631.

As to liability for permitting a train to become so crowded that there is no more room for passengers, see *note* to Lynn v. Southern Pacific Co. (Cal.) 24 L. R. A. 710.

Effect of limitation of liability in time-tables.

If the company expressly states that it will use due care to have its trains on time but will not insure punctuality, a passenger cannot recover damages for delay in the absence of negligence on the part of the carrier. Prevost v. Great Eastern R. Co. 13 L. T. N. S. 20.

If the time-table states that the company will not hold itself responsible for delays arising over its lines, a passenger cannot hold it responsible for such delay. Thompson v. Midland R. Co. 34 L. T. N. S. 34.

If the time-table states that every attention will be paid to insure the punctuality, but that the directors will not undertake that trains shall be on time, and that they will not be responsible beyond their own line in case a train becomes late so that connections are missed, the passenger may hold the company to some responsibility if it was due to the negligence of the company, but he cannot engage a special train to take him to his destination at the expense of the company unless passengers would ordinarily have incurred such expenses on their account under similar circumstances. Le Blanche v. London & N. W. R. Co. L. R. 1 C. P. Div. 286.

If a carrier circulates a time-table with a particular train marked on it which it knows does not run, it will be liable for the injuries suffered by an intended passenger who is delayed because of reliance upon the time-table. Denton v. Great Western R. Co. 5 El. & Bl. 860.

745. There is always, on the creation of a relation, an agreement express or implied, and a legal obligation to perform the stipulation of the contract by transporting the passenger in accordance with the published schedule, or within a reasonable time. Hutchinson, Carriers, §§ 603 *et seq.* If an action be brought for a breach of this contract, the amount recovered is limited (with the single exception of a breach of marriage contract, say many law writers) to damage supposed to have been in contemplation of the parties, and actually caused by such breach. The measure of damages is ordinarily not materially different whether the defendant fails to comply with his contract through inability, or wilfully disregards it. We shall have occasion presently to advert to the distinction between actions of tort founded upon a wilful omission of a common law duty, but involving at the same time a breach of contract, and such as are brought to obtain redress for the intentional failure or absolute refusal to comply with the terms of an agreement. Actionable negligence must be the proximate cause of a legal injury and damage. It may be (1) a pure tort; (2) an inadvertent breach of contract, which cannot be regarded as independent of the contract and tortious; (3) a breach of contract in the nature of tort, and which may be treated as such independent of the contract. 5 Am. & Eng. Enc. Law, *suprd.* Treating of torts of this third class, Bishop Non-cont. L. § 74, says: "Because a common carrier, whether of goods or passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a part, though there is also a contract which is violated by the same act." Whenever there is a public employment from which arises a common-law duty, an action for a breach of such duly may be brought in tort. *Southern Exp. Co.* v. *McVeigh*, 20 Gratt. 264; *Clark* v. *St. Louis, K. C. & N. R. Co.* 64 Mo. 440; Shearm. & Redf. Neg. § 32. In actions *ex delicto* the motive of the defendant becomes material. 1 Sutherland, Damages, § 373. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received. 5 Am. & Eng. Enc. Law, p. 21, note 3. But where there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury, punitive damages are allowed, said the court in *Holmes* v. *Carolina C. R. Co.* 94 N.

If the time tables state that the railroad company does not warrant that its train shall be on time the mere taking of a ticket will not render the company liable for connections missed because a train gets behind time so that the passenger is delayed in reaching his destination. Hurst v. Great Western R. Co. 19 C. B. N. S. 310.

But a railroad company cannot absolve itself from liability from negligence in not starting a train on time by stating in its time tables that it will not hold itself responsible for delay or any consequences arising therefrom. Buckmaster v. Great Eastern R. Co. 23 L. T. N. S. 471.

Passenger's rights.

If a train is delayed by a wreck and there is no prospect of its being able to move for some time, a passenger may leave the train for necessary accommodations at an hotel and pursue his journey upon another train at his convenience. Wilsey v. Louisville & N. R. Co. 83 Ky. 511.

Where the train carrying a passenger was delayed the court held that the passenger was justified in hiring a conveyance which would get him to his destination half an hour sooner than the railroad company were prepared to carry him, and to charge the cost to the railroad company. Turner v. Great Western R. Co. cited in 2 Wood, Railway Law, p. 1175.

If connections are not made as advertised the passenger may complete his journey at the expense of the carrier, but cannot hold it liable for money lost by reason of failure to keep engagements at the point of destination. Hamlin v. Great Northern R. Co. 1 Hurlst. & N. 408.

Where a passenger on a branch road bought an excursion ticket good to return on certain advertised trains for fourteen days, and upon taking one of such trains to the junction found that no train would run during that day upon the branch, he was entitled to hire a conveyance to take him to his home and charge the cost to the carrier. Hawcroft v. Great Northern R. Co. 16 Jur. 196, 8 Eng. L. & Eq. 362.

What damages are recoverable.

In case a train fails to stop for a passenger who could reach his destination by hiring a conveyance, the damages for which the carrier will be liable are the cost of the conveyance and the value of lost time. Gulf, C. & S. F. R. Co. v. Cleveland (Tex.) 33 S. W. 687.

If the carrier takes the passenger only part way, which results in extra expense to him and considerable delay, he may recover for such expenses and for the mental suffering caused thereby. St. Louis, A. & T. R. Co. v. Berry (Tex.) 15 S. W. 48.

In case a train does not make a regular stop as advertised an intending passenger will be entitled to compensatory damages, if it was through mere negligence, and punitive damages if the failure to stop was wilful. The court says it will be a denial of justice to permit a common carrier to exhibit such inability and wilful neglect of the duties it has assumed and such disregard of the rights of others. Purcell v. Richmond & D. R. Co. 108 N. C. 414, 12 L. R. A. 113.

Damages not shown to be the direct result of the delay cannot be recovered from the carrier for the delay. Benson v. New Jersey Transp. Co. 9 Bosw. 412.

If a passenger delayed by a wreck does not follow the instructions of the conductor as the means of going forward on the journey, and is left and has to go home, he can recover only compensatory damages, if anything, although when the relief train leaves the conductor knows that that passenger is being left. Alabama & V. R. Co. v. Purnell, 69 Miss. 652.

In case a train runs by a station without stopping for passengers more than actual damages may be recovered for the protection of the public. Memphis & C. R. Co. v. Green, 52 Miss. 779.

If a train refuses to stop on signal to take up a passenger at a flag station such action may subject the company to exemplary damages. Wilson v. New Orleans & N. E. R. Co. 63 Miss. 352.

A person for whom a train fails to stop cannot walk to his station and recover from the company for sickness brought on by the exertion. Indianapolis, B. & W. R. Co. v. Birney, 71 Ill. 391.

Money which a theatrical manager is compelled to refund because of failure to reach his engagement in a town by delay on a railroad cannot be recovered from the company. Georgia Railroad v. Hayden, 71 Ga. 518, 51 Am. Rep. 274.

Remote and contingent damages cannot be recovered for delay in carriage. Yonge v. Pacific Mail S. S. Co. 1 Cal. 353. H. P. F.

C. 318; but the statement of the rule was modified by omission of the term "gross negligence" in the subsequent cases of *Rose* v. *Wilmington & W. R. Co.* 106 N. C. 170, and *Tomlinson* v. *Wilmington & S. C. R. Co.* 107 N. C. 327. The modification mentioned was due to the fact that this court meantime had said, in *McAdoo* v. *Richmond & D. R. Co.* 105 N. C. 149, that "the most learned and discriminating text-writers concur in the opinion, that in actions arising *ex delicto* there is no degree of negligence that can be described by the word 'gross' alone. But where an injury is due and can be traced direct to the wilful act of another he is not absolved from liability. . . . Hence, we often find, in opinions emanating from this and other courts, the expression 'gross and wanton negligence'; but the former word is never used to describe a degree of carelessness that will excuse the fault of a plaintiff in exposing himself to danger, except where it is improperly held synonymous with either the word, 'wilful,' 'malicious,' or 'fraudulent.'" Thompson, in his work on Carriers of Passengers (p. 573, § 27), says: "Such damages are termed 'exemplary,' 'punitive,' or 'vindictive' damages,—sometimes called 'smart money,'—and are only awarded in cases where there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury. . . . Some of the authorities include 'gross negligence' on the part of the defendant as one of the elements which . . . entitles the plaintiff to exemplary damages. But the better view is given in an opinion delivered in a recent case in the Supreme Court of the United States. . . In reversing the case Mr. Justice Davis, who delivered the opinion, . . . said: 'Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence.'" *Milwaukee & St. P. R. Co.* v. *Arms*, 91 U. S. 489, 23 L. ed. 374. The general rule, therefore, is that, where the violation of duty makes the defendant a wrongdoer, only compensatory damages are allowed, while proof of a wrongful purpose may take a case out of it as an exceptional one. Fraud, malice, or insult imply from their very definitions the existence of an intent on the part of the wrongdoer to cheat, to injure through hatred, or to oppress. Where even the rightful ejection of a passenger is accompanied with undue force, "rudeness, recklessness, or other wilful wrong" (*Rose* v. *Wilmington & W. R. Co. supra*), the law assumes the existence of bad motive on the principle applicable in ordinary cases of assault,—that every person is presumed to intend the natural consequences of his own act. *Tomlinson's Case*, *supra*. It must be noted that Mr. Thompson carefully excludes "gross negligence" as an element warranting the allowance of such damages, and substitutes the expression "such a degree of negligence as indicates a reckless indifference to consequences," which is equivalent to wanton carelessness; yet the learned justice who wrote the opinion in *Holmes' Case*, *supra*, inadvertently cited that author (94 N. C. 323) in support of his statement of the doctrine. In the consideration of the case at bar, therefore, it is proper to dismiss from our minds the idea that the weight of authority in our own court or elsewhere leaves us at liberty to hold that punitive damages may be awarded in every instance where a court can, by giving a very comprehensive meaning to that undefined and improper term, "gross negligence," as descriptive of the degree of carelessness, classify a case as an exceptional one, taken out of the general rule by the evidence of intent.

Counsel for the defendant asked the court, on the trial at the case at bar, to charge as follows: "(1) That upon the complaint and the facts as stated in the complaint, in the absence of any allegations of wilful or gross negligence, the plaintiff is not entitled to recover punitive damages; (2) that, taking the entire evidence in view, the plaintiff is not entitled to punitive damages . . .; (4) that if the plaintiff knew, when he contracted for transportation to Jamesville and return, of the general character, quality, and condition of the defendant's equipment, and the general condition of its road, plaintiff would be entitled to recover no damages except the cost of transportation back to Washington; (5) that the cause of action being laid in tort, the plaintiff cannot recover damages for a breach of contract of carriage in this action; (6) that, upon the entire evidence, the jury should respond to the several issues in favor of the defendant; (7) that, if the defendant was expending the entire income from its road in the maintenance of its roadway and the equipment of said road, it is not guilty of such wilful negligence as will subject it to punitive damages, but the plaintiff can only recover such actual damages as may have been proved." The court refused to give the instructions asked, but charged the jury, among other matters, as follows: "(2) The plaintiff claims that he bought a ticket from Washington to Jamesville, and back to Washington; that the defendant negligently failed to have a train to bring him back; and also punitive damages for the wrongful act of the defendant in failing to bring him back. He alleges that the defendant has wilfully failed and neglected its duty to the public in not properly keeping its roadbed, tracks, engines, and cars in such condition as to do the business which it naturally gets; and if you are satisfied that the defendant has wilfully neglected to do this, and in consequence of this wilful negligence they failed to run the engines and cars to return the plaintiff to Washington, then he would be entitled to punitive damages; otherwise he will only be entitled to compensatory damages." The court also charged the jury that it was the duty of defendant to have known the condition of its road and cars; and if they found that the roadbed, track, and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engine would be able to carry the trains through, etc., it would be wilful negligence, for which they might allow punitive damages.

It appeared from the testimony that the road was originally constructed for the purpose of hauling lumber, but ultimately engaged in the business of transporting passengers across the

intervening swamp from its northern terminus, at Jamesville, to its southern terminus, at Washington. The roadbed had been made by driving down piles of various kinds to make a foundation for the cross-ties. In the earlier years of its operations, as a carrier of passengers, the company had owned two engines, one regular narrow gauge passenger car, and one passenger car constructed out of a street car; but the latter car had become unservicable sometime before the injury complained of, and on extraordinary occasions a flat or box car had to be used to accommodate passengers. The engines had become worn, and had been jolted and injured on account of the bad condition of the roadbed and the consequent jarring in passing over it. The earnings of the road had been applied exclusively to its improvement during the whole period of its use as a road for transporting passengers, but latterly the income had been greatly diminished, and was insufficient to keep the roadbed in repair, much less to provide additional cars or engines. These are some of the facts testified to by the witnesses. The gravamen of the complaint is that the defendant company carried the plaintiff from Washington to Jamesville November 7, 1892, but failed to furnish means of transportation at the stipulated time, November 9, to bring him back to Washington on his return ticket. In applying the abstract principles which we have stated more specifically to the case before us, we find it to be a well-settled rule that where a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, such person is entitled to recover in all cases at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching the objective point by means of some other conveyance. *Yonge* v. *Pacific Mail S. S. Co.* 1 Cal. 353; *Hamlin* v. *Great Northern R. Co.* 1 Hurlst. & N. 408; *Savannah, S. & S. R. Co.* v. *Bonaud*, 58 Ga. 180; *Hawcroft* v. *Great Northern R. Co.* 8 Eng. L. & Eq. 362; *Sears* v. *Eastern R. Co.* 14 Allen, 433, 92 Am. Dec. 780; *Eddy* v. *Harris*, 78 Tex. 661; *Walsh* v. *Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376. The rule of damage just stated is to be adopted, not only when the suit against the railway company is brought for, or the proof confined to, the breach of contract of carriage, but as well where the plaintiff elects to sue in tort and rely upon the disregard of duty on the part of the carrier as a cause of action, unless it appear that the plaintiff has suffered, in addition to the expense, loss of time, and inconvenience incident to every failure to comply with such a contract, some personal injury of which the wilful failure to transport him according to the schedule time is a proximate cause. 5 Am. & Eng. Enc. Law, p. 40; *Milwaukee & St. P. R. Co.* v. *Arms, supra; Alabama G. S. R. Co.* v. *Sellers*, 93 Ala. 9; 3 Sutherland, Damages, §§ 934–938; *Martin* v. *Columbia & G. R. Co.* 32 S. C. 592; *Wilkinson* v. *Searcy*, 76 Ala. 176; Shearm. & Redf. Neg. § 23. In *Alabama G. S. R. Co.* v. *Sellers*, *supra*, where the conductor carried a female passenger beyond the station to which the company had contracted to carry her, and ordered her off the train in a driving rain with an infant in her arms, and so encumbered with baggage that she could not protect herself by using an umbrella, thereby subjecting her to exposure from which she contracted sickness that lasted for three weeks, the court carefully and in express terms rested the decision that the jury might allow exemplary damages upon the ground, not of the "omission of the duty" on the part of the conductor of stopping at the station, but of his wilful disregard of her comfort and health in forcing her to expose herself and her infant, instead of letting her off at a house or backing the train to the station. In discussing this doctrine, Sutherland (vol. 3, § 938) says: "Where a person has bought a ticket and is carried beyond the station for which he is ticketed, without any fault on his part, he has a right of action for at least nominal damages, though he suffers no actual injury, and for such actual injury as he may in fact suffer." After laying down the foregoing as the ordinary rule, when the conductor, with a full knowledge of the destination of a passenger, merely takes him beyond that point, and lets him off without circumstances of aggravation, he proceeds to refer with approval to the ruling of the court of Alabama, already cited, that where there was evidence in addition that a female passenger was ordered off the train with her infant, the circumstances attending her expulsion were evidence to be considered by the jury of wilful wrong on the part of the conductor, and consequent liability on the part of the company to punitive damages. It is an error that will lead to endless confusion to hold that "smart money," which is allowed as a punishment to the wrongdoer, may be recovered in every case where, under the common-law practice, an action of *ex delicto* would lie. *Wanamaker* v. *Bowes*, 36 Md. 42; *Wilkinson* v. *Searcy*, *supra*; *Phelps* v. *Owens*, 11 Cal. 22. All of the actions brought against railway companies for breach of duty arise out of tort; but it is only in those where the elements already mentioned as indicative of bad motive exist, and where, in addition, some personal injury or indignity is sustained, that the plaintiff is allowed to recover more than compensatory damages. *Morse* v. *Duncan*, 14 Fed. Rep. 396. In *Tomlinson* v. *Wilmington & S. C. R. Co. supra*, the court said: "'The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude, as a claimant of punitive damages, than if he had been rightfully ejected, but in an unlawful and unwarranted manner or with undue force. It is an essential prerequisite to the acquisition of the right to recover exemplary damages for the wrongful expulsion of a passenger from a train, that there should be evidence of undue force, unnecessary rudeness in the application of the force, or insult, malice, or some wilful wrong accompanying the act of ejecting him or causing him to leave the train.' *Rose* v. *Wilmington & W. R. Co. supra*, and authorities there cited." Justice Clark, for the court, in *Wallace* v. *Western N. C. R. Co.* 104 N. C 452, approving the rule laid down in 3 Sutherland Damages (1st ed.) 261, said: "Plaintiff is to have a reasonable satisfaction . . . for loss of both bodily and mental powers, or for actual suffering both of body and mind, which

are the immediate and necessary consequences of the injury." "In the absence of any sufficient testimony to make the company liable for wilful disregard of the intestate's danger," said the court in *Roseman* v. *Carolina C. R. Co.* 112 N. C. 719, 19 L. R. A. 327, "we think the court below erred in submitting the case to the jury."

It is true that smart money may be awarded by the jury when no actual but only nominal damage is shown, as when a conductor rightfully expels a person from a car or the owner puts a trespasser off his premises, and either of them uses excessive force or subjects such persons to useless indignity. *Tomlinson* v. *Wilmington & S. C. R. Co. supra; White* v. *Barnes*, 112 N. C. 323. The allowance is made, in these instances, on account of the assault or rudeness. But where a trespass is committed by mistake, the case is not governed by the same principle as when a wilful assault is committed. *Beveridge* v. *Welch*, 7 Wis. 465. It is not sufficient ground for allowing punitive damages that the defendants, when they committed a trespass, had reason to believe, but did not know, that their acts were wrongful and might result in injury to plaintiff. *Inman* v. *Ball*, 65 Iowa, 543. On the other hand, a trespasser is always responsible for such actual damages as legitimately follow from his act, whether he contemplated the result or not (*Allison* v. *Chandler*, 11 Mich. 542), while one who assaults another is presumed to have intended the personal injury,—that is, the consequence of committing the assault,—it being a wrongful act, done purposely and without cause. *Goetz* v. *Ambs*, 27 Mo. 33; *United States* v. *Taylor*, 2 Sumn. 586, Fed. Cas. No. 16,442; *Causee* v. *Anders*, 4 Dev. & B. L. 246. We think that the case at bar is one of those where the plaintiff, under the old common-law practice, might have elected to bring his suit either for the breach of contract in failing to bring the plaintiff back on schedule time, or for the disregard of his duty to the public as a carrier,—either an action of assumpsit or of trespass. But because he chose then to sue for the tort, and now to allege such facts as show an omission of duty, it does not follow that, upon proof of such allegations, exemplary damages will be allowed. There has been a failure to show the sort of wilfulness that manifests its presence in malice, rudeness, violence, indignity, and reckless disregard of consequences, and there is no evidence that the plaintiff suffered from sickness contracted by exposure incident to the delay, or was subjected, in consequence of the defendant's failure to furnish transportation, to any other personal injury or to indignity. If neither the intentional or wrongful expulsion of a passenger not accompanied with undue force (*Tomlinson's Case, supra*), nor the negligent carrying him beyond his destination (3 Sutherland, Damages, § 938), after having inspected his ticket or received it, is sufficient evidence of the wilful infliction of personal injury to warrant the allowance of punitive damages, we fail to see upon what principle we can hold a railroad company liable to be so punished because, with a full knowledge on the part of its manager that the company had but two engines, one of which was in the shop at Norfolk for repairs, it undertook to haul to Jamesville and back, with the other, not then in good condition, the train on which the plaintiff and others who had return tickets were to be carried as passengers, because only of the delay and inconvience incident to such detention. If the same engine, in consequence of the bad condition of the track or the engine itself, had, with the cars, been derailed, only those passengers who received bodily injury could have maintained actions against the company, and have recovered, as a part of the compensation for the consequences of the accident, exemplary damages. It is not necessary to cite authority in support of the soundness of so plain a proposition; and yet, if we sustain the court below, the logical result would be that a passenger who is delayed without suffering bodily injury by a defective engine is entitled to smart money, though he could not have subjected the company to such punishment had he escaped unharmed when it was derailed and upset. "Neither negligence without damage, nor damage without negligence, will constitute any cause of action." Shearm. & Redf. Neg. §§ 23–25. The case of *Purcell* v. *Richmond & D. R. Co.* 108 N. C. 414, 12 L. R. A. 113, seems to have been confidently relied on to sustain the contention of the plaintiff. The facts in that case were that the plaintiff had purchased a ticket, and was waiting at the time at which it was advertised that the train would stop at the station where he was to embark; but the cars being overloaded because a circus was to give an exhibition at the station to which the passenger was destined, the conductor did not stop at the station, but left him standing. It was held that the failure to provide sufficient means of transportation, when by reasonable diligence it could have been ascertained that they would be needed, was such evidence of wilfulness and gross negligence as to warrant the court in instructing the jury that they might allow punitive damages. In the opinion, *Heirn* v. *M'Caughan*, 32 Miss. 17, 66 Am. Dec. 588, was cited as "exactly in point" to sustain the ruling, though even that extreme case was distinguishable from *Purcell's Case*, as well as that at bar, in that the jury must have found preliminary to the assessment of exemplary damages, (1) that, after advertising that the boat would stop for passengers at the landing where the *feme* plaintiff was waiting, the owners or their agent wilfully and capriciously passed by, when they could have effected a landing there and had room to accommodate the plaintiff; (2) that the instruction excepted to and sustained was that the plaintiffs were entitled, "from the exposure and discomfort they suffered" in waiting for the boat, to exemplary damages (p. 24); it appearing on the trial that the *feme* plaintiff was pregnant, and that, the weather being unusually cold, she suffered great pain and anguish, whereby her health and life were in peril.

In addition to the authorities already cited upon this point, we find a summary of the doctrine (compiled from the leading cases in Ray on Negligence of Imposed Duties, Passenger Carr. p. 228, § 68), which is as follows: "Where, according to the schedule of trains, a passenger arrives at a station, intending to take

passage, and he finds no train ready, and is compelled to remain over the night, and in consequence of the delay he fails to keep an appointment and complete business arrangements, while he will be entitled to recover the actual expense incurred at his hotel, he cannot recover beyond more than nominal damages," —citing *Memphis & C. R. Co.* v. *Green*, 52 Miss. 779, to sustain the proposition; and the court says in that case, on page 229, that "punitive damages will not be allowed in the absence of any circumstances of malice, oppression, insult, personal injuries, damages to business, mental or physical suffering, although something more than actual damages may be awarded against common carriers by way of punishment for neglect of duty and protection to the public." In the application of the proposition which is taken from that case, the court held that where a passenger train ran 60 yards beyond the platform, and failed to stop there long enough for a passenger who had bought a ticket and was waiting to embark, to reach it, the allowance of $1,500 damages was excessive because "no damages were proved except disappointment, delay, and inconvenience." The reasonable rule adopted in Mississippi will not, therefore, apply either to *Purcell's Case* or to that at bar, since no personal injury was sustained by the complainant in either case, nor was there any ground for compensatory or punitive damages shown, except the disappointment, delay, and inconvenience resulting from the failure to furnish means of transportation. We conclude, therefore, that the plaintiff was not entitled, upon any phase of the evidence, to recover punitive damages, for the reasons (1) that he had not proved that he sustained any personal injury, or shown any grounds for asking damages except inconvenience, delay, and disappointment; (2) that in no aspect of the testimony is there evidence of bad motive sufficient to entitle the plaintiff to more than compensatory damages.

In passing upon this question we must invoke the aid of common sense and common observation, since the question whether a given act amounts to negligence at all, and if it does, what degree of culpability attaches to it, depends not only upon surrounding circumstances, such as the condition of the parties, but the condition of the country and the progress of improvement in science and the arts. We cannot shut our eyes to the history of railways in North Carolina, and the daily developments of the country by new branch lines, built first for the transportation of lumber, and gradually extending their business as carriers to other freight, until at last, though the corporation has been able to purchase not more than two or three engines and a single passenger car with few appointments, its patrons induce it to transport passengers in order that they may have the advantage of saving time and expense by substituting such a conveyance as an improvement on a road wagon or other vehicle. We are not disposed to check the process of evolution which we see around us, from a lumber road into a comfortable line for passengers, as the development of business justifies the change. Even where a road appears to be retrograding, we see no reason why we should interpose with a harsh rule, such as would have stopped the operation of the Raleigh & Gaston Road nearly fifty years ago with the best efforts of our distinguished Governor Graham, representing the state, as a principal stockholder, and running it with poor equipments and constant danger of injury to passengers by derailments and snakeheads, and frequent delays of many days to purchasers of tickets. History has repeated itself in the gradual improvement of the roadbed and equipments of the Western North Carolina Railroad. If the axe is to be brought to the root of the tree by stopping these roads from transporting persons at all unless the conditions be improved, the legislature has wisely attempted to vest the necessary power in a railroad commission to accomplish this end either by ordering a cessation of operations, or the improvement of the roadbed and the purchase of new equipments. Meantime, neither the law, fairly interpreted, nor considerations of public policy, warrant the adoption of so harsh a rule as that proposed. It necessarily follows that *Purcell's Case* is overruled as inconsistent with the principles we have laid down. We are less averse to taking this course because the doctrine there enunciated can never become a rule upon which the title to property depends, and, as we have intimated already, because it may operate in its enforcement to check the improvement and development of sections now too remote from market to justify the most costly roadbeds and the best equipments. For the reasons given, we deem it unnecessary to discuss the other exceptions, which we may state, in a general way, are untenable, and we feel constrained to grant a new trial.

Clark, J. dissenting:

It is the duty of railroad companies to run their trains according to schedule. "Passengers, if delayed, are entitled to compensation for a loss of their time (*Pennsylvania R. Co.* v. *Books*, 57 Pa. 339); for expenses during delay, or, when necessary, expenses for procuring another conveyance. As to the compensation for loss of time, it . . . is admissible . . . to prove the rate of wages at the place of his destination." 2 Harris, Damages by Corp. § 545. "A passenger, in order to avoid a delay, can only incur a reasonable expense. He cannot take a special train in order to avoid a slight delay. . . . The value of the time lost may be recovered. Evidence of the rate of wages earned by persons of the plaintiff's trade at the place of his destination . . . is admissible to guide the jury in fixing the damages." 2 Sedgw. Damages, §§ 862, 863. Such are the general principles applicable in cases where, by reason of the train being behind the schedule time, the passenger misses connection with the first train on a connecting road, or is delayed even in reaching his destination on the carrier's own line according to the advertised schedule, when the action is for breach of contract. As in every such case of delay each passenger is entitled at least to nominal damages, it is of importance to the public and the common carrier to revert to the settled principle, in actions for breach of contract,—that the parties are only liable for those dam-

ages which were reasonably in their contemplation at the time of making the contract. This is the usual limit of damages, but there may be cases where the neglect of the carrier is so wilful as to make it liable in an action of tort for exemplary damages. The plaintiff, however, contends that, as the present is an action of tort upon the evidence, he is entitled to recover exemplary damages. The question was decided by this court, no one dissenting, in *Purcell* v. *Richmond & D. R. Co.* 108 N. C. 414, 12 L. R. A. 113, where it is said (pp. 417, 418, 108 N. C.,): "The Code, § 1963, provides: 'Every railroad corporation shall . . . at regular times, to be fixed by public notice, . . . take, transport, and discharge such passengers and property . . . on due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.' For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges* v. *Wilmington & W. R. Co.* 105 N. C. 170), but he could elect to sue in tort for the injury and the breach of public duty (existing independent of the statute) by the wilfulness or negligence of defendant. Bishop, Non-cont. L. §§ 73, 74; Redf. Carr. § 422; *Tattan* v. *Great Western R. Co.* 2 El. & El. 844. If the tort was committed by mere negligence of the defendant as simple carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, and as no special damages were alleged and shown other than obtaining another conveyance, the measure of damages as laid down by the court, to wit, the price of the ticket and of procuring such other conveyance—40 cents in all—would have been correct. But if the conduct of the defendant was wilful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition." In the present case there was evidence of great dilapidation of cars, rolling stock, engines, roadbed, and trestles, and of continued neglect to repair the same. So gross was it that for defendant to continue to offer to transport and to receive for transportation passengers, with such defective machinery and roadway, was such a disregard of its duties and the rights of the public that, in case of death resulting to a passenger while *en route*, there are authorities which would have sustained an indictment for manslaughter against the president, directors, and other chief officers. It is very certain that, with such machinery and roadbed, to contract to take the plaintiff and others on a round trip, and, having gotten them to the other end of the line, to leave them there to get back as they could, was such "gross and wilful disregard of plaintiff's rights as would entitle him to recover punitive damages." As was said in *Purcell* v. *Richmond & D. R. Co. supra:* "Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and wilful neglect of the duties it has assumed and such disregard of the rights of others. Yet such is the effect if, without adequate excuse, it should be allowed so to act with no other penalty than refunding the price of the ticket and the price paid for another conveyance, since the latter would be demanded in very few cases and only when the destination is at a short distance. . . . The refunding the price of the ticket would amount in most cases to nothing, as the passenger would usually buy a ticket by the next train. Yet the inconvenience, annoyance, and injustice to the traveling public by such detentions would be great and difficult to estimate." In that case the plaintiff sued for damages because the train ran by its regular station without stopping to take him on. Here the condition of the machinery and roadbed was such that it was dangerous to travel over the road. The defendant company showed a criminal indifference to the rights of the public in offering to transport passengers when it knew the uncertainty alike of transportation safe and on schedule time, both of which are implied in its offer. The company owed it to the public to keep its appliances and roadway in proper condition to transport safely and according to schedule. If it had not money in the treasury, it should have borrowed it, and, if unable to do that, it should have suspended operations, as we learn it has since done.

It is not in every case where a railroad is in a bad condition and there is delay or failure to convey, that the jury can give punitive damages. The court here told the jury that "if the defendant had reason to believe, and did believe, from the business of the road for several years past and the condition of its engines, that it would be able to keep its contract to transport plaintiff, and an accident occurred which they could not, in the ordinary course of their business, have foreseen and provided for, it would not be wilful negligence." To this the defendant did not except. The court further charged, if the jury "found that the roadbed, track, and engines of the defendant were at the time alleged in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engines would not be able to carry the trains through, or the roadbed and track in such condition as to render it unsafe to carry its trains over it, and they permitted this condition of things to continue up to the alleged time, it would be wilful negligence, for which you may allow punitive damages. If you find that they had allowed their road, track, and engines to get in such condition as not to be able to do the ordinary business of the road, by their negligence, and the character of that negligence was such as to satisfy you that defendant did not care, or was indifferent, as to whether they had the train there or not, it would be wilful negligence." To this the defendant excepted. The action was brought for a tort. The second paragraph of the complaint was as follows: (2) That the defendant so carelessly and negligently conducted and managed the said railroad, and so carelessly and negligently allowed its track, cars, locomotives, and other appurtenances belonging to the said railroad as a common carrier to become so out of repair, and the equipment of the said railroad to become so run down and incomplete, and so negligently failed to provide adequate facilities for the transportation of passengers, that the

plaintiff, by reason of the premises, having on the 7th day of September, 1892, purchased at the town of Washington a ticket to the town of Jamesville and return,—to return on the 9th day of September, 1892,—and for which the defendant charged and received from the plaintiff the sum of $1, was carried over the railroad of the defendant company to the town of Jamesville; that upon the said 9th day of September, 1892, at the advertised time plaintiff presented himself at the defendant's depot in Jamesville, N. C., for transportation over said railroad to Washington, N. C., and because of the negligence, carelessness, and lack of proper equipment of a railroad receiving the profit of a common carrier and owing duties to the public, and without fault on the part of the plaintiff, defendant failed to provide locomotive, cars, or other means for the transportation of, and failed to transport, this plaintiff to the town of Washington, according to its public duty and advertisement, to plaintiff's damage $500." And one of the issues submitted was: "Did the defendant negligently suffer and permit its road, rolling stock, and equipment to become in the condition described in section 2 of the complaint, so that it was unable to discharge its duties to the public as a common carrier of freight and passengers?" The above charge was therefore appropriate to the controversy in the pleadings, and it was most amply supported by the testimony. It will be seen by reference thereto that the roadbed, the engines, and the rolling stock were all unfit and dangerous to be used; that the manager of the company reported the condition of the same to the owners in Philadelphia, but that in wilful disregard of their public duties they neither put the road, engines, and rolling stock into fit condition, nor discontinued holding themselves out to the public for the safe and regular carriage of passengers. If such conduct as the evidence described was not such wilful disregard of the defendant's duties to the public as will entitle the plaintiff to recovery punitive damages, it will be absolutely impossible for a railroad company in this state to show such "wilful disregard of its duties and indifference to the rights of the public" as will, under all the authorities, make it liable for punitive damages. The damage recovered was $50. Upon the evidence, the defendant has cause to congratulate itself that it is not defendant in an action for damages for death or personal injuries caused by its gross and wilful negligence, or that its officers are not under indictment for manslaughter. This is not a breach of contract of carriage by a private party; but it is the direct result of a long-continued disregard of duties assumed in regard to the public by a corporation which sought and obtained the exercise of the right of eminent domain to furnish it a right of way and other special privileges. These were granted solely in consideration of the services which the defendant undertook to render to the public, but which it has wilfully and grossly neglected to properly render. The defendant's own evidence was that its manager had repeatedly, time and again, notified the president and directors of the dilapidated and dangerous condition of the machinery and roadbed, but that adequate relief had always been denied. In *New Orleans, J. & G. N. R. Co.* v. *Hurst*, 36 Miss. 630, 74 Am. Dec. 785, it is said: It is "the right of the jury in such cases to protect the public by punitive damages, against the negligence, folly, or wickedness, which might otherwise convert these great public blessings into the most dangerous nuisances."

The railroad commission act (1891, chap. 320, § 11), provides that for a wilful violation of the rules and regulations made by the commissioners railroad companies are liable for exemplary damages. It would be an anomaly, certainly, if they are not liable for exemplary damages for a wilful violation of statutory regulations, as in this case.

This disposes of the exception to the charge. The exception to the evidence that an engineer in defendant's employ a year previous was allowed to testify to the bad condition of roadway and machinery at that time cannot be sustained. This was competent, taken with the other evidence, to show the gross neglect of defendant in permitting the dilapidation to continue, all the while holding itself out to the public for the safe and regular carriage of passengers. The exception to issues is also without merit. Every phase of the controversy raised by the pleadings could be fairly presented upon the issues submitted. *Humphrey* v. *Front Street M. E. Church*, 109 N. C. 132.

A petition for rehearing was subsequently filed by *Messrs.* **Chas. F. Warren** and **L. T. Beckwith** for petitioner, *Messrs.* **John H. Small, MacRae & Day,** and **W. B. Rodman,** *Contra*,—in response to which, on October 22, 1895, **Furches,** J., delivered the following opinion:

This is a petition to rehear this case, decided at September term, 1894, of this court, and published in 115 N. C. 602. The defendant is a corporation under the laws of this state, running and operating its road between the towns of Washington and Jamesville, transporting both freight and passengers as a common carrier for pay. The plaintiff, a citizen of Washington, wanting to go to the town of Edenton and back, on the 7th of September, 1892, purchased a ticket of defendant to Jamesville, and from Jamesville back to Washington on the 9th. The defendant carried plaintiff to Jamesville on the 7th, and he went on to Edenton and was in that town on the 8th of September. (It is not stated in this case that plaintiff went to Edenton, and was there on the 8th, but this was stated and agreed to by counsel on the argument.) On the 8th of September, soon after leaving Jamesville for Washington, the axle of defendant's engine broke, and when the plaintiff returned from Edenton to Jamesville on the 9th the defendant was unable to carry him on its road from Jamesville back to Washington as it had contracted to do. Thereupon plaintiff brings this action for damages, which he lays at $500, and alleges that defendant's roadbed was in a bad, shackling, and ruinous condition; that defendant had but two engines, both of which were worn and in bad condition, one of them at that time being in the shops for repair, and not in a condition to be used; that the bad condition

of defendant's roadbed had rattled the other one so as to cause the axle to break; that all this showed such wilful negligence on the part of defendant towards the public and towards the plaintiff as to entitle him, not only to compensatory damages, but to exemplary damages. The defendant answered, denying the allegation of negligence, admits that the road was not in good condition, says that it was poor and struggling for existence, and that it was expending the whole earnings of the road, and more, in trying to keep it in good repair, and was not able to do so. Therefore defendant denies that it is liable to plaintiff for anything, and certainly not for punitive damages. And, without reviewing the evidence, it is such as to warrant us in saying that the roadbed was in a bad, dilapidated, and ruinous condition; that defendant had but two engines, and they were old, worn, and in bad condition. That plaintiff is entitled to compensatory damages there can be no doubt, but as to whether he is entitled to exemplary damages is the question. It is said that railroads are quasi-public servants; that they are created by the public (the legislature), and owe duties to the public in return for their right of franchise. And, while this is true, it can only be considered by us as a reason for establishing the law as we shall find it, and not as a reason for us to establish the law. Nor can we consider the question as to whether defendant's road is a poor corporation, struggling for existence, and expending all its earnings, and more, on its road; or whether it is a rich corporation. These are questions we have no right to consider in passing upon the question of law as to whether plaintiff is entitled to recover damages against defendant or not. *Taylor* v. *Grand Trunk R. Co.* 48 N. H. 317, 2 Am. Rep. 229.

The legal question involved in this case is conceded to be an important one, and is entitled to our best consideration. It is one that has been so much discussed by law writers and by the courts in judicial opinions in which different phases or facts appear, that it is somewhat difficult to establish ourselves on what we consider solid ground. Often a very slight difference in the facts changes the reason upon which a case is decided. We find that decided cases, unless closely attended to, are often misleading. Also often a misunderstanding of some of the facts, or an inadvertence to some fact in the case, leads to error. This, we think, was the case with the learned justice who wrote the opinion we are now reviewing. In stating the facts in *Purcell's Case*, 108 N. C. 414, 12 L. R. A. 113, he stated that when the defendant's train passed the depot it "was overloaded," when there was evidence tending to show that there was room for a number of other passengers; and this was the hypothesis upon which the court was asked to charge the jury, and which was refused by the court. This inadvertence, as we think, led the court to overrule *Purcell's Case*, *supra*. After as full investigation as we have been able to give to this case, we are of the opinion that the true ground for allowing exemplary damages is personal injury to plaintiff, caused by the negligence of defendant (and we do not undertake here to enumerate all the causes for exemplary damages where there is personal injury). And where there is no personal injury, there must be insult, indignity, contempt, or something of the kind, to which the law imputes bad motive towards a plaintiff; and when they are allowed they are in addition to compensatory damages. 1 Sedgw. Damages, 520; 5 Am. & Eng. Enc. Law, p. 43, note, and cases cited. This principle we find is recognized and enforced in the following cases: A railroad conductor kissed a lady passenger on his train, and she was allowed to recover punitive damages, upon the ground that it was a personal indignity. 5 Am. & Eng. Enc. Law, p. 43. Where a railroad conductor refused to carry a passenger after he had paid his fare, the road is liable to exemplary damages. 3 Sutherland, Damages, §§ 935, 937. This is upon the same ground. Plaintiff is not entitled to exemplary damages unless there is a wilful or intentional violation of plaintiff's personal rights. *Milwaukee & St. P. R. Co.* v. *Arms*, 91 U. S. 489, 23 L. ed. 374. Where a railroad carried a lady passenger a few hundred yards beyond the station, and upon application of the passenger refused to back the train to the station, but put the passenger out in a driving rain with her infant child and baggage, the defendant was held to be liable to punitive damages. But this was put upon the ground of personal indignity and insult, as all the cases we have cited are; and the fact that the passenger could not use her umbrella, got wet, and was sick from the effects, was only allowed in evidence upon the measure of damages. But the gravamen of the action was the personal indignity with which the plaintiff had been treated by the defendant. *Alabama G. S. R. Co.* v. *Sellers*, 93 Ala. 13. We might cite many other cases to sustain the principle we have laid down, but do not deem it necessary.

We make no question under our system of liberal pleading, that plaintiff may recover either in contract or tort, if he has made out his case. But he can no more recover in tort without making out his case than he could recover in contract without making out his case. The fact that the defendant's road was in bad condition was no insult or indignity to plaintiff, and as there was no personal injury on account of its bad condition, this affords him no cause of action. The fact that defendant's engine broke down on the 8th when plaintiff was in Edenton was no personal insult, indignity, or intentional wrong to plaintiff. No doubt the defendant regretted the breaking down of the engine as much as plaintiff. The fact that plaintiff had a right of action for breach of the contract gives him no right of action for tort against the defendant. And unless he had the right to maintain an action for tort, he had no right to punitive damages. There can be no damage recovered when there is no right of action. Damages are not the cause of action, but the result of the action. Taking all the evidence in the case offered by the plaintiff, or that may be considered in his favor, we do not think it makes a cause of action against the defendant in tort, and that the defendant was entitled to have his second prayer for instruction submitted to the jury, to wit, "Taking the entire evidence in view, the plaintiff is not entitled to punitive damages." This was refused by the court, and we think there

was error. We have arrived at our conclusion by a different treatment of the case, to some extent, from that adopted by the court in the opinion published in 115 N. C. 602, but our judgment is the same. And in this opinion we do not think it necessary to disturb the judgment as announced in *Purcell's Case, supra*. But the judgment in that case should be put upon the ground that the defendant treated the plaintiff, Purcell, with indignity and contempt in rushing by the station at faster speed when there was room for other passengers, or at least when there was evidence tending to show this, and the court refused the prayer for instruction submitting this question to the jury.

The petition is dismissed.

Clark, J., concurring in part:

Concurring in the opinion in so far as it reinstates the authority of *Purcell* v. *Richmond & D. R. Co.* 108 N. C. 414, 12 L. R. A. 113, the vast and growing importance of the principles involved in this case to every one who shall travel over or ship freight by these great public agencies forbids my acquiescence in some of the reasoning relied on in the present case. In the recent case of *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106, 37 L. ed. 101, Mr. Justice Gray commends the historical instruction of Chief Justice Pratt (afterwards Lord Camden) that: "A jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury of the action itself." And Mr. Justice Gray, for the court, adds: "The doctrine is well settled" that the jury, in addition to compensatory damages, "may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly . . . or with criminal indifference to civil obligations." In the present case his honor below charged the jury that "if defendant failed to provide proper means for transportation of passengers—as, for instance, the plaintiff in this case—as they had undertaken to do, wantonly and wilfully, the jury may give punitive or punishing damages; and the amount of such is largely a matter for the jury to determine, but the court will supervise, so as to see that no wrong is done." This sums up in a few words the whole controversy in this case, and it is this charge which "is this day brought into question." In *Purcell's Case, supra*, this court, in a unanimous opinion, laid down the wholesome, and it would seem the necessary, principle that for the wilful and wanton violation by a railroad corporation of the regulations prescribed for its control and conduct by the lawmaking power (Code, § 1963) such corporation is liable to punitory damages. These words, "wilful and wanton," have a well-defined meaning in our courts, and have been construed in *State* v. *Brigman*, 94 N. C. 888, and *State* v. *Morgan*, 98 N. C. 641, to mean "purposely, intentionally, and with reckless disregard of the rights of others." Our courts have upheld the authority to grant punitory damages in all proper cases, and if they could ever be granted against a corporation in any case it would seem certainly they should lie whenever the conduct of its officials, has shown a "wilful, intentional violation" of the statutes enacted by the legislature for the control of these corporations, and a "reckless disregard of the rights of the traveling public" or shippers of freight. The sovereignty which, through its agents, created and gave existence to this corporation, has recognized this rule as wholesome and just, for in the act creating the railroad commission (act 1891, chap. 320, §11), it is provided in almost identically the same words (indeed the very same, leaving out the word "wantonly") that for a "wilful violation of the rules and regulations made by the commissioners railroad companies are liable for exemplary damages." It would be the strangest of anomalies if a railroad corporation is liable to exemplary damages for the wilful violation of the regulations of the railroad commission, but is not thus liable for the wilful and wanton violation of the regulations prescribed by the legislative power which created them both. And we should have this further anomaly in the law: A telegraphic dispatch announcing the critical illness of a near relative is sent. If not delivered promptly, the sendee, as is properly held by numerous decisions of this court, is entitled to exemplary damages, though he has suffered no personal injury, nor has any indignity been inflicted upon him. *Young* v. *Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Thompson* v. *Western U. Teleg. Co.* 107 N. C. 449; *Sherrill* v. *Western U. Teleg. Co.* 116 N. C. 655. The reason is that, being put upon notice by the tenor of the dispatch, it is wanton and wilful violation of the duties for which it was incorporated for the company to fail to deliver the message promptly, and the highest reasons of public policy require that exemplary damages should be imposed. Now, suppose the dispatch is delivered and the sendee starts for his home, but the railroad corporation finding that it can send a larger number of passengers to another point, stops its car,—as in the present case they stopped it, because it was cheaper to send a broken piece of machinery to Norfolk to repair than to keep necessary repair shops or another engine,—and by this wilful and wanton violation of its statutory duties to furnish sufficient transportation the recipient of the telegram does not reach the bedside of his dying wife, would it not be an anomaly that for a wilful and wanton violation of its duty to deliver the telegram promptly the telegraph company is liable to exemplary damages, but for an equally wilful and wanton violation by the railroad corporation to transport the passenger according to schedule that company is only liable to pay the passenger's board bill during his detention. In a case where the corporation failed to bring the passenger home on his round-trip ticket, as the defendant in this case failed to do, punitive damages were sustained in *Head* v. *Georgia P. R. Co.* 79 Ga. 358.

But it was contended on the argument that though the railroad corporation is liable for the wiful and wanton violation of its statutory duty in running its trains by a station without stopping, and thus failing to take on a passenger when there happens to be a vacant seat, it is not so liable if with full notice of more pass.

engers waiting at a station than the cars can carry, and in time to add more cars, it fails to do so. It is difficult to recognize the authority to hold that this act of wilful violation of its statutory duties and wanton disregard of the rights of the public does not subject the corporation to punitive damages, while the same wilfulness and wantonness in running by a station without stopping does so subject the corporation if there happens to be a vacant seat. It is the same wilfulness and wantonness to fail to have sufficient seats when the corporation has notice in time and cars in its control as not to stop to fill the empty seat. The statute authorizes no such discrimination. It provides (Code, § 1963): "Every railroad corporation . . . shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of stopping and . . . at the usual stopping places established for receiving and discharging passengers and freight for that train, . . . and shall be liable to the party aggrieved in damages for any neglect or refusal." The statute nowhere intimates any distinction whereby one wilful and wanton violation of the statute is cause for exemplary damages, and that another equally wilful and wanton violation of the same statute incurs no such liability. The reasonable and impartial rule laid down by a unanimous court in *Purcell's Case* is that, if the breach of the statute "was mere inadvertence or negligence, or was caused by an unforseen number of passengers presenting themselves which rendered it unsafe to take a greater number aboard, and the company could not by reasonable diligence have increased the number of cars, then the plaintiff would be held to recover only the bare compensatory damages laid down. If, however, the defendant . . . by reasonable diligence could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but regardless of its duties and of the rights of those whom it had invited to leave their ordinary avocations and present themselves at its regular station for passage, or if, having room for additional persons, it passed without stopping, this displayed "a gross and wilful disregard of the rights of the plaintiff which entitled him to recover punitive damages." This is sustained by numerous authorities in other states. *Heirn* v. *McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *New Orleans, J. & G. N. R. Co.* v. *Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Silver* v. *Kent*, 60 Miss. 124; *Wilson* v. *New Orleans & N. E. R. Co.* 63 Miss. 352; *Alabama G. S. R. Co.* v. *Sellers*, 93 Ala. 9; 3 Sutherland, Damages, § 937. It was urged on the argument that it would be difficult often to decide what state of facts would or would not constitute a wilful and wanton disregard of statutory duties. But that does not authorize a judicial repeal of the statute, either in whole or in part. It must, in each case, be determined whether the facts proved show a "wilful and wanton disregard of statutory regulations," and, if they do, the jury is empowered to impose exemplarly damages, subject to the protective supervision of the court to prevent abuse by setting aside the verdict.

But it was further argued before us that, while a railroad corporation is by statute liable for "a wilful violation" of the regulations of the railroad commission, it is not liable for "a wilful and wanton violation of statutory regulations;" and hence when a train with several vacant seats passes its regular station without taking on a passenger waiting there, the liability is only because of the indignity offered the intending passenger. But it will be noted that this is a mere substitution of words. The sole indignity offered him is the wilful and wanton disregard of his rights as guaranteed by the statute (Code, § 1963), that "sufficient accommodation for transportation shall be afforded at the usual stopping places;" and the same indignity is equally offered him by the violation of the same statute if the company knows in reasonable time that the number of cars are insufficient, and can supply them, and fails to do so, running by without stopping, though with crowded cars, because it chose not to supply enough. The duty to furnish sufficient cars is clearly stated in *Branch* v. *Wilmington & W. R. Co.* 77 N. C. 347, independently of the express requirement of the statute (Code, § 1963),—above quoted. In the present case the learned judge charged the jury in accordance with the ruling of this court, that, if the defendant was guilty of wilful and gross negligence, the plaintiff could recover, otherwise not; and further, that if the accident occurred, which they could not have, in the ordinary course of their business, foreseen and provided for, this would not be wilful negligence, but, "if the character of the negligence was such as to satisfy the jury that the defendant did not care or was indifferent as to whether they had the train there (to bring the passengers home), it would be wilful negligence." It was in evidence that when the plaintiff, who held a return ticket, applied for transportation, the official in charge gave himself no concern whatever, made no effort to have the plaintiff brought home, and refused the use of the hand car. His honor, after stating correctly and more fully what facts would constitute wilful negligence and what would not, instructed the jury that only in the event they found wilful negligence could the plaintiff recover. There was ample evidence to submit to the jury the inquiry whether or not there was wilful negligence. Both authority and reason sustain the proposition that "the liability of a railroad company for exemplary damages cannot be made to depend on the ability of the corporation to earn enough money to keep its road in such condition as to be operated with safety." *Texas Trunk R. Co.* v. *Johnson*, 75 Tex. 158, 162; *Taylor* v. *Grand Trunk R. Co.* 48 N. H. 304, 317, 2 Am. Rep. 229. If the company is unwilling or unable to furnish money to run its trains according to the statutory requirement, it should cease to hold itself out to the public as a common carrier.

The jury having found that there was a wilful violation by the defendant of its statutory duty to transport the plaintiff, and a wanton disregard of the plaintiff's rights in that respect, it is not the province of this appellate court to review the facts and disturb the verdict.

The principle involved is one of universal in-

terest. It is nothing less, when reduced to its last analysis, than whether these corporations, primarily created for the convenience and advantage of the public, with the incidental benefit of profit to their owners, are subject to exemplary damages when they wilfully and wantonly violate the statutes passed for their regulation by the power which created them. If they are not, then clearly and unmistakably the public are in the power and at the mercy of the arbitrary will of corporations, which, daily aggregating into larger and larger masses, are powerful beyond any control other than the law. And if they possess the power of violating wilfully and wantonly the statutory regulations prescribed for the protection of the public, without fear of punishment by the imposition of exemplary damages at the hands of a jury, then the law-making power in creating them is, like the magician in the Eastern story, evoking a spirit which mastered and destroyed him. The rights of the people are too much at stake in maintaining the principle that railroad corporations are liable to exemplary damages for the "wilful violation" of statutes passed for their regulation, equally with similar violations of the regulations of the railroad commission, for any denial or limitation of such principles to pass unnoticed.

ILLINOIS SUPREME COURT.

John F. McCARTNEY *et al.*, *Appts.*,
v.
Thomas S. RIDGWAY *et al.*

(160 Ill. 129.)

1. **A court of equity will not aid a mere volunteer to carry into effect an imperfect gift** or an executory trust; but where a voluntary trust upon a meritorious consideration has been perfectly created, it is irrevocable and may be enforced in equity.

2. **An executory trust** is one which is not fully and finally declared, but requires some other act or acts in order to perfect it and carry out the intention of the settler.

3. **An executed trust** is one fully and finally declared by the person creating it, so that nothing further remains to be done in order to make it effective.

4. **An agreement between the devisees of lands,** providing for the selection of a trustee by the parties or an appointment by the judge, and that the lands shall be transferred to such trustee by a proper and suitable conveyance to hold a portion thereof for the benefit of the sisters of such devisees, with remainder to their children, no consideration moving from such children, is both voluntary and executory,—especially where by its terms it is impossible to tell what lands will go into the trust estate.

5. **To constitute a valid gift inter vivos,** possession and title must pass to and vest in the donee or in a trustee for the donee. Anything which remains to be done to complete the gift cannot be enforced; and the gift, while so incomplete, may be revoked.

6. **A gift of a legal estate** capable of legal conveyance is revocable at any time before conveyance is made.

7. **A voluntary settlement** intended to be effectuated by a certain mode will not be given effect by the court by applying a different mode.

8. **A voluntary settlement in trust** providing that it shall take effect by conveyance will not be held to operate as a declaration of trust.

9. **An agreement between devisees of land to convey a portion thereof to a trustee** to be appointed, for the benefit of their sisters for life with remainder to the latter's children, cannot be considered as creating a trust for the benefit of the remaindermen on the ground that it creates the relation of vendor and purchaser, and that in equity vendors are trustees of the land for the purchasers, where there is no consideration as between such remaindermen and the signers of the agreement.

10. **The sureties upon the bond of a trustee under an agreement that he shall sell and convert lands** to be conveyed to him, as soon as can be conveniently, without sacrifice, invest the money and pay over the interest, with authority to make public or private sale for cash or on credit as he may deem best, except that the consent of four persons is required to a private sale, are released by a subsequent agreement by which the trustee can make no public sale for a year, and no private sale at any time without the consent of seven persons, is deprived of all discretion as to the sales, and by which his duties are changed and his responsibilities increased.

(October 11, 1895.)

APPEAL by the trustee under a certain trust agreement and beneficiaries of such agreement from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in favor of plaintiffs in a proceeding to enforce the liability of sureties on the bond of a deceased trustee for his alleged breach of duty. *Affirmed.*

Statement by **Magruder,** J.

This is a bill filed on February 26, 1890, by Cornelia Peeples, a minor, by her next friend, against Thomas R. Reid, of Gallatin county, Ill., administrator of the estate of George H. Potter, deceased, who died, intestate, on September 30, 1889, and who, in his lifetime, was a trustee under the agreements hereinafter set forth; John F. McCartney, of Massac county, appointed on October 31, 1889, as successor in trust to said Potter; the widow and children and grandchildren, hereinafter named, of Orva Pool, deceased; Thomas S. Ridgway, David Reid, Robert Reid, Henry O. Docker, and John M. Peeples, jr., sureties upon the bond of said

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NOTE.—The distinction between executory and executed trusts has an important illustration in the above case in determining the effect of a contract to create a trust.

As to the rights of the beneficiaries of a contract to enforce provisions made for their benefit, see *note* to Jefferson v. Asch (Minn.) 25 L. R. A. 257.

Potter, trustee, the said Henry O. Docker and John M. Peeples, jr., being husbands of two of the daughters of said Orval Pool; and Harriet M. Peeples, executrix, and Thomas S. Ridgway, executor, of the will of John M. Peeples, sr., or J. McKee Peeples, deceased, who died, testate, on December 22, 1878, and who, in his lifetime, was also one of the sureties upon the bond of said trustee. The bill charges, in general terms, that the trustee George H. Potter was guilty of negligence and mismanagement in his administration of the trust estate, and prays that an accounting be had, and that the amount of the liability of such of the defendants as are liable may be ascertained, and ordered to be paid over to the successor in trust of said Potter. It appears from the allegations of the bill and the evidence in the case that Orval Pool, of Gallatin county, died, testate, on June 30, 1871, leaving, him surviving, his widow, Madeline Pool, and four children,—one son, Marshall M. Pool, and three married daughters, to wit, Mary Pool Docker (wife of Henry O. Docker), Augusta M. Pool Townshend (wife of Richard W. Townshend, since deceased), and Ellen Pool Peeples (wife of John M. Peeples, jr.). These four children were the only heirs at law of Orval Pool. At the death of Orval Pool, his daughter Mrs. Docker had four children, William, Guy, Henry, and Daisy; and, since his death, she has had one son, George, born November 19, 1874. At the death of said Orval, his daughter Mrs. Peeples had one child, Clarence, and, since his death, has had one daughter, the complainant Cornelia, born November 11, 1875. The bill was answered by all the adult defendants, except the widow, Madeline Pool, and the son, Marshall M. Pool, against whom defaults were entered, and by the infant defendants, through their guardians *ad litem*. A cross-bill was filed by Thomas R. Reid, administrator of Potter's estate, and a cross-bill was also filed by McCartney, the successor in trust, and Ellen Pool Peeples and Mary Pool Docker. Several petitions were also filed by several of the parties. These cross-bills and petitions were answered. A reference was taken to a master in chancery, who made an elaborate report upon the issues involved. The cause was heard upon exceptions to the master's report. On April 2, 1894, the circuit court rendered a decree against the sureties on the bond of George H. Potter, trustee, requiring them to pay to John F. McCartney, as trustee, succeeding Potter, who died insolvent, the sum of $19,795.24, with costs. Said sureties, except John M. Peeples, jr., and Henry O. Docker, to wit, Thomas S. Ridgway, executor, and Harriet Peeples, executrix, of the estate of John McKee Peeples, deceased, and Thomas S. Ridgway, Robert Reid, and David Reid, took an appeal to the appellate court. The appellate court reversed the decree of the circuit court, and dismissed the bill as to the appellants there, who are the appellees here, to wit, the executor and the executrix of the estate of John McKee Peeples, deceased, and Ridgway and the Reids. The present appeal is prosecuted from the judgment of the appellate court, by John F. McCartney, trustee, Ellen P. Peeples, and Mary P. Docker.

The estate of Orval Pool is alleged in the bill to have been worth, at the time of his death, about $400,000. By his will he devised lands worth about $9,041.23 to his daughters Mrs. Docker and Mrs. Peeples, for life, with remainder over to their children, and gave all the rest of his estate, real and personal, to his son, M. M. Pool, and his daughter Mrs. Townshend. Mrs. Docker and Mrs. Peeples claimed that the will was void, and demanded from the two other devisees enough of the estate to equalize the shares of the four. M. M. Pool and Mrs. Townshend insisted that the will was valid, but proposed a settlement, and the following agreement, dated November 2, 1871, was entered into, to wit:

It is agreed between the parties hereto that the estate of Orval Pool, deceased, shall be divided upon the following basis, to wit:

(1) Equal division as near as may be of the entire estate, real and personal, of which Orval Pool died seised and possessed, between the four children of said Orval Pool, to wit, Marshall M. Pool, Augusta M. Pool Townshend, Mary Pool Docker, and Ellen Pool Peeples. The shares of the said Mary and Ellen shall be limited to them during their lifetime, and at their decease to descend to their children or descendants of children; and in case of the death of said Mary or Ellen, or both, so dying without children or descendants of children, then the share of said Mary and Ellen, or both, so dying without children or descendants of children, shall go in equal shares to the children of said Orval Pool, deceased, and their heirs. The lands and personalty heretofore devised to the said Mary and Ellen by the will of Orval Pool, deceased, are to be taken into consideration in equalizing the division of said estate, and the same to be deducted from the shares of said Mary and Ellen.

(2) The interest of the said Mary Pool Docker and Ellen Pool Peeples in the moneys, personal property, and proceeds of real estate that may be converted into money, as hereinafter provided, shall within a reasonable time, by a proper and suitable conveyance or conveyances, be conveyed and transferred to some suitable and responsible trustee, whose duty it shall be to keep the principle invested in United States interest-bearing bonds, or in some other profitable manner, and pay semi-annually the accumulations and interest thereon to the said Mary Pool Docker and Ellen Pool Peeples, or their order, respectively, during their natural lives, the principal to be kept intact and paid to their children or descendants of children, as hereinbefore provided, subject to the reversion aforesaid. A trustee shall be chosen by the parties to this agreement, whose duty it shall be to carry out and execute the trust hereby created, and shall enter into a good and sufficient bond, to be approved by the judge of the circuit court of Gallatin county, for the faithful performance of his duty as such trustee. Said bond shall be made payable to the parties to this agreement for the use of all parties interested in the provisions of this agreement; and, if the parties hereto cannot agree upon the person who shall act as such trustee, then the said judge of said Gallatin circuit court shall appoint said trustee; and the said appointment and the approval of said bond may be made by him either in vacation or term time, as may be most convenient.

(3) Marshall M. Pool and Augusta M. Pool Townshend shall retain thirteen hundred and ten (1,310) of the stock of the Gallatin National Bank, and four hundred (400) shares of the said stock shall be conveyed to the trustee, aforesaid, for the use of the said Mary Pool Docker and Ellen Pool Peeples, subject to the limitations and conditions aforesaid; the interest of the said Mary Pool Docker and Ellen Pool Peeples in said bank stock to be equalized with the interest of the said Marshall M. Pool and Augusta M. Pool Townshend in said stock, as hereinafter provided.

(4) The trustee herein provided for shall have power, and it is made his duty, to sell and convert into money, as soon as the same can be conveniently done without sacrifice, so much of said lands and real estate, except the homestead, with the lands adjoining thereto, and real estate in Shawneetown, as may be necessary to equalize the interest of the said Mary Pool Docker and Ellen Pool Peeples with the interest of the said Marshall M. Pool and Augusta M. Pool Townshend in the shares of said bank stock, which said sum of money so to be first raised shall be invested, and the interest thereon paid over, in the manner and upon the conditions and subject to the limitations as hereinbefore provided; and provided, further, if the proceeds of the sale of said lands shall not be sufficient to equalize the interest aforesaid in said bank stock, then the said Marshall M. Pool and Augusta M. Pool Townshend are to pay the deficit in money to the said trustee for the use of the said Mary Pool Docker and Ellen Pool Peeples, to be invested by him under the conditions and limitations aforesaid; and provided, further, that, until said real estate shall be converted by said trustee for the purpose above mentioned, it shall be the duty of said Marshall M. Pool and Augusta M. Pool Townshend to account for and pay over to said trustee one half of the net rents and profits of the above-mentioned real estate, for the use of Mary Pool Docker and Ellen Pool Peeples; and provided, further, that the said Marshall M. Pool and his wife and the said Augusta M. Pool Townshend and her husband shall, on the request of the said trustee, or any purchaser from him, join with the said trustee in all necessary deeds and conveyances for the purpose of fully and completely assuring the title to the lands to be sold by him as aforesaid; and provided, further, that, after the interest of the said Mary Pool Docker and Ellen Pool Peeples in the bank stocks shall be made equal as above provided, the residue of said lands shall be held by the said Marshall M. Pool and Augusta M. Pool Townshend, subject to the following trusts, to wit: To pay to the said Mary Pool Docker and Ellen Pool Peeples, respectively, one fourth of the net rents, issues, and profits thereof, until the same shall be conveyed by them to the trustee, as herein next provided; secondly, to convey one undivided half thereof, whenever requested by the said Mary Pool Docker and Ellen Pool Peeples, to the trustee hereinbefore provided for, who shall hold the same for their use during their lives as aforesaid; provided that whenever said lands, or any portion of them, shall become unprofitable, or the value thereof can be more profitably invested, it shall become the duty of said trustee, upon the request of the said Mary Pool Docker and Ellen Pool Peeples, to convert the same into money and invest the proceeds as hereinbefore provided; and provided, further, the words 'residue of said lands,' as last above used, shall be held and understood to include the said home farm or homestead, together with the farms and lands adjoining the same, as well, also, as the lots and real estate in said city of Shawneetown, excepted in the first part of this paragraph. It is further understood and provided that said trustee, for the purpose of equalizing the interest of the parties in the shares of the bank stock as hereinbefore provided, may sell and dispose of the lands and real estate subject to sale and disposition for that purpose, either at public or private sale, either for cash in hand or upon a credit, as he may deem best; provided that, in case of public sale, a notice of the time, place, and terms of sale shall be published in one or more weekly newspapers published in the county where the lands offered for sale lie, at least four weeks next before the time of such sale, with a like notice posted upon the court-house door and three other of the most public places in the county where the sale is had and lands lie; provided that the failure to post up the last-mentioned notices shall not vitiate any sale made by said trustee when the same shall have been advertised in some newspaper or newspapers, as above provided.

(5) And provided, further, that should there be no such newspapers or newspaper in the county where said lands or any part thereof may lie and where it is sought to sell the same, then it shall be sufficient as to such lands to post up written or printed notices as above provided; and provided, further, that all public sales shall be at the court-house door, and no lands shall be sold outside of the county in which the same shall lie; and provided, further, that, in case of sale upon time, a longer credit shall not be given in any case than one year, unless by and with the written consent of all the parties to this agreement, and the purchaser in every such sale shall give a note, with one or more solvent sureties thereto, for the amount of the unpaid purchase money, together with a mortgage on the premises to secure prompt payment of said note and all interest thereon. The note in all such cases shall be made to bear interest from date, at the rate of 10 per cent per annum until paid; provided that, when the purchaser at any such sale shall pay as much as one third of the purchase money in hand, then no personal security shall be required, unless the said trustee for good reasons shall think proper to do so; and provided, further, that said trustee shall make no private sale under the authority above granted until he shall have first obtained the written consent of said Marshall M. Pool, Augusta M. Pool Townshend, Mary Pool Docker, and Ellen Pool Peeples. And it shall be the duty of said trustee in all cases of public sale to furnish within a reasonable time before said sale, to each of the parties hereto, a copy of the notice thereof; provided the failure to furnish a copy of such notice shall not vitiate the title of any purchaser at such sale.

(6) A committee of three persons is hereby constituted, whose duty it shall be to fix and

determine the cash value of the lands and real estate bequeathed to the said Mary Pool Docker and Ellen Pool Peeples by the said Orval Pool, deceased; and the amount, when so ascertained, shall be charged to them respectively by way of equalizing their interest with that of the said Marshall M. Pool and Augusta M. Pool Townshend in the shares in the bank stock aforesaid. In the event that the parties hereto cannot agree among themselves as to who shall constitute said committee, then the said Marshall M. Pool and Augusta M. Pool Townshend shall select one of the said committee, and the said Mary Pool Docker and Ellen Pool Peeples shall select another, and the two so chosen shall select the third; and said committee before proceeding to the discharge of their duties, shall take and subscribe an oath, to be administered by some person authorized by law to administer oaths, to the effect that they will, to the best of their ability, skill, and understanding, faithfully, fairly, and without favor or partiality, ascertain, fix, and report the cash value of the lands in question, and, for this purpose, that they will use all practicable and reasonable means within their power to arrive at a true and correct conclusion in fixing the value of said lands; said committee to ascertain and report the value of said lands as soon as practicable.

(7) And the undersigned Madeline Pool, widow of the said Orval Pool, deceased, in consideration of the promises, covenants, and agreements by the other parties to this agreement, and the conditions, provisos, and provisions herein contained, hereby waives, releases, and absolutely renounces all right, title, and interest that she may in any wise have in the real or personal estate of Orval Pool, her late husband, as his widow, devisee, or otherwise, and hereby accepts, in lieu thereof, the provisions made for her in this agreement; this concession on her part being made in the spirit of love and affection for her children, and with a sole view of securing good feeling and harmony between them, and promoting their common welfare and happiness.

(8) In consideration of the renunciation by the said Madeline Pool of her entire interest in the estate of the said Orval Pool, deceased, it is hereby agreed and expressly stipulated by all the other parties to this instrument that she shall have and hold, during her natural life, the house now occupied by her, and the twenty (20) acres of land upon which it is situated, together with the garden, orchard, and outhouses, and all the conveniences, improvements, and appurtenances thereon, being the same messuage and premises given to her by the will of the said Orval Pool, deceased; provided, however, that if, at any time, she, the said Madeline Pool, should desire to abandon the above-mentioned premises, and acquire a new residence in the city of Shawneetown, then a suitable lot of ground shall be procured in said city of Shawneetown, and a dwelling house, with necessary fencing and outhouses, shall be erected thereon, equal in value, convenience, architecture, workmanship, and finish to the house and premises above-mentioned; and, in the plan and construction of the same, her wishes and tastes shall in all things be respected and observed, and the cost of said lot of ground, dwelling house, and other improvements made thereon shall be equally borne by her four children, Mary Pool Docker, Marshall M. Pool, Augusta M. Pool Townshend, and Ellen Pool Peeples, which said lot of ground and buildings thereon, when so provided for her by the children as aforesaid, shall be held by her in lieu of her homestead and ground now occupied by her, for and during her natural life; and a suitable and apt conveyance shall be made to her, limiting the same to her for life, with remainder in fee to said trustee, in trust to convey one undivided fourth part thereof absolutely upon her death to the said Marshall M. Pool and his heirs, and another one-fourth part thereof to the said Augusta M. Pool Townshend and her heirs, and upon the further trust to sell and convert the other undivided half of said lot and premises into money when requested by the said Mary Pool Docker and Ellen Pool Peeples, and invest the proceeds thereof in manner, upon the conditions, and subject to the limitations hereinbefore provided; and, until such sale by said trustee, it shall be the duty of said trustee to pay over to the said Mary Pool Docker and Ellen Pool Peeples, in equal parts, the rents, issues, and profits of said undivided half of said lot and premises.

(9) And the said Mary Pool Docker and the said Ellen Pool Peeples, for the consideration last aforesaid, hereby jointly and severally covenant, promise, and agree to and with the said Madeline Pool to pay to her as a personal annuity, at her residence, the sum of $1,000 semi annually, for and during her natural life; the first payment to be made on the 1st day of December, 1871, the second payment to be made on the 1st day of June, 1872, and so on, every six months, for and during her natural life.

(10) And the said Marshall M. Pool and Augusta M. Pool Townshend, for the consideration last aforesaid, hereby jointly and severally covenant, promise, and agree to and with the said Madeline Pool to pay her semi-annually as a personal annuity, at her residence, the sum of $1,000 for and during her natural life; the first payment to be made on the 1st day of December, 1871, and the second on the 1st day of June, 1872, and so on every six months thereafter, for and during her natural life, as aforesaid.

(11) And it is hereby expressly provided that if the said Mary Pool Docker and Ellen Pool Peeples, on the one hand, or the said Marshall M. Pool and Augusta M. Pool Townshend, on the other, shall at any time fail to pay the annuities above mentioned at the time and place above provided, or if the said Madeline Pool shall at any time hereafter, for good cause, become alarmed or apprehensive about the solvency of the above-mentioned parties, or either of them, and the ultimate payment of said annuities, or either of them, then it shall be the duty of the said parties about whom and whose annuity such apprehension exists, upon notice thereof, and upon request of the said Madeline Pool, to make and file with the circuit clerk of Gallatin county, Illinois, a good and sufficient bond, payable to the said Madeline Pool, to be examined and approved by the circuit judge of said court, from time to time, in like manner

as official bonds are now by law required to be approved, to secure the punctual and faithful payment of said annuity; and if the said parties shall fail to execute and file the same, and give additional security whenever the said judge of said court shall require the same to be done, then it shall be lawful, and the circuit court of Gallatin county is hereby authorized, upon the application of said Madeline Pool, to enter a decree against such defaulting party or parties, requiring them to pay said annuity as herein provided, which decree shall be made a lien by said court upon the entire estate, both real or personal, of the party or parties being in default as aforesaid, and shall provide for the payment and satisfaction of said decree by execution, as in other cases.

(12) And Richard W. Townshend, husband of Augusta M. Pool Townshend, and Henry O. Docker, husband of Mary Pool Docker, and John M. Peeples, jr., husband of Ellen Pool Peeples, each covenants with the parties hereto for the true and faithful performance of all the stipulations contained in this agreement of their respective wives.

Witness our hands and seals, this 2d day of November, 1871.

[Signed]

Marshall M. Pool.	[Seal.]
Augusta M. Pool Townshend.	[Seal.]
Richard W. Townshend.	[Seal.]
Madeline Pool.	[Seal.]
Ellen Pool Peeples.	[Seal.]
J. M. Peeples, jr.	[Seal.]
Henry O. Docker.	[Seal.]
Mary P. Docker.	[Seal.]

The parties being unable to agree upon a trustee, the judge of the circuit court of Gallatin county, on December 26, 1871, appointed the said George H. Potter as such trustee. On the same day, to wit, December 26, 1871, Potter gave a bond in the penal sum of $400,000, the terms and phraseology of which were substantially the same as those of the bond hereinafter set out; but the bond of December, 1871, was defective in certain respects, not necessary to be mentioned here. *Pool* v. *Potter*, 63 Ill. 533. Potter thereupon entered upon the duties of the trust, and continued to act as trustee until his death. Afterwards, on account of the defects in the first bond, he executed a new bond, dated May 15, 1872, which was accepted and approved by the judge of the circuit court of Gallatin county, and which is in the following words and figures, to wit:

Know all men by these presents, that we, George H. Potter, as principal, and Robert Reid, David Reid, John M. Peeples, jr., Henry O. Decker, J. McKee Peeples, and Thomas S. Ridgway, are held and firmly bonded unto Mary Pool Docker, Henry O. Docker, Marshall M. Pool, Richard W. Townshend, Augusta M. Pool Townshend, John M. Peeples, jr., Ellen Pool Peeples, and Madeline Pool, for the use of all persons who may now and [or] hereafter have any rights or interests arising under or growing out of a certain instrument in writing hereinafter mentioned, in the penal sum or $400,000, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Sealed with our seals, and dated the 15th day of May, A. D. 1872.

The condition of the above obligation is such that whereas, the above-mentioned obligees did, on the 2d day of November A. D. 1871, execute and deliver in duplicate, under their respective hands and seals, a certain instrument in writing, providing for a division of the estate, both real and personal, of Orval Pool, deceased, and the appointment of a trustee to execute and carry into effect certain duties therein created and defined; and whereas the above-named George H. Potter has been duly appointed trustee, under the provisions of said instrument in writing. Now, if the said George A. Potter shall faithfully and efficiently discharge said trust, and in good faith do and perform all such duties as may be now or hereafter imposed upon him by, or otherwise arise under, said instrument in writing, and growing out of the trust therein created, and shall also well and truly account for, and pay over to the party or parties entitled thereto all moneys and property which may come into his hands as such trustee, at such times and in such manner as is provided for in said instrument, and finally, when the objects of said trust shall have been accomplished, make all such transfers and conveyances of the trust property, and account for and pay over all moneys and effects, that may be in his possession or under his control, or for which he is in any manner liable as such trustee, to those then entitled thereto under said instrument, then this obligation to be void; otherwise, to remain in full force and effect. The word "dollars," in line 14, page 1, interlined before signing.

[Signed]

George H. Potter.	[Seal.]
H. O. Docker.	[Seal.]
David Reid.	[Seal.]
Robert Reid.	[Seal.]
J. McKee Peeples.	[Seal.]
J. M. Peeples, jr.	[Seal.]
Thos. S. Ridgway.	[Seal.]

Subsequently, on November 19, 1872, the parties signing the first agreement of November 2, 1871, and George H. Potter, the trustee, executed a new agreement, which is in the words and figures following, to wit:

This memorandum of an agreement made and entered into by and between the parties hereto, this 19th day of November, 1872, witnesseth and provides as follows:

(1) This agreement is made for the express purpose of carrying into effect, and supplementary to, a certain other agreement and indenture, bearing date the 2d day of November, 1871, and duly signed by Madeline Pool, Mary P. Docker, Henry O. Docker, Augusta M. P. Townshend, Richard W. Townshend, Ellen P. Peeples, John M. Peeples, jr., and Marshall M. Pool, and is not intended and is not to be construed as conflicting with said last-mentioned agreement.

(2) Inasmuch as some of the parties hereto are of the opinion that a postponement of the sale of the lands belonging to the estate of Orval Pool, deceased, by the trustee, at public auction, as provided for under said last-mentioned agreement, would subserve the best in-

terest of all persons having any right to or in said lands or the proceeds thereof, it is therefore agreed and hereby expressly provided that there shall be no such public sale of any of said lands for a period of one year from this date, without the written consent of all the parties hereto.

(3) The trustee provided for in the agreement and indenture hereinbefore referred to may sell at private sale any and all of the lands and town lots belonging to said estate, except the homestead and farm adjoining thereto, at the best prices that can be obtained for the same, with the written consent of the parties hereto, and not otherwise.

(4) The said Marshall M. Pool, Mary P. Docker, Augusta M. P. Townshend, Ellen P. Peeples, and their respective husbands hereby agree to give whatever aid they may be able to secure the best prices that can be obtained for said lands and town lots to be sold by the trustee as herein provided.

(5) That the said trustee is to perform only such services in procuring and completing said sales as the parties hereto may deem necessary.

(6) All suits or motions now pending against the executors of said estate, or between the parties hereto, in the supreme or any other court, at the suits of any of the parties hereto, are to be dismissed without damages; and the costs and expenses attending the case now in the supreme court, including attorneys' fees on both sides, are to be borne by and paid out of the funds belonging to said estate.

(7) It is also agreed and hereby provided that the said Marshall M. Pool, Augusta M. P. Townshend, and her husband, Richard W. Townshend, shall respectively pay to said trustee, for the use of those entitled under said agreement, interest at the rate of 6 per cent per annum on whatever excess of their shares of the personal estate, at the time so receiving them, they may have respectively received, exclusive of said bank stock, from the date they so received this sum.

(8) That the said Marshall M. Pool, Augusta M. P. Townshend, and Richard W. Townshend, her husband, are not to be held liable for any rents which have heretofore accrued, except such as have actually came into their hands; but hereafter they shall be liable for the rents which they receive or might receive by the exercise of reasonable care and diligence.

(9) The taxes of 1871 are to be paid by the executors, and all thereafter, until the difference in the bank stock is equalized, are to be paid out of the proceeds of the sale of lands by the trustee.

(10) The value of each share of $100 of said bank stock is hereby fixed at $111, being the estimated value of said stock on the 2d day of November, 1871; and until the shares of said bank stock are equalized, as provided for in said original agreement, the parties hereto who have received an excess of said bank stock, after deducting the value of the lands willed respectively to Mary Pool Decker and Ellen Pool Peeples, as provided for under said original agreement, so as to be equalized, shall, respectively, pay semiannually to said trustee, for the use of those entitled thereto under said original agreement interest thereon at the rate of 6 per cent per annum, the interest to be computed from the 2d day of November, 1871, and be paid as above provided, until said bank stock is equalized as aforesaid.

(11) That inasmuch as it is apprehended by some of the parties hereto that some of the lands inventoried by the executors of said estate, and valued by the appraisers under said original agreement as land having been willed respectively to Mary Pool Docker and Ellen Pool Peeples, did not belong to said Orval Pool at the time of his death, and hence no title passed by his will to some of his lands to said devisees, and whereas the entire value of all of said lands supposed to have passed by said will to the said Mary Pool Docker and Ellen Pool Peeples, including those the title to which is apprehended to be bad as well as those believed to be good, is for the present to be deducted from the excess of the estimated value of the bank stock, it is therefore hereby expressly provided that the said Marshall M. Pool, Augusta M. Pool Townshend, and Richard W. Townshend shall refund and pay to the said trustee, for the use of those entitled under said original agreement, the estimated value of all such lands as have been taken by them, respectively, to which the said Orval Pool did not at the time of his death have a good title, or which have not now become good since his death, or which cannot be made good by resorting to a court of equity, together with interest thereon at the rate of 6 per cent per annum, to be computed with half-yearly rests from the 2d day of November, 1871; and it is hereby further provided that all costs and expenses incurred in perfecting or attempting to perfect, the title to any of said lands under the provisions of this article, are to be equally borne by the children of said Orval Pool, deceased, or paid out of funds belonging to said estate.

(12) The parties hereto hereby pledge themselves each to the other, and hereby expressly bind themselves, that they will in good faith do all reasonably within their power to effect a final settlement between the said executors and said estate during the November term, 1872, of the county court. And it is hereby further agreed that, when such final settlement is had, there shall be an equal division of the moneys and effects, exclusive of said bank stock, between the parties entitled thereto, as provided for under and in said original agreement, and the interest to be paid to those entitled as provided for under this agreement. And it is hereby expressly understood and agreed that if from any cause, without the fault of said trustee, or the said Mary Pool Docker, Ellen Pool Peeples, their respective agents and attorneys, said executors should refuse, neglect, or be unable to make a final settlement as herein contemplated, then the said Marshall M. Pool, Augusta M. P. Townshend, and the said Richard W. Townshend, on behalf of his said wife, hereby covenant and agree to pay to said trustee, under said original agreement, whatever they have received of said moneys and personal estate, as shown by the report of the said executors approved at the September term, 1872, of the county court, in excess of their respective shares of said moneys and personal estate actually recovered by them, as shown by said last-mentioned report, exclusive of said bank

stock, together with interest thereon, as hereinbefore provided, and the same, when so paid over to said trustee, to be held by him for the use of those entitled under said original agreement; provided that if there shall be a final settlement as contemplated at said November term of said county court, by said executors, and there is a complete division of said personal estate, as herein before provided, then and in that case the said trustee is to receive, as part payment of said moneys and personal estate coming to him as trustee, such good notes, with accrued interest thereon, as may be in the hands of said executors and belonging to said estate.

(13) That by computation upon the basis fixed by article 10 hereof the total value of the bank stock on the said 2d day of November, 1871, received by the said Marshall M. Pool and Augusta M. Pool Townshend in excess of the amount of said bank stock received by the said Mary P. Docker and Ellen P. Peeples, is found to be, and is hereby fixed at, $———. And whereas the parties hereto are desirous that the same shall be liquidated at as early a day as practicable, it is therefore hereby provided and made the duty of said trustee, at the date of each sale of lands made by him, under the provisions of this agreement and the original agreement to which this is a supplement, to credit the above mentioned indebtedness by one half of the proceeds of such sale, and retain the other half of said proceeds as such trustee, for the use of those entitled thereto, under the provisions of said original agreement. The provisions of this article, however, are not to be construed as extending to so much of said proceeds of sales as may be required to be paid out for other purposes specified in this agreement, or to so much of said proceeds as are required to defray such expenses as are necessarily incurred in the execution of this trust.

(14) And it is hereby further provided that said trustee shall provide himself with a well-bound book, in which he shall record the particulars of every sale made by him as such trustee, in which such record, so to be made out and kept by said trustee, must appear the time of each sale, a description of the tract of land or lot sold, the amount for which it sold, the name of the purchaser, the terms of sale, what portion of the proceeds have been applied towards liquidating the indebtedness mentioned in article 13 hereof, and what portion kept by him in trust for those entitled under said original agreement, and what portion, if any, retained by him for defraying the necessary expenses of this trust, which book so to be procured and kept by said trustee shall be open to inspection at all reasonable hours to the parties hereto, their agents and attorneys.

(15) And the said trustee hereby agrees, and it is made his duty, to carry into effect and consummate any and every proposed sale and transfer of land or lots, under the provisions of this agreement, whenever the parties hereto shall, in writing, request him to do so.

November 19, 1872.

After the execution of the second bond and the second agreement, controversies arose from time to time between the parties thereto. Some of these controversies may be understood by reference to the following cases: *Pool* v. *Potter*, 63 Ill. 533; *Potter* v. *Peeples*, 92 Ill. 430; *Pool* v. *Docker*, Id. 501.

Mr. **John H. Mulkey,** with *Mr.* **Frank A. Johnson,** for appellants:

By the contract of November 2, 1871, an equitable estate for life in one fourth of the estate, real and personal, of Orval Pool, immediately upon its execution, passed to Mrs. Docker and Mrs. Peeples, respectively, and an equitable vested estate in remainder immediately passed to the children of Mrs. Docker and Mrs. Peeples, respectively, then living, subject only to be opened to let in afterborn children to shares.

Hagan v. *Varney*, 147 Ill. 281; Story, Eq. Jur. § 980; *Legard* v. *Hodges*, 1 Ves. Jr. 478; 2 Story, Eq. Jur. chap. 33, §§ 1212, 1231, 789; *Collyer* v. *Fallon*, Turn. & R. 459; *Power* v. *Bailey*, 1 Ball & B. 50; *Chilliner* v. *Chilliner*, 2 Ves. Sr. 528; *Champion* v. *Brown*, 6 Johns. Ch. 402, 10 Am. Dec. 343; *Morrison* v. *Brown*, 83 Ill. 562; Adams, Eq. *40; *Egerton* v. *Brownlow*, 4 H. L. Cas. 210; 2 Pom. Eq. Jur. p. 1001; *Janes* v. *Throckmorton*, 57 Cal. 368; *Phipps* v. *Ackers*, 9 Clark & F. 594; *Stanley* v. *Stanley*, 16 Ves. Jr. 507; Perry, Tr. §§ 95, 100, 359.

The bond is a valid obligation, enforceable in a court of equity, notwithstanding the fact that two of the obligors are named therein as obligees.

Bradford v. *Williams*, 45 U. S. 4 How. 576, 11 L. ed. 1109; 2 Rob. Pr. 309; *Moffatt* v. *Van Mullingen*, 2 Chitty, 539; *Mainwaring* v. *Newman*, 2 Bos. & P. 120; *Thomas* v. *Thomas*, 3 Litt. (Ky.) 9; *Allen* v. *Gray*, 1 T. B. Mon. 98; *Pearson* v. *Nesbit*, 1 Dev. L. 315, 17 Am. Dec. 569; *Justices* v. *Armstrong*, 3 Dev. L. 286; *Rose* v. *Poulton*, 2 Barn. & Ad. 822; *Richards* v. *Richards*, 2 Barn. & Ad. 447; *Booth* v. *Kinsey*, 8 Gratt. 569; *Smith* v. *Lusher*, 5 Cow. 711; *Smyth* v. *Strader*, 45 U. S. 4 How. 416, 11 L. ed. 1036; *Parker* v. *Macomber*, 18 Pick. 509; *Absolon* v. *Marks*, 11 Q. B. 19; Pom. Eq. Jur. §§ 103, 109, 114, 115, 189, 1297; 1 Story, Eq. Jur. § 680; *Haven* v. *Wakefield*, 39 Ill. 509; *Hall* v. *Kimball*, 77 Ill. 162; *Chapman* v. *Evans*, 44 Miss. 113; *Piercy* v. *Fynney*, L. R. 12 Eq. 69; *Hayes* v. *Bement*, 3 Sandf. 394.

The bond is joint and several, and action may be maintained against any one or more of the obligees.

1 Bacon, Abr. p. 164; Murfree, Official Bonds, §§ 237, 248; *Hankinson* v. *Sandilaus*, Cro. Jac. 322; 2 Am. & Eng. Enc. Law, p. 465; *Macintyre* v. *Connell*, 1 Sim. N. S. 241; *Moore* v. *Rogers*, 19 Ill. 347; *Conover* v. *Hill*, 76 Ill. 342; *Besore* v. *Potter*, 12 Serg. & R. 154; *Berg* v. *Radcliff*, 6 Johns. Ch. 302; Brandt, Suretyship, § 141.

When one enters into a contract with another upon good consideration for the benefit of a third person such third person may maintain an action at law for a breach of such contract.

Eddy v. *Roberts*, 17 Ill. 505; *Brown* v. *Strait*, 19 Ill. 88; *Wilson* v. *Bevans*, 58 Ill. 232; *Shober & C. Lithographing Co.* v. *Kerting*, 107 Ill. 344; *Eggleston* v. *Buck*, 24 Ill. 262; *Bristow* v.

Lane, 21 Ill. 194; *Beasley* v. *Webster*, 64 Ill. 458; *Steele* v. *Clark*, 77 Ill. 471.

The contract of 1871 operated to convey to the children of Mary and Ellen an equitable vested estate in remainder subject only to be opened to let in afterborn children.

Marvin v. *Ledwith*, 111 Ill. 150.

A vested remainder is where the estate is fixed to remain to a determinate person after the particular estate is spent or comes to an end.

Nicoll v. *Scott*, 99 Ill. 540.

A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested; and an estate once vested will not be devested unless the intent to devest clearly appears.

Doe, Poor, v. *Considine*, 73 U. S. 6 Wall. 458, 18 L. ed. 869; *Den, Croxall*, v. *Sherrerd*, 72 U. S. 5 Wall. 268, 18 L. ed. 572; *Duryea* v. *Duryea*, 85 Ill. 41; 4 Kent, Com. 202; 2 Washb. Real Prop. chap. 4, § 18, *229.

In the bonds signed by the appellees as sureties they recite and acknowledge in writing that by the agreement of 1871, therein referred to, a trust was "therein created."

They are now estopped from making a claim that it was simply an agreement to create a trust at some future time.

2 Brandt, Suretyship, §§ 42–46.

The agreement of 1871 was not executory.

Perry, Tr. § 359; *Pool* v. *Potter*, 63 Ill. 533; *Potter* v. *Peeples*, 92 Ill. 430; *Cushing* v. *Blake*, 30 N. J. Eq. 689.

There are no special equities in favor of sureties. They are not wards of chancery, in whose favor most refined technical objections are to be seized upon and the evident intention of parties to an instrument, as evidenced by the instrument itself and their own construction of it, is to be disregarded and well-settled principles of law avoided.

Adams, Eq. 5th ed. *268, note; *Rees* v. *Berrington*, 2 White & T. Lead. Cas. Eq. 814; *Dawson* v. *Lawes*, 23 L. J. Ch. N. S. 434; 2 Am. & Eng. Enc. Law, p. 465; *Conover* v. *Hill*, 76 Ill. 342; Brandt, Suretyship, § 141; *Brooks* v. *Brooks*, 12 Gill & J. 306, 38 Am. Dec. 310.

Sureties on the bond of a trustee have no right to any favor or immunity that would not be accorded to the trustee.

Re Gaston, 35 N. J. Eq. 60.

Any expressions that show unequivocally the intention of the parties to create a trust will have that effect.

27 Am. & Eng. Enc. Law, p, 35, note 5; *Tobias* v. *Ketchum*, 32 N. Y. 319.

In determining whether or not a trust is perfectly created or executed the situation and relation of the parties, the object of the trust, and the property involved, should be considered.

27 Am. & Eng. Enc. Law, p. 12, note 1; *Gaylord* v. *Lafayette*, 115 Ind. 423; *Brabrook* v. *Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Hackney* v. *Vrooman*, 62 Barb. 650; *Re O'Brien*, 11 R. I. 419; *Stone* v. *Bishop*, 4 Cliff. 593; *Taylor* v. *Henry*, 48 Md. 550, 30 Am. Rep. 486.

Where a writing is ambiguous and indefinite the practical construction given by the parties themselves is entitled to great weight.

Reissner v. *Oxley*, 80 Ind. 580; *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594; *Buchanan* v. *Howard*, 3 Tenn. Ch. 206; *Padfield* v. *Padfield*, 72 Ill. 326; *Otis* v. *Beckwith*, 49 Ill. 135.

Messrs. **John H. Mulkey, Charles F. Beach,** and **S. P. Shope,** in support of petition for rehearing:

The agreement of November 2, 1871, by which the trust estate was created, was, so far as it operated to create estates in Mary Pool Docker and Ellen Pool Peeples and their children, obviously intended as a mere enlargement of the estates theretofore devised to them by the will of Orval Pool.

Pool v. *Docker*, 92 Ill. 501; *Pool* v. *Potter*, 63 Ill. 533.

A construction of a written instrument by the parties themselves, although it has not the force of a judicial decision, is of great weight, and should not be lightly disregarded by the court.

Vermont Street Church v. *Brose*, 104 Ill. 206.

The estates secured by the agreement of November 2, 1871, to Mary Pool Docker and Ellen Pool Peeples were, like the estates devised to them by the will of Orval Pool, life estates, with vested remainders in their children.

Pool v. *Docker*, *supra*.

The language of the contract itself, in creating the estate in favor of Mary and Ellen and their children, is under the decision of this court amply sufficient to support a vested remainder.

Allen v. *McFarland*, 150 Ill. 455; *Carper* v. *Crowl*, 149 Ill. 465; *Chapin* v. *Crow*, 147 Ill. 219; *Ducker* v. *Burnham*, 146 Ill. 9; *Scofield* v. *Olcott*, 120 Ill. 362; *Potter* v. *Peeples*, 92 Ill. 430; *Schaefer* v. *Schaefer*, 141 Ill. 337.

The supplementary agreement of November 19, 1872, was obviously a compromise of quarrels and dissensions that had arisen between the parties over the details of the administration of the trust, and was in no wise intended and did in no wise operate as an essential or substantial modification or change in the trust agreement of November 2, 1871, and did not therefore operate to release the sureties upon the bond of May 15, 1872.

Pool v. *Docker*, 92 Ill. 501.

Messrs. **Oliver & Showalter** for appellees.

Magruder, J., delivered the opinion of the court:

The original bill herein filed by one of the owners of the estate in remainder, and the cross bill filed by the life tenants and the present trustee, seek to charge the administrator of the deceased trustee and the sureties on his bond with what is alleged to be due upon accounting from the estate of said deceased trustee. The only defendants below who appealed from the decree of the circuit court were the sureties upon said bond. The bill here is not a bill to enforce either of the agreements set forth in the record; nor is this a controversy between the parties to those agreements as to the proper construction to be given to either of them. The real dispute is between the remaindermen and the life tenants on one side, and the sureties upon the bond of the deceased trustee on the other side,

as to whether such sureties should be held liable for what may be due from said trustee or his estate. The question is whether the trustee, who was the principal in the bond, and the parties to the agreement the performance of which was secured by the bond, entered into any agreement which so changed the duties and obligations of the trustee, or the terms of the trust imposed upon him, as to release the sureties from their liability upon the bond.

The bond which was executed on May 15, 1871, recites that the obligees therein, to wit, the widow and son and three daughters of Orval Pool, and the husbands of said daughters, did, on November 2, 1871, execute a certain instrument in writing, providing for a division of the estate of said Orval and the appointment of a trustee to execute and carry into effect certain duties and trusts therein created and defined, and that George H. Potter had been duly appointed trustee under the provisions of said instrument in writing. The condition of the bond is that Potter shall discharge the trust imposed by the agreement of November 2, 1871, and perform such duties "as may be now or hereafter imposed upon him by, or otherwise arise" under, said last named agreement, and pay over and account for all moneys and property coming to his hands as such trustee, "at such times and in such manner as is provided for" in said agreement of 1871. After the execution of the bond of May 15, 1871, to wit, on November 19, 1872, the same parties who signed the agreement of November 2, 1871, to wit, the widow and son and daughters of Orval Pool, and the husbands of the latter, together with Potter, the trustee, executed a new agreement. Thereafter Potter performed his duties as trustee, and managed the interests of the trust, under and in accordance wtih the provisions of the new agreement of November, 1872, or, if not wholly under the latter agreement, certainly under the latter agreement in connection with the agreement of November, 1871.

Inasmuch as the obligations of the bond were based upon the agreement of 1871, it becomes important to inquire whether the new agreement of 1872 produced such changes in the duties and obligations of the trustee, or in the terms and conditions of the trust as fixed by the agreement of 1871, that the sureties can be said to have been released from their liability on the bond. Whether or not such a change was wrought can only be determined by a comparison of the terms and conditions of the one agreement with those of the other. A preliminary question, however, arises as to the nature of the interests of the remaindermen mentioned in the agreement of 1871 thereunder, and whether the parties executing the agreement of 1872 had any power to change the agreement of 1871 so far as the latter agreement had reference to the children of Mary Pool Docker and Ellen Pool Peeples. The shares of said Mary and Ellen were to be limited to them during their lifetime, and at their decease to descend to their children, etc. The children or remaindermen did not sign either contract. It is not denied that the widow and son and daughters and sons-in-law of Orval Pool, who signed the agreement of 1871, had the power to change it by a subsequent agreement so far as it affected themselves or their own interests; but it is claimed on the part of the appellants that the parties so signing the agreement of 1871 could not change it so as to affect the interests of the remaindermen, and that, this being so, there was no change wrought by the agreement of 1872, which could release the liability of the sureties to the remaindermen As a reason for the contention that the later contract did not change the earlier one so far as the interests of the remaindermen are concerned, it is urged that, by the contract of 1871, the children of Mrs. Docker and Mrs. Peeples were equitable owners of one half of the estate, subject to the life estates of their mothers, and had the right to have the trust created exactly as proposed in the contract of 1871, and to have the trustee's liability to them measured by that contract.

On the part of the appellees it is claimed that the agreement of 1871 created an incomplete voluntary trust, and that, therefore, it was within the power of the signers of the agreement to change it by a subsequent one. A court of equity will not aid a mere volunteer to carry into effect an imperfect gift or an executory trust; but where a voluntary trust, upon a meritorious consideration, has been perfectly created, it is irrevocable, and may be enforced in equity. Whether a trust has been perfectly created is largely a question of fact in each case. 27 Am. & Eng. Enc. Law, pp. 11, 12; Perry, Tr. § 99. Hence it may be well to examine the terms of the agreement of 1871 with reference to the question whether it provides for an executed or an executory trust.

The will of Orval Pool, having devised certain lands worth about $9,041.33, to his daughters Mrs. Docker and Mrs. Peeples, for life, with remainder over to their children, vested the title to these lands in remainder in said children; and of course their interests in remainder therein could not be, and were not, affected by the agreements of 1871 and 1872, to which they were not parties. All the rest of the property having been devised to M. M. Pool and Mrs. Townshend, the title thereto was held by them when the agreement of 1871 was made. That agreement makes no declaration that M. M. Pool and Mrs. Townshend hold such title for the benefit of their sisters, or of the children of their sisters, nor does it transfer or convey any of the property of the estate to a trustee for their benefit. It is executory in its character. *Pool* v. *Docker*, 92 Ill. 501. It names no trustee, but provides for the selection of one by the parties, and in case of their failure to select for the appointment of a trustee by a judge of the circuit court of Gallatin county. It further provides that the interest of Mrs. Docker and Mrs. Peeples "in moneys, personal property, and proceeds of real estate that may be converted into money," as therein directed, "shall within a reasonable time, by a proper and suitable conveyance or conveyances, be conveyed and transferred to" the trustee so to be appointed. Nothing is presently conveyed to the trustee, but thereafter, in the future, moneys, personal property, and not real estate, but the proceeds of real estate, to be converted into money, are to

be conveyed to the trustee. While it is true that there is a good and valuable consideration for the agreement of 1871, as between the parties who signed it, so that it could be enforced in equity as between them, yet no consideration for that agreement moved from the children of Mrs. Docker and Mrs. Peeples. The provision therein made for them was consequently a gift, and not a present gift, but a gift which the parties agreed among themthemselves should be made thereafter. So far as the land was concerned, the trust was indefinite and uncertain; and not only so, but it was incomplete, because it was impossible to tell, when the agreement of 1871 was made, what lands would go into the trust estate. The agreement shows that the estate of Orval Pool owned 1,710 shares of bank stock, shown by the evidence to be worth $189,810, or $111 per share; that M. M. Pool and Mrs. Townshend were to retain 1,310 shares, or $145,410, and 400 shares, or $44,400, were to be conveyed to the trustee for the use of Mrs. Docker and Mrs. Peeples, the income to be paid to them, and the principal to be kept for their children; and that the trustee was to sell and convert into money so much of the lands as might be necessary to equalize the interest of Mrs. Docker and Mrs. Peeples with the interest of M. M. Pool and Mrs. Townshend in the shares of said bank stock. M. M. Pool and Mrs. Townshend were to join the trustee in executing the deeds to the purchasers of the lands. When sales enough should be made to raise the amount necessary to equalize the interests in the bank stock, M. M. Pool and Mrs. Townshend were to convey the residue of such lands to the trustee whenever requested by Mrs Docker and Mrs Peeples; and the trustee was to hold them, or to sell them and invest the proceeds as provided in the agreement. The agreement provides for no conveyance to the trustee of the lands to be sold. The title remained in M. M. Pool and Mrs. Townshend until sales enough were effected to accomplish the equalization; and the trustee was a mere agent to make the sales. *Pool* v. *Potter*, 63 Ill. 533.

It is manifest that, by the terms of the agreement of 1871, the children or remaindermen were mere volunteers. The principle is well settled that a court of equity will not lend its aid to establish a trust at the instance of mere volunteers. If the transaction on which the voluntary trust is attempted to be established is still executory or incomplete, the court will decline all interference in the matter. Where there is only a voluntary agreement for the creation of a trust, a court of equity will not regard the agreement as binding so long as it remains executory. An executory trust is one which is not fully and finally declared, but requires some other act or acts in order to perfect it and carry out the intention of the settlor; while an executed trust is one fully and finally declared by the person creating it, so that nothing further remains to be done in order to make it effective. *Clarke* v. *Lott*, 11 Ill. 105; *Badgley* v. *Votrain*, 68 Ill. 25, 18 Am. Rep. 541; *Padfield* v. *Padfield*, 68 Ill. 210; *Barnum* v. *Reed*, 136 Ill. 388; 27 Am. & Eng. Enc. Law, p. 11.

Before an executed and fully-created trust could arise, under the agreement of 1871, in favor of the children of Mrs. Docker and Mrs. Peeples, it was necessary that there should be transferred or conveyed to a trustee, to be thereafter appointed, money and personal property, and the proceeds of sales of land thereafter to be made. To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee, or in a trustee for the donee. If anything remains to be done to complete the gift, what so remains to be done cannot be enforced, as it is based upon no consideration; and, when the gift is thus incomplete, there is a *locus penitentiæ*, and the gift may be revoked. Where the alleged gift is of a legal estate capable of legal conveyance and no conveyance is made, the gift is revocable. *Barnum* v. *Reed, supra; Wadhams* v. *Gay*, 73 Ill. 415; 8 Am. & Eng. Enc. Law, pp. 1313–1318; *Telford* v. *Patton*, 144 Ill. 611. A gift *inter vivos* cannot be made to take effect in possession *in futuro;* nor will equity interpose to perfect a defective gift or voluntary settlement made without consideration; nor can equity convert an imperfect gift into a declaration of trust merely on account of that imperfection. *Young* v. *Young*, 80 N. Y. 422. In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, it was necessary to do in order to transfer the property and make the settlement binding upon him; and such a settlement may be effectual by transferring the property to the persons for whom he intends to provide, or by transferring it to a trustee for the purpose of the settlement, or by declaring that he himself holds it in trust for those purposes. If it is intended to effectuate the settlement by one of these modes, the court will not give effect to it by applying another of them. If it is intended that the settlement shall take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, because it would thereby convert an imperfect instrument into a perfect trust. Where the instrument contemplates that there shall be a transfer of the property to the trustee, the relation of trustee and *cestui que trust* does not arise until such transfer is made. Until then the person for whose benefit the voluntary settlement is made takes no estate in the property, and cannot enforce the agreement to make the gift, or compel the alienation to the trustee. Before the alienation to the trustee the gift is an imperfect one, and a court of equity will not interfere to complete it. *Milroy* v. *Lord*, 4 De G. F. &. J. 264; *Bridge* v. *Bridge*, 16 Beav. 315; *Beech* v. *Keep*, 18 Beav. 285; *Colyear* v. *Countess Mulgrave*, 2 Keen, 82; 1 Vaizey, Settlements of Property, pp. 93, 140, 143, 145; *Jefferys* v. *Jefferys*, Craig & Ph. 138; *Re D'Angibau*, L. R. 15 Ch. Div. 228.

Now, the evident purpose of the agreement of 1871 was that the interest which was to go to the children should be settled upon them by a transfer of the property to a trustee, who was to hold it upon trust. A transfer to a trustee was that particular one of the three modes above specified by which, under the agreement of 1871, the settlement upon the children was to be made effectual. It cannot be held, therefore, that it can be made effectual by constru-

ing the agreement as amounting to a declaration of trust by the signers of it. A complete voluntary trust is clearly distinguishable from a voluntary contract to create a trust. We do not think that it was the intention of M. M. Pool and Mrs. Townshend to constitute themselves trustees of the fund to be settled upon the remaindermen. Their intention was that the trust should be vested in the trustee to be thereafter selected, either by the parties or by a judge. Until the property was transferred to such trustee, the instrument, so far as the children were concerned, was an imperfect gift or voluntary settlement, without consideration, which the beneficiaries themselves, being mere volunteers, could not enforce against the settlors or signers of the agreement, and which the latter were at libery to revoke or change. "When two persons, for valuable consideration, between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other." 1 Vaizey, Settlements of Property, p. 143. "Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favor of some person entitled to enforce the contract against the person liable to perform it." Id. p. 145. Here any one of the signers of the agreement of 1871 could insist on the proposed transfer of the property to the trustee in order to make the proposed gift, but no right vested in the proposed remaindermen until such transfer was made. Whenever any part of the property was conveyed to the trustee an equitable estate in remainder therein vested in the children, and as to that the power of the settlors to make a change by contract was gone. As to property not conveyed to the trustee the parties were at liberty to make a new contract.

There is some proof tending to show that the 400 shares of bank stock above mentioned were delivered to the trustees before the execution of the agreement of November 19, 1872. It does not appear, however, that there was an actual transfer of the stock upon the books of the bank prior to that time. In *Milroy* v. *Lord*, *supra*, it was held that where bank shares were transferable only by entry in the books of the bank, and no such transfer was made to the trustee in a voluntary settlement like that here under consideration, the gift remained uncompleted and imperfect. But, even if it be conceded that 400 shares came to the hands of the trustee by a proper transfer before the second agreement was made, we understand that no loss was sustained as to this stock, and that no default in relation thereto is embraced in the amount found against the sureties by the decree below.

We cannot subscribe to the theory that the agreement of 1871 is to be regarded as creating the relation of vendor and vendee between the signers of that agreement, or some of them, and the proposed remaindermen, and that a relation of trust was thereby created, upon the theory that, in equity, the vendors are trustees of the land for the purchasers, and the vendees are trustees of the purchase money for the sellers. The doctrine thus invoked has no application here, for the reason, among other reasons, that a sale implies a consideration, whereas here there was no consideration as between either or any of the signers and the children.

It being established that the parties to the agreement of 1871 had the power to change it by a new agreement, both as to their own interest and as to the interests therein proposed to be vested, through a trustee, in the children of Mrs. Docker and Mrs. Peeples, the question again recurs whether the agreement of 1872 made such changes in that of 1871 as had the effect of releasing the sureties on the bond.

The undertaking of a surety is to receive a strict interpretation. *Chicago & A. R. Co.* v. *Higgins*, 58 Ill. 128. He is not to be held beyond the precise terms of his contract. His liability is *strictissimi juris*, and cannot be extended by construction. Where the term of an officer is for a definite and fixed period, the surety is only liable for the faithful performance of his duties during that period. *People* v. *Toomey*, 122 Ill. 308. The extent of his liability must be embraced in the obligation or contract. *Phillips* v. *Singer Mfg. Co.* 88 Ill. 305. If a creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal, the surety is discharged both in law and equity, whether the surety is thereby actually damnified or not. *Dodgson* v. *Henderson*, 113 Ill. 360. Where a party gives a bond with sureties conditioned for his faithful performance of a written contract, the sureties will not be liable for the default of their principal to perform any duty or obligation arising out of a contract not fairly within the provisions of the written contract which the bond was given to secure. *Burlington Ins. Co.* v. *Johnson*, 120 Ill. 622. Sureties have a right to prescribe the terms and conditions upon which they will assume a responsibility, and no person has a right to change those terms. *Ryan* v. *Shawneetown*, 14 Ill. 22. It is a general rule that any agreement between the principal and the party secured, essentially varying the terms of the contract by which the surety is bound, without the consent of the surety, will release him from responsibility. 2 Brandt, Suretyship, § 378; *Gardiner* v. *Harback*, 21 Ill. 129; *Trotter* v. *Strong*, 63 Ill. 272; *United States* v. *Corwine*, 1 Bond, C. C. 339, Fed. Cas. No. 14,871. If the duties which the principal is to perform are varied by agreement between the principal and obligee after the surety for the conduct of the principal has become bound, such surety will generally be thereby discharged. Any dealings between the principal and obligee amounting to a departure from the contract by which the surety is bound, and materially varying or enlarging his liabilities without his consent, will generally operate to discharge him. The same result will follow, as a general thing, where the principal acts in another office or capacity from that designated in the contract of suretyship, or where his reponsibilities in the same office are increased. 2 Brandt, Suretyship, §§ 393, 397; *People* v. *Seelye*, 146 Ill. 189; 24 Am. & Eng. Enc. Law, p. 759.

It is difficult to see how an application of these well settled principles to the facts of this case can lead to any other result than a discharge of the sureties upon Potter's bond.

By the agreement of 1871 it was made the duty of the trustee "to sell and convert into money, as soon as the same can be conveniently done without sacrifice, so much of said lands and real estate" as may be necessary to equalize the interests already mentioned, and to invest the money raised by such sales, and pay over the interest thereon, as therein directed, and subject to the conditions therein specified. He is thereby authorized to make such sales, either at public or private sale, or for cash or on credit, "as he may deem best," subject to certain provisions as to giving notice. In case of sales on time, no credit is to be given for a longer time than one year, except with the consent of the parties. Purchasers are to secure the purchase money by mortgages and notes drawing 10 per cent interest, and, where the cash payment is less than one third, the note is to have a surety. The trustee can make no private sale without the consent of M. M. Pool, Mrs. Townsend, Mrs. Docker, and Mrs. Peeples. From these provisions it is manifest that, by the agreement of 1871, the trustee could exercise a reasonable degree of discretion in the matter of making sales, both as to the time and mode of making them, and that the intention of the agreement was to make such sales as would equalize the interests, as rapidly as could be done without sacrifice. The agreement of 1872 provided that the trustee should make no public sale of any of the lands for a period of one year from November 19, 1872, without the written consent of the parties to the agreement of 1872; and that he should make no private sale at any time without the written consent of such parties; and that he should only perform such services in procuring and completing such sales as the parties thereto might deem necessary. By the second agreement, the time within which the trustee was required to make public sales was necessarily extended, and he was robbed substantially of all right to exercise any judgment or discretion about any of the sales. By the first agreement, he could make private sales, with the consent of the son and three daughters of the testator; by the second, he could not make private sales without the consent of the son and three daughters and widow and three sons-in-law of the testator. By the first agreement, he could make public sales as soon as could be conveniently done without sacrifice; by the second, he could not make public sales for a year from November, 1872, without the consent of the seven persons last named; and, in fact, he could procure no sales, either public or private, except so far as said seven persons should deem necessary. The sureties contracted that they would be liable for the judgment and skill of a trustee. They are sought to be held liable for transactions controlled entirely by the judgment and skill of seven persons, acting independently of the trustee. By their bond, they contracted that the trustee would account for and pay over all moneys and property which might come into his hands as such trustee, "at such times and in such manner as is provided for in said instrument;" that is to say, in the agreement of 1871. But the "times" and "manner" specified in the agreement of 1871 were materially altered by the agreement of 1872. By the latter agreement, the duties of the trustee were changed, and his responsibilities were increased. These changes not only affected the character and duration of his duties, but the amount and kind of property of which he was to have the care, and the times when said property should come to his hands. We cannot stop to point out all these changes. They can be easily ascertained by a study and comparison of the terms of the two agreements, as they are set out in the statement which precedes this opinion. The agreement of 1872 put it in the power of the seven persons above named to postpone the completion of the trust, to delay the transfer of the trust property to the possession and control of the trustee, and to hinder the trustee in his management of the trust. As a necessary result, sales and investments, which under the first agreement were to be accomplished within a conveniently reasonable time, were not effected for many years. The evidence shows that it was not until 1886, 14 years after the second agreement was made, that enough land had been sold to equalize the interests in the bank stock.

Many other points are ably discussed by counsel in their arguments, but we deem it unnecessary to comment upon them, as the views already expressed are deemed sufficient to dispose of the case.

The judgment of the Appellate Court is affirmed.

Rehearing denied March 13, 1896.

Abraham D. CECIL, *Appt.*,
v.
Hamer H. GREEN.

(161 Ill. 265.)

1. **The general expression in the civil rights act** of June 10, 1885, "all other places of public accommodation and amusement," embraces only places of the same general character or kind as inns, restaurants, eating houses, barber shops, public conveyances, and theaters, specifically enumerated.

2. **A drug store in which soda water is sold** is not a place of public accommodation and amusement within the civil rights act of June 10, 1885, but is to be classed with other mercantile stores.

(May 12, 1896.)

APPEAL by plaintiff from a judgment of the Appellate Court, Third District, affirming

NOTE.—For discrimination against colored persons in restaurants, see Ferguson v. Gies (Mich.) 9 L. R. A. 589.

For discrimination against them in places of amusement, see Younger v. Judah (Mo.) 16 L. R. A. 558, and People v. King (N. Y.) 1 L. R. A. 293.

For rights of colored passengers, see *Ex parte* Plessy (La.) 18 L. R. A. 639, and *note*. (This case is affirmed by the Supreme Court of the United States as Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. ---).

On the same question see also Chilton v. St. Louis & I. M. R. Co. (Mo.) 19 L. R. A. 269, and Smith v. Chamberlain (S. C.) 19 L. R. A. 710; also Louisville, N. O. & T. R. Co. v. State (Miss.) 5 L. R. A. 132.

a judgment of the Circuit Court for McLean County in favor of defendant in an action brought to recover damages for defendant's refusal to sell plaintiff soda water. *Affirmed.*

Statement by **Phillips, J.**:

The original declaration in this case contained two counts, the first of which alleges that the defendant, in a building occupied by him, was engaged in the drug business, and in connection therewith kept for sale certain refreshments, to wit, soda water, ice cream soda water, ginger ale, phosphate, cherry phosphate, root beer, etc.; that the plaintiff tendered the price of cherry phosphate, and was refused, and was informed that it was on account of his color. The second count alleges that the defendant was engaged in the public business, and kept for sale to the public certain refreshments, to wit, the same articles mentioned above, and that the plaintiff, on the 6th day of August, 1894, entered said place of business and tendered the price of certain articles kept for sale by the defendant (without mentioning the name of the article), and was informed by the defendant that he could not purchase such article of him. This count does not allege any reason for the refusal. A demurrer was interposed to these counts. Subsequently, by leave of the court, three other special counts were filed, the first two of which were withdrawn, and the third allowed to stand. This count was also demurred to. It alleges in substance that on the 6th day of August, 1894, the defendant was engaged in running a soda fountain for public accommodation, and that said soda fountain was a place of public accommodation, and the defendant kept certain articles for sale at said place of business, to wit, the same articles mentioned in the first count, and that the plaintiff, being a colored citizen, on the 6th day of August, 1894, entered said place of the defendant, and tendered the "ordinary price for which said articles kept by said Hamer H. Green for public accommodation were sold to the public in general," and that the defendant refused to sell said articles to plaintiff on account of his color. The court sustained demurrer to each of these counts, and the judgment was affirmed by the appellate court for the third district, and this appeal is prosecuted.

Mr. **Charles M. Peirce,** for appellant:

Case is the proper remedy.

Baylies v. *Curry*, 30 Ill. App. 105, 128 Ill. 287.

If the rights and privileges of the colored citizen are to be restricted by the whims and at the pleasure of those who engage in public business and who solicit public patronage, as has been done by the defendant in this case, then the rights of the colored citizen and the great freedom to him of which we boast will soon be relegated to the tomb of oblivion, and the shackles of slavery will again be welded on this unfortunate race of human beings.

People, Longress, v. *Quincy Bd. of Edu.* 101 Ill. 308.

Messrs. **Rowell, Neville, & Lindley,** for appellee:

The civil rights statute is highly penal, and is therefore to be strictly construed, and cannot be extended so as to include any kind of business not mentioned.

Brooks v. *Cook*, 44 Mich. 617, 38 Am. Rep. 282.

The license which every retail dealer impliedly gives to the public to enter his shop for the examination of his goods is always subject to revocation.

Cooley, Torts, chap. 10, p. 305; *Burton* v. *Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Woodward* v. *Seely*, 11 Ill. 157, 50 Am. Dec. 445; *Wood* v. *Leadbitter*, 13 Mees. & W. 838.

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rest upon reason or is the result of a whim, caprice, prejudice, or malice.

Cooley, Torts, 278-286, and cases cited.

Theaters and other places of public amusement exist wholly under the authority and protection of state laws, their managers are commonly licensed by the state, and in conferring the license it is no doubt competent for the state to impose the condition that the proprietor shall admit and accommodate all persons impartially; and the power of the state to regulate the business of an innkeeper would be at least equally plain.

Cooley, Torts, 285.

It is not competent for the legislature to select owners and operators of one kind of property and provide that they shall bear burdens not imposed on other owners of property and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make.

Frorer v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869.

The common law casts no duty on a mere tradesman or retailer to exercise his trade for or to sell his wares to such as should request him.

Munn v. *Illinois*, 94 U. S. 115, 24 L. ed. 77.

Phillips, J., delivered the opinion of the court:

This case presents for construction the provisions of an act entitled "An Act to Protect All Citizens in Their Civil and Legal Rights, and Fixing a Penalty for Violation of the Same," approved June 10, 1885 (Laws of 1885, p. 64). Section 1 of that act reads as follows: "That all persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens." Under this provision of the statute, full and equal enjoyment of the accommodations, advantages, facilities, and privileges of certain places of public resort is required to be extended to all persons within the jurisdiction of this state.

It is a clearly established rule of construction that if, after enumerating certain places of business on which a duty is imposed or a license required, the same statute then employs

some general term to embrace other cases, no other cases will be included in the general term except those of the same general character or kind so specifically enumerated. Potters' Dwarr. Stat. 247, 248; *Re Swigert*, 119 Ill. 83; *Shirk* v. *People*, 121 Ill. 61; *Brooks* v. *Cook*, 44 Mich. 617, 38 Am. Rep. 282. Public conveyances on land or water, and inns, and theaters have, from the earliest history of this state, been to a greater or less extent subjected to police regulations, and statutes have been enacted with reference to their government. Restaurants, eating houses, and barber shops are of such character they are resorted to necessarily by all classes of persons, from time to time. All these places of public resort were by the legislature declared to be places at which all persons within the jurisdiction of this state should be entitled to full and equal enjoyment of their accommodations and advantages, under all conditions. The term "and all other places of public accommodation and amusement," under the principle of construction first stated, can only be held to include cases of the same general character, sort, or kind.

Under the averments of this declaration, the defendant, as proprietor of a drug store, kept a soda fountain, from which he dispensed the character of liquids usually sold therefrom. Such places can be considered places of accommodation or amusement to no greater extent than a place where dry goods or clothing, boots and shoes, hats and caps, or groceries are dispensed. The personal liberty of an individual in his business transactions, and his freedom from restrictions, is a question of the utmost moment; and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment, and certainly included within the constitutional limitation on the power of the legislature. Nothing in this provision requires a physician to attend a patient, a lawyer to accept a retainer, a merchant to sell goods, or a farmer to employ labor, unless of his own volition, regardless of any reason, whether expressed or not. The general provision does not include the business of the defendant, nor is it included within the terms specially named. It was not error in the circuit court to sustain the demurrer, nor in the appellate court to affirm its judgment.

The judgment of the Appellate Court is affirmed.

KENTUCKY COURT OF APPEALS.

MT. STERLING NATIONAL BANK,
Appt.,
v.
James GREENE.

(.....Ky.....)

1. **Damages are recoverable against a bank** for refusal to pay the check of a customer who has sufficient funds in the bank applicable to the check.
2. **A bank holding an overdue note of a depositor** of greater amount than his deposit may properly refuse to pay his check without any formal appropriation of the deposit upon the note.

(May 14, 1896.

APPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action to recover damages for defendant's refusal to pay a check. *Reversed.*

The facts are stated in the opinion.

Messrs. **Tyler & Apperson,** for appellant:

The bank has a general lien on the money and funds of the depositor in its vault for the payment of a general account of the depositor.

Masonic Sav. Bank v. *Bangs*, 8 Ky. L. Rep. 168; *Herndon* v. *Louisville Bkg. Co.* 10 Ky. L. Rep. 584. Morse, Banks & Banking, 2d ed. 31, 34, 42, 46, 47; *Jordan* v. *National Shoe & L. Bank*, 74 N. Y. 467, 30 Am. Rep. 321; *Falkland* v. *St. Nicholas Nat. Bank*, 84 N. Y. 145; *Bank of Marysville* v. *Windisch Muhlhauser Brewing Co.* 50 Ohio St. 151; Bolles, Banks & Depositors, 360, §§ 374, 375.

The petition does not state a cause of action in that it failed to state that plaintiff had money to his credit in defendant bank subject to check and upon which the bank had no lien at the time the check was presented, sufficient to pay the check drawn by plaintiff payable to Bratton.

Morse, Banks & Banking, 35.

Messrs. **A. T. Wood, B. T. Day,** and **Z. T. Young,** for appellee:

Appellee had over $4,700 on deposit in the bank, and he had no intimation that they were going to refuse to pay his checks; yet when he gives his check for $1,000 it is protested. They did not place this $4,700 as a credit on the $5,600 note and charge it up to his account, but kept the money to his credit and were having the use of it, and his note was running at interest, and they never did appropriate $1 of it on this debt.

If the bank, as it contends, had a lien on this fund for the payment of its debt it should have applied it on the $5,600 note and charged it up to appellee's account and stopped the interest. It could not refuse to pay appellee's check unless it appropriated the money to the payment of the note held on him.

Continental Nat. Bank v. *Weems*, 69 Tex. 489; *Russell* v. *Hadduck*, 8 Ill. 233, 44 Am. Dec. 693; *Fourth Nat. Bank* v. *City Nat. Bank*, 68 Ill. 398.

The appellee was entitled to substantial damages if no special damages had been shown, but special damages were shown in this case.

Morse, Banks and Banking, § 458; *Patterson* v. *Marine Nat. Bank*, 130 Pa. 419; *First Nat.*

NOTE.—As to the liability of a bank for refusal to pay a check when it has funds therefor, see *note* to Schaffner v. Ehrman (Ill.) 15 L. R. A. 134.

Bank v. *Mason*, 95 Pa. 113, 40 Am. Rep. 632; Boone, Banking, § 278.

Mr. **C. P. Chenault** also for appellee.

Lewis, J., delivered the opinion of the court:

James Greene brought this action to recover of the Mt. Sterling National Bank $5,000 damages, his cause thereof being stated substantially as follows: That October 17, 1892, he drew his check on defendant for $1,000, payable to the order of Sally A. Bratton, which was, October 27, 1892, duly presented for payment, but that although when said check was drawn and delivered, as also when it was presented by Sally A. Bratton for payment, plaintiff had ample money on deposit and to his credit in the bank to pay said check, defendant refused to pay, and caused the check to be protested, and thereby injured plaintiff's credit and standing in the community as an honorable business man, to his great damage, etc. As a ground of defense, defendant stated in its answer, substantially, that December 2, 1891, plaintiff executed and delivered to it his promissory note agreeing to pay, six months thereafter, $5,671.31, which became due June 2, 1892; that October 27, 1892, said note was still due and unpaid, and was for largely more than plaintiff then had on deposit and to his credit in defendant bank; that because it had a lien upon, and right of set-off against, the amount of plaintiff's credit on that day as depositor, defendant refused to pay said check, and retained the amount of his deposit until October 31, 1892, when payment was actually made by him of the note, and then defendant released its lien, and plaintiff drew checks in favor of other parties for the entire amount of his deposit, which were paid as presented. To that answer a general demurrer was filed and sustained, a demurrer to the petition having been previously overruled; and, verdict and judgment being subsequently rendered in favor of plaintiff for $2,000, the defendant appealed.

It seems to be well settled that the obligation of a bank to pay checks, drafts, and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not encumbered by the attaching of an earlier lien in favor of the bank, and the reciprocal right of the depositor to have them paid, are so far substantial that if the bank refuses without sufficient justification to pay the check of a customer the customer has his action for damages against the bank. Morse, Banks and Banking, § 458. As, therefore, the statements in the petition constitute prima facie a cause of action, the demurrer to it was properly overruled. But, in the language of *Masonic Sav. Bank* v. *Bangs*, 8 Ky. L. Rep. 16: "The right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books on banks and banking, and sustained by an unbroken line of American decisions." In *Pursifull* v. *Pineville Bkg. Co.'s Assignee*, 97 Ky. 154, it is said by this court that there is no difference of opinion as to the right of a bank, under the doctrine of set-off, to have applied to the payment of a note held by it against a depositor unappropriated funds he may have deposited in the bank to his credit. As aptly and correctly said in *Herndon* v. *Louisville Bkg. Co.* (decided by the superior court) 10 Ky. L. Rep. 584: "The relation between the bank and depositor is that of debtor and creditor, and as long as it exists the bank must honor drafts or checks of the depositor in the order in which they are presented, to the extent of the deposit. But when, on account of any legitimate transaction between the parties, the relation is shifted, and the balance of the account is against the depositor, it seems to us that, upon principle, the bank should not be required to respond to the demand of a holder of a check which was drawn before this altered condition of affairs, but of which the bank had no notice until afterwards." In this case, however, the depositor, prior to and at the date of the check, was indebted to the bank, by a promissory note past due, in an amount greater than what he had on deposit, and therefore occupied the relative attitude of debtor. In sustaining the demurrer to the answer, the lower court expressed the opinion that defendant had a lien on the deposit of plaintiff, and the right, at the time of presentation of the check by the holder for payment, to appropriate the entire amount then on deposit, belonging to plaintiff, to the payment of said note then due from plaintiff to defendant. But the demurrer to the answer was nevertheless sustained, because, in the language of the court, the defendant failed, on presentation of the check, to appropriate said deposit and apply the same as a credit on the said note, and thereby released its lien. It seems to us that the reason for that decision is not sufficient. The question is whether, at the time the check was presented, the bank had the right to refuse payment. If it had, then its simple refusal to honor the check was a proper exercise of that right, and all the appropriation needed for that purpose. In our opinion the facts stated in the answer constitute a sufficient justification of the bank's refusing to pay the check in question, and, prima facie, sufficient ground of defense to the action. And, as this record stands, defendant was, on the pleadings, entitled to judgment. We need not refer to the instructions, further than to say that, having been given upon an incorrect hypothesis, they are necessarily erroneous.

For the primary error in sustaining the demurrer to the answer, *the judgment is reversed* and the case remanded for a new trial consistent with this opinion.

Hazelrigg, J., did not sit.

MARYLAND COURT OF APPEALS.

Charles W SWEETING *et al.*, *Appts.*,
v.
MUTUAL FIRE INSURANCE COMPANY.

(.....Md.....)

1. **Insurance which is invalid** by reason of the existence of valid prior insurance will not defeat the prior policy under a provision against additional insurance.
2. **An insurer has the burden of proving the invalidity** of the insurance because of additional insurance.

(March 25, 1896.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Harford County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. **S. A. Williams** and **H. J. Jewett**, Jr., for appellants:

Subsequent insurance, to avoid prior insurance, must be valid.

Jackson v. *Massachusetts Mut. F. Ins. Co.* 23 Pick. 418, 34 Am. Dec. 69; *Clark* v. *New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44; *Barrett* v. *Union Mut. F. Ins. Co.* 7 Cush. 175; *Forbes* v. *Agawam Mut. F. Ins. Co.* 9 Cush. 470; *Hardy* v. *Union Mut. F. Ins. Co.* 4 Allen, 217; *Jackson* v. *Farmers' Mut. F. Ins. Co.* 5 Gray, 52; *Kimball* v. *Howard F. Ins. Co.* 8 Gray, 33; *Thomas* v. *Builders' Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317; *Wheeler* v. *Watertown F. Ins. Co.* 131 Mass. 1; *Hughes* v. *Insurance Co. of N. A.* 40 Neb. 626; *Stacey* v. *Franklin F. Ins. Co.* 2 Watts & S. 506; *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Behrens* v. *Germania F. Ins. Co.* 64 Iowa, 19; *Phenix Ins. Co.* v. *Lamar*, 106 Ind. 513, 55 Am. Rep. 764; *Fireman's Ins. Co.* v. *Holt*, 35 Ohio St. 189; *New England F. & M. Ins. Co.* v. *Schettler*, 38 Ill. 166; *Germania F. Ins. Co.* v. *Klewer*, 129 Ill. 599; *Gale* v. *Belknap County Ins. Co.* 41 N. H. 170; *Philbrook* v. *New England Mut. F. Ins. Co.* 37 Me. 137; *Keyser* v. *Hartford F. Ins. Co.* 66 Mich. 664; *Schenck* v. *Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447; *Donogh* v. *Farmers' F. Ins. Co.* (Mich.) 62 N. W. 721; *Gee* v. *Cheshire County Mut. F. Ins. Co.* 55 N. H. 65; *Phœnix Ins. Co.* v. *Copeland*, 86 Ala. 551, 4 L. R. A. 848.

When by the acts of the parties the subsequent policy was treated as valid and the amount of loss claimed under it was actually paid by the second company, it could not bar a recovery upon the prior policy.

Stacey v. *Franklin F. Ins. Co.*, *Jackson* v. *Massachusetts Mut. F. Ins. Co.*, *Hardy* v. *Union Mut. F. Ins. Co.*, *Philbrook* v. *New England Mut. F. Ins. Co.*, *Gale* v. *Belknap County Ins. Co.*, *Thomas* v. *Builders' Mut. F. Ins. Co.*, and *Hubbard* v. *Hartford F. Ins. Co. supra*; *Knight* v. *Eureka F. & M. Ins. Co.* 26 Ohio St. 664, 20 Am. Rep. 778.

The rule in marine insurance is that, where a policy of insurance contains a condition of avoidance on account of additional or overinsurance, such policy is not avoided by a contract for additional insurance when that contract is shown to be invalid.

Dumas v. *Jones*, 4 Mass. 647; *Finney* v. *Bedford Commercial Ins. Co.* 8 Met. 348, 41 Am. Dec. 515; *Graves* v. *Boston Marine Ins. Co.* 6 U. S. 2 Cranch, 419, 2 L. ed. 324; *Lucas* v. *Jefferson Ins. Co.* 6 Cow. 635; *Knight* v. *Eureka F. & M. Ins. Co. supra.*

It is for the defendant to show that the subsequent policy was valid and legal, effectual and binding upon the insurers.

Thomas v. *Builders' Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317.

When the prior policy was voidable, but was not avoided, then it is yet valid, and will invalidate a subsequent policy.

Carpenter v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044.

When the subsequent policy was voidable, and is avoided, then the prior policy is yet valid.

David v. *Hartford Ins. Co.* 13 Iowa, 69; *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Bigler* v. *New York C. Ins. Co.* 20 Barb. 635, 22 N. Y. 402.

It is the general rule that the prior policy shall be held valid and the subsequent policy be invalidated.

Guinn v. *Phœnix Ins. Co.* (Tex.) 31 S. W. 566; *Phœnix Ins. Co.* v. *Copeland*, 86 Ala. 551, 4 L. R. A. 848; *Germania F. Ins. Co.* v. *Klewer*, 129 Ill. 599.

Mr. **George L. Van Bibber**, for appellee:

If the first policy alone contained the prohibitory clause there would be no difficulty in this case, for all the courts agree that subsequent insurance under such circumstances would be a clear breach of the first contract and would relieve it from liability.

Jackson v. *Massachusetts Mut. F. Ins. Co.* 23 Pick. 418.

Overinsurance offers a motive or inducement on the part of the assured to destroy the insured property, and notice enables the insurer to determine whether it is willing to continue the contract.

Carpenter v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Simpson* v. *Pennsylvania F. Ins. Co.* 38 Pa. 250; *Barnard* v. *National F. Ins. Co.* 27 Mo. App. 26; *Lackey* v. *Georgia Home Co.* 42 Ga. 456.

In construing contracts, no distinction should be made between insurance and any other contracts, and when parties enter into contracts which depend for their validity and enforcement upon the fulfilment of prescribed condi-

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NOTE.—In connection with the above case, which so extensively reviews the authorities as to the effect of invalid policies of insurance upon prior policies stipulating against other insurance, see also Saville v. Ætna Ins. Co. (Mont.) 3 L. R. A. 542, and Reed v. Equitable F. & M. Ins. Co. (R. I.) 18 L. R. A. 496.

32 L. R. A.

tions, they should be held to the exact nature of their engagement.

Sugg v. *Hartford F. Ins. Co.* 98 N. C. 143; *Allen* v. *German-American Ins. Co.* 123 N. Y. 6.

Procuring the additional insurance rendered the first policy void.

Carpenter v. *Providence Washington Ins. Co. supra; Bigler* v. *New York C. Ins. Co.* 22 N. Y. 402; *Somerfield* v. *State Ins. Co.* 8 Lea, 547; *Manhattan Ins. Co.* v. *Stein*, 5 Bush, 652; *Suggs* v. *Liverpool & L. & G. Ins. Co.* (Ky.) 9 Ins. L. J. 657; *Campbell* v. *Ætna Ins. Co.* 1 Cochran, 21 (Nova Scotia); *Gauthier* v. *Waterloo Ins. Co.* 44 U. C. Q. B. 490; *Lackey* v. *Georgia Home Ins. Co. supra; Stevenson* v. *Phœnix Ins. Co.* 83 Ky. 7.

A second policy is not void by reason of its containing the prohibitory clause in reference to other insurance, but it is voidable only at the option of the insurer. This right to avoid the policy can be waived by the insurer and the policy is a valid subsisting obligation until the insurer either waives it or declares his intention to waive it. The fact that it is at any time a contract only voidable, and not void *ab initio*, renders it such a policy as is contemplated in the policy sued on in this case, when it speaks of subsequent insurance.

Atlantic Ins. Co. v. *Goodall*, 35 N. H. 328; *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Stevenson* v. *Phœnix Ins. Co. supra.*

The validity of a policy claimed to be other insurance cannot be tried in a suit against another company.

Somerfield v. *State Ins. Co.* 8 Lea, 547, 41 Am. Rep. 662; *Gauthier* v. *Waterloo Ins. Co. supra.*

McSherry, Ch. J., delivered the opinion of the court:

The Mutual Fire Insurance Company in Harford County issued a policy of insurance against loss by fire to Mr. J. Thomas C. Hopkins in March, 1893. The insured premises were subsequently purchased by the appellant Sweeting, and Mr. Hopkins assigned the policy to him. In October, 1894, additional insurance was granted by the same underwriter to the appellant, upon the same premises. Among the terms and conditions annexed to, and forming a part of, the policy, was the following: "If any property insured by this company shall be already insured, or shall be hereafter insured, by any other company or companies or individual, or otherwise, such insurance or insurances must be made known to this company, and indorsed on the policy, or otherwise acknowledged in writing, or otherwise the policy of this company shall be void." In November, 1894, the appellant without giving notice to, or obtaining the consent of, the Harford Insurance Company, and without disclosing to the second insurer the existence of the first policy, procured a policy, for the same amount of insurance, on the same property, from the Farmers' Fire Insurance Company of York, Pa. In the policy issued by this last-named company, it is provided and declared "that this company shall not be liable . . . for loss if there is other prior or subsequent insurance, whether valid or otherwise, without the written consent of this company." It is further stipulated that "said company shall in no case be deemed to have waived a full, literal, and strict compliance with, and performance of, each and every of the terms, provisions, conditions, and stipulations in this policy contained, and hereto annexed, to be performed and preserved by and on the part of the insured, . . . unless such waiver be expressed and manifested in writing under the signatures of the president and secretary of said company." On March 11, 1895, the dwelling house described in and covered by both the policies was destroyed by fire, and both of the underwriters refused to pay the loss,—the Harford Company, because its policy was avoided, according to its contention, by the subsequent insurance procured without its consent, and the York Company because the omission of the assured to disclose the fact that he held a policy on the same property in the Harford Company invalidated the policy of the York Company, issued in ignorance of the antecedent outstanding insurance in the Harford Company. Subsequently this suit was brought against the Harford Company to recover on the policy issued by it, that policy being the first in date and delivery. Upon the trial of the cause one exception was reserved which brings up for review the rulings of the trial court upon the prayers for instructions to the jury. The verdict and judgment were entered for the defendant, the Harford Company, and the plaintiffs have appealed.

All of the plaintiffs' prayers were rejected, and all of the defendant's were granted. Together they present but a single question; and that question, though one of much interest and importance, has not heretofore been raised in this court for decision. It is this: Does the fact that a subsequent policy was procured without the consent of the first underwriter avoid the first policy, under the above-quoted conditions contained therein, against other insurance, when the second policy explicitly declares that the company which issued it shall not be liable for loss if there is other prior insurance, whether valid or not, held on the same property, without the written consent of the second insurer? There is a wide diversity of opinion on this question in the various courts of this country. The doctrine laid down by the highest tribunals of Massachusetts, Pennsylvania, and other states is that the subsequent insurance being invalid at the time of loss, by reason of the breach of condition therein, the prior insurance is good, and the first underwriter is liable on the policy issued by it. *Thomas* v. *Builders' Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317; *Allison* v. *Phœnix Ins. Co.* 3 Dill. 480, Fed. Cas. No. 252; *Fireman's Ins. Co.* v. *Holt*, 35 Ohio St. 189; *Knight* v. *Eureka F. & M. Ins. Co.* 26 Ohio St. 664, 20 Am. Rep. 778; *Stacey* v. *Franklin F. Ins. Co.* 2 Watts & S. 506; *Jackson* v. *Massachusetts Mut. F. Ins. Co.* 23 Pick. 418, 34 Am. Dec. 69; *Clark* v. *New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44; *Hardy* v. *Union Mut. F. Ins. Co.* 4 Allen, 217; *Philbrook* v. *New England Mut. F. Ins. Co.* 37 Me. 137; *Lindley* v. *Union Farmers' Mut. F. Ins. Co.* 65 Me. 368, 20 Am. Rep. 701; *Gale* v. *Belknap County Ins. Co.* 41 N. H. 170; *Gee* v. *Cheshire County Mut.*

F. Ins. Co. 55 N. H. 65; *Jersey City Ins. Co.* v. *Nichol*, 35 N. J. Eq. 291, 40 Am. Rep. 625; *Schenck* v. *Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447; *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520; May, Ins. § 364.

On the other hand, it has been held elsewhere that a subsequent policy, whether legally enforceable or not, or whether voidable on its face, or voidable for extrinsic matter, works a forfeiture of the prior policy. *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Allen* v. *Merchants' Mut. Ins. Co.* 30 La. Ann. 1386, 31 Am. Rep. 243; *Somerfield* v. *State Ins. Co.* 8 Lea, 547; *Funke* v. *Minnesota Farmers' Mut. F. Ins. Co.* 29 Minn. 347, 43 Am. Rep. 216; *Lackey* v. *Georgia Home Ins. Co.* 42 Ga. 456; *Bigler* v. *New York C. Ins. Co.* 22 N. Y. 402; May, Ins. § 364.

There is still an intermediate view, taken by the supreme court of Iowa in the case of *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325, to the effect that the question of the validity of the prior policy turns upon whether the subsequent policy has in fact been avoided. If the second policy is recognized by the insurer issuing it to be a valid policy, any breach of conditions being waived, this makes it a valid insurance, and avoids the first policy; but, if the subsequent policy has been rescinded for condition broken, there is no other insurance, so as to invalidate the prior policy. The obvious and insuperable objection to this latter view lies in the fact that it makes the validity of the contract between the parties under the first policy depend, not upon their own agreement, nor the effect of that agreement, nor upon their own acts, nor the acts of either of them, but upon what another person (the second underwriter), a stranger to the first contract, may voluntarily do with respect to affirming or repudiating a totally different and distinct contract of insurance, without the slightest reference to any judicial inquiry as to the validity or invalidity of the second policy, or its resultant legal effect upon the first. Now, as the parties to the first policy of insurance have, by the unequivocal terms employed in their contract, declared that, if the property insured should be thereafter insured by any other company, the first policy should be void, unless the second insurance were made known to the first insurer, and were indorsed on the policy written by it, or were otherwise acknowledged and assented to by it in writing, and as the manifest object and design of such a provision were to guard against the dangers supposed to be incident to a double or an over insurance, the natural and reasonable interpretation of this forfeiting condition would, aside from adjudged cases, seem to prohibit a second valid insurance, and not a mere ineffectual attempt to procure additional insurance. The two things are not identical. "Other insurance" does not mean a void policy, which obviously affords no insurance at all. Nor does it mean a policy which may, at the option of the underwriter, be canceled; for that is, at best, but conditional insurance. But it means a binding, available insurance,—one upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer. If the underwriter contemplated something else than a valid insurance under a second policy, it should have been expressed in plain and unambiguous language, as was done by the York Company. Upon the face of the latter's policy, it was expressly declared that the policy would be void if other insurance existed or were procured, even though the other insurance were itself invalid. And such a provision has been recognized as effectual. *Liverpool, L. & G. Ins. Co.* v. *Verdier*, 35 Mich. 395; *Bigler* v. *New York C. Ins. Co. supra.* A second policy which, by its own terms, is void for any cause, is not an insurance at all; and this is equally true whether the invalidity is apparent on the face of the policy itself, or is made to appear by evidence *aliunde* the policy. It is not the method by which the invalidity of the second policy may be shown that determines whether it does or does not create a liability on the part of the underwriter who issues it, and therefore does or does not constitute a breach of the condition in the first policy against further insurance; but it is the fact that the second policy is valid and binding that alone fixes upon its underwriter a liability, and accordingly determines whether, in this respect, the condition against other insurance set forth in the first policy has been violated or not. Hence the inquiry is not as to how the invalidity of the second policy may be shown, but as to whether it is invalid. The parties to it themselves stipulate in it that it shall be void if there exists, at the time of its issue, undisclosed insurance in some other company, whether that prior insurance be valid or not. If such insurance, valid or invalid, does exist, then by the explicit terms of the contract, the second policy is void, and not merely voidable. Such is the distinct agreement of the parties themselves, and such is the character or status which they themselves have given to the second policy. To ascribe to the second policy, which the parties in direct terms declare shall be void if prior undisclosed insurance exists, the effect of annulling an antecedent policy not only ignores the agreement that stamps it as invalid, but involves the incongruity of treating the second policy as at one and the same time a subsisting, binding contract, for the purpose of avoiding the first policy, and a nugatory policy in respect to indemnifying the assured. It cannot be both valid and invalid, nor can it be valid for one purpose and invalid for another. If valid at all, it annuls the prior policy, precisely because it is valid; but, to be valid for any purpose, its explicit terms, declaring it invalid, must be deliberately disregarded. If, then, its provisions be given the effect which the parties to it intended they should have, it is void, and not merely voidable, the moment the condition arises upon the occurrence of which the parties have declared it shall be invalid. And, if thus invalid, it obviously does not create other insurance, within the prohibition contained in the first policy. It would then be nothing more than an attempt to secure other insurance. An ineffectual attempt to secure insurance is confessedly no insurance; and a policy which, in terms, declares its own invalidity in the event of their being prior undisclosed insurance on the same property, is a policy which, by

the agreement of the parties to it, has never become binding, if the prior insurance did exist, and consequently it grants no additional or other insurance whatever. And if it grants no additional or other insurance, and is, for the reason stated, and by the stipulation of the parties, a mere nullity, its issue by the insurer, and its acceptance by the insured, cannot invalidate antecedent insurance, which, by express provisions contained in the prior policy, is only to be avoided when subsequent undisclosed insurance is obtained. Giving to the words of the contract of insurance set forth in the first policy their obvious meaning, and bearing in mind that they do not, as those used in the second policy, relate to, or specifically designate, invalid insurance, the only tenable conclusion is that the intention of both the contracting parties was to strike down the first policy only on the condition that the second was valid and binding. And this is the conclusion reached by the best-considered cases. If the "other insurance" does not mean such a contract of insurance as is legally enforceable, then no certain test can be applied, and we abandon all legal guides. "The sound conclusion would seem to be that in cases like that at bar the 'other insurance' must be legal insurance, and that the true issue is whether the policy, not on its face, but on all the facts legally in evidence, was binding upon the insurer." *Dahlberg* v. *St. Louis Mut. F. & M. Ins. Co.* 6 Mo. App. 126.

The leading case relied on to support the opposite doctrine is *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044. In commenting on this case, Judge Dillon, in *Allison* v. *Phœnix Ins. Co.* 3 Dill. 484, Fed. Cas. No. 252, remarks: "The general, but not uniform, opinion of the court, is that, to avoid the first policy the second policy must be valid, that it must constitute an effectual insurance; and we are inclined to so hold, if this can be done consistently with *Carpenter* v. *Providence Washington Ins. Co. supra.* The case last cited has been subjected to much criticism. (See *Clark* v. *New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44; *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325; May, Ins. § 365, and the authorities there collected.) And it may be conceded that, though not unsupported it does not, at least in its reasoning, accord with the prevailing view. . . . That case holds that the company which issued the second policy (the Providence Company) was entitled to notice of the prior insurance in the American Company, though the policy in that company had been 'procured by misrepresentation of material facts, and the reason given (which has been criticised, and its soundness denied) is that such a policy is not 'to be treated, in the sense of the law, as utterly void *ab initio*, but merely voidable, and as one that may be avoided by the underwriters upon the proof of the facts, but until so avoided, to be treated for all practical purposes as a subsisting policy.'" *Carpenter's Case* was decided by the supreme court in 1842, and the opinion of the court was delivered by Mr. Justice Story. Carpenter was denied a recovery on the Providence policy—the second in order of time—because when it was issued the insured held a prior policy in the American Company, which fact was not communicated to the second underwriter; and it was insisted that, under the condition in the Providence policy against prior insurance, the policy sued on was avoided. But it was replied that the American policy had been procured by misrepresentation of material facts, and was therefore void, and, if void, that it did not constitute a prior insurance which would invalidate the second policy. This position the supreme court repudiated, upon the distinct ground that the American policy was not void, but only voidable, and until it was avoided it was to be treated as a subsisting policy. Now, singularly enough, in 1839 the same plaintiff, Carpenter, brought suit on the American policy, and the case was decided by Mr. Justice Story. *Carpenter* v. *American Ins. Co.* 1 Story, C. C. 57, Fed. Cas. No. 2,428. In course of the opinion delivered by him, he said: "We are clearly of opinion that the policy in this case, having been obtained upon a misrepresentation of material facts, is utterly void." Thus in a suit on the American policy Mr. Justice Story pronounced that policy "utterly void," while, in a subsequent suit on the Providence policy, he declared the latter invalid because the American policy was not void, but voidable. Carpenter was not allowed to recover on the first policy because it was held to be utterly void by reason of misrepresentations. He was not permitted to recover on the second because that one was held to be void by reason of the first one being only voidable, which made it, though antecedently annulled, a subsisting, outstanding prior insurance. *Clark* v. *New England Mut. F. Ins. Co. supra.* Obviously, one or the other of these conflicting decisions must be wrong. If the second policy was void, as held in *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044, because procured while there was an earlier outstanding insurance in existence when it was obtained, then, manifestly, the earlier outstanding policy was not void when written, because, if void then, it would have been void always, and would have granted no insurance at all, and therefore would have been no breach of the second policy's condition against prior undisclosed insurance, and would, consequently, not have invalidated the second policy. That the first policy was declared in the suit on the second policy not to be void is perfectly apparent, because the court explicitly determined that it was only voidable, and, being only voidable, was binding until repudiated by its underwriter. But it could not be merely voidable in 1842. If in fact it had been not only therefore repudiated by its underwriter, but, besides this, had been previously adjudicated by a court of competent jurisdiction to be utterly void on account of material misrepresentations made by the assured at the time it was issued. In 1839 this first policy had actually been declared utterly void, and not merely voidable. That decision has never been reversed, and was in effect when, in 1842, the second policy was held invalid because the first, which had been previously declared utterly void, was then treated as only voidable. If the first was void in 1839, it was equally void in 1842; and, if void at all, a subsequent decision founded

on the assumption that the first policy was simply voidable and not void,—though it had been solemnly pronounced not voidable, but utterly void,—was incontestably based upon a mistaken and indefensible premise, and is, of necessity, untenable. This is inevitable; for, if the second policy was void simply because the first was but voidable, then if the first was really void the second must have been valid. As the first had been pronounced void in 1839, it could no longer be treated as only voidable, and it ought therefore, in 1842, to have been held as furnishing no ground for questioning the validity of the second. Either this is so, or the prior decision striking down the first policy, was wholly wrong, and that policy was not void. Apart, then, from the criticism upon the reasoning of the *Carpenter Case* alluded to by Judge Dillon, the decision itself is open to the serious objection that it rests upon a palpable error as to the status of the first policy.

But it is insisted that by a second policy on the same property, effected without notice to, or the assent of, the first underwriter, the insurer may believe he has obtained an overinsurance, whereby the temptation to carelessness, if not to incendiarism, on his part, will be greatly increased, to the prejudice and probable loss of the insurer; and, to use the language employed in *Phœnix Ins. Co.* v. *Lamar*, 106 Ind. 515, if a recovery be allowed on the first policy, it "affords the opportunity for the anomalous spectacle of an insured avoiding the effect of apparent overinsurance, and compelling payment of one policy by exhibiting his own turpitude in obtaining another." But the obvious vice of this position consists in its assumption, without proof, that the assured has acted in bad faith, and necessarily has been guilty of fraud, in securing the second insurance. There is no warrant in the law for making such an assumption in the absence of evidence (*Fireman's Ins. Co.* v. *Holt*, 35 Ohio St. 192), or for its acceptation as a universal and unvarying rule. It is entirely possible,—first, that two policies on the same property, in the hands of the same individual, will not in fact create an overinsurance; secondly, that the assured may not believe that the two policies create an overinsurance, even if in fact they do; thirdly, that the second may have been procured with a view of discontinuing the first, while the loss intervenes before the actual cancelation of the earlier one; and fourthly, that, though legally chargeable with notice of the prohibition against other insurance, the assured may be in reality ignorant of its terms, and may with a view to secure additional indemnity, while in absolute good faith, procure the subsequent policy. In any one of these contingencies it would be going beyond a legitimate presumption to hold inexorably that fraud or turpitude tainted the conduct of the assured.

Nor is there any substance in the objection that an inquiry into the validity of the second policy, in a suit on the first one, opens up an investigation of a contract between other parties which is wholly collateral to the issue on trial. The first policy is valid unless the defendant establishes its invalidity by reason of some breach of a material condition, and the burden is on the defendant to show that there is a second insurance which invalidates the first; that is, that there is a second valid insurance. Hence the validity of such second policy is, in the very nature of the case, essentially and directly put in issue. That a policy of later date was issued is, of itself, not sufficient. It must be a policy which grants further insurance, and it can only grant further or other insurance in the event that it is valid. Similar inquiries are frequently involved. Thus, where a first policy prohibited any increase of risk, and the insured increased the risk by erecting a building connecting his house and barn, it was held that the first policy, being at an end, and of no effect, by reason of this breach of one of its conditions, did not avoid the second policy. The inquiry to ascertain whether the first policy was legally at an end was gone into in a suit on the second policy, and a recovery on the latter was sustained because the former was shown to be no longer in force. *Jackson* v. *Farmers' Mut. F. Ins. Co.* 5 Gray, 52. Precisely the same principle would permit the insured to show the invalidity of a second policy in his suit on the first. In each instance he would merely prove a fact upon the existence of which the validity of the contract which he seeks to enforce depends. By the terms of the York Company's policy, no waiver of any of its conditions can be shown unless such waiver was indorsed in writing on the policy. Confessedly there was no waiver of any kind written thereon. Upon its face, then, it contained an unwaived and effective condition avoiding it for prior undisclosed insurance in some other company. The prior insurance was shown,—the policy securing it was the cause of action in the suit on trial,—and the second policy was consequently void. Being void, it created no other insurance at all, and therefore did not impair the validity of the first policy. It results from the views we have expressed that there was error in the ruling which granted the defendant's prayers and rejected those of the plaintiffs. Because of this error the judgment must be reversed, and a new trial must be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

CONNECTICUT SUPREME COURT OF ERRORS.

Royal M. BASSETT *et al.*, *Appts.*,
v.
William C. ATWATER *et al.*

(65 Conn. 353.)

1. **Mandamus may properly issue to compel the officers of a corporation to call a special meeting of the stockholders** when requested in accordance with the provisions of the by-laws if a statute prescribes the mode for calling such meetings, since the statute thereby makes it the imperative duty to give the prescribed notice when properly requested.
2. **That refusal to call a meeting of the stockholders** of a corporation does not work a public wrong is not sufficient to defeat the issuance of a mandamus to compel the officers to do so.
3. **The obligation imposed by the by-laws of a corporation** upon its officers are not such as rest wholly upon contract for breach of which there is an adequate legal remedy which will prevent the issuance of a writ of mandamus to compel compliance with them.

(January 8, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in a mandamus proceeding to compel the calling of a meeting of the stockholders of the Derby Rubber Company. *Reversed.*

The facts are stated in the opinion.

Messrs. **Edwin B. Gager** and **William S. Downs,** for appellants:

When by-laws are made in pursuance of the legislative authority, expressly or impliedly granted, the by-laws themselves have the force and the effect of a public statute; for they are binding upon the corporation, binding upon the officers and stockholders, binding upon those dealing with the corporation.

Cummings v. *Webster*, 43 Me. 192; *McDermott* v. *Metropolitan Police Dist.* 25 Barb. 635; *Brick Presby. Church* v. *New York*, 5 Cow. 540; *Stuyresant* v. *New York*, 7 Cow. 591; *Evans* v. *Osgood*, 18 Me. 213; Potter, Corp §§ 72, 75; *Brent* v. *Bank of Washington*, 35 U. S. 10 Pet. 615, 9L. ed. 555; 1 Morawetz, Priv. Corp. § 491; Cook, Stock & Stockholders, § 593.

Mandamus is not now restricted to public officials.

Gilman v. *Bassett*, 33 Conn. 298; *Ward* v. *Griswoldville Mfg. Co.* 16 Conn. 593; *Fuller* v. *Academic School*, 6 Conn. 532; *Brainard* v. *Staub*, 61 Conn. 570; *American Railway-Frog Co.* v. *Haven*, 101 Mass. 398, 3 Am. Rep. 377; *Com.*, *Sellers*, v. *Phœnix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *Foster* v. *White*, 86 Ala. 469; *State*, *Rosenfeld*, v. *Einstein*, 46 N. J. L. 479; Lindley, Partn. § 1037; Spelling, Extraordinary Relief, §§ 1364, 1365.

NOTE.—*Mandamus to enforce provision of by-laws of corporation.*

The cases in which mandamus has actually issued to enforce by-laws of a corporation are very few, but there does not appear to be any decision denying the power of the court to use mandamus for such a purpose if it becomes necessary to do so.

There are several classes of cases involving the internal management of corporations, which more or less directly affect the enforcement of by-laws, in which mandamus has been used, but in none of them did the decision turn squarely upon the right to use the writ to enforce the by-law.

There are decisions concerning the right to issue the writ to compel the issuing or transfer of corporate stock, but some of these cases involve principles other than the enforcement of by-laws, and are therefore reserved for an independent note, although some of them are collected in a *note* to Burnsville Turnp. Co. v. State, McCalla (Ind.) 3 L. R. A. 265.

Decisions as to the use of the writ have also been made in regard to the reinstatement of members who have been expelled from a corporation. These cases do not alone involve the question of the enforcement of by-laws and are therefore also omitted. Some of them may be found collected in a *note* to Com., Burt, v. Union League (Pa.) 8 L. R. A. 195.

It may be stated, however, that it has been decided that when the action of the corporation in expelling a member is violative of its rules in disregard of the rights of the member, courts will interfere to compel a restoration of the franchise to him of which he has been improperly deprived. Nelson v. Board of Trade, 58 Ill. App. 399.

Other cases analogous to the subject but not directly involving the point are those in which the question of the right to mandamus to compel the inspection of books and papers of the corporation has been discussed; these cases will also form a note by themselves.

The remaining cases seem to be confined to the question of the right to mandamus to compel the calling of corporate meetings, but there are very few of these directly in point.

In Reg. v. Aldham & U. Parishes Ins. Soc. 15 Jur. 1035, 6 Eng. L. & Eq. 365, in which a mandamus was granted to compel the calling of a meeting, the act was required by statute.

So, in State, Flagg. v. Lady Bryan Min. Co. 4 Nev. 400, where a mandamus was issued to compel the calling of a meeting of the stockholders, the time of meeting was prescribed by statute and not by by-law, and the same was true in State, Sears, v. Wright, 10 Nev. 167.

So, in People, Miller, v. Cummings, 72 N. Y. 433, where a mandamus was granted to compel the calling of a meeting for an election, the duty was imposed by statute.

So, if the corporation neglects to fill up the board of directors as required by the charter the court may order an election for the purpose of doing so. *Re* Union Ins. Co. 22 Wend. 591.

Under the New York statute if the officers of a corporation neglect to hold an election as required by the by-laws, the court will by mandamus require them to do so. People, Walker, v. Albany Hospital Governors, 61 Barb. 397.

If the laws of the state require the holding of election by a religious society as provided by the by-laws, courts will compel the giving of notice for the election. People, Maclaury, v. Hart, 11 N. Y. Supp. 67.

Mandamus may compel the calling of a meeting at the time and place provided by the by-laws. Com., McCalmont, v. Keim, 15 Phila. 1, 33 Legal Int. 32.

Mandamus will lie to compel the holding of an election at the time prescribed by the by-laws. Mottu v. Primrose, 23 Md. 482. H. P. F.

If the by-law gave room for discretion it would be quite another case, but the duty of the president and secretary under this by law comes within the most approved rule of imperative ministerial duty.

Mississippi v. *Johnston*, 71 U. S. 4 Wall. 498, 18 L. ed. 440; *Flournoy* v. *Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Reg.* v. *Aldham & U. Parishes Ins. Soc.* 6 Eng. L. & Eq. 365; *People, Miller*, v. *Cummings*, 72 N. Y. 433.

Messrs. **Henry Stoddard** and **V. Munger**, for appellees:

The applicant must have a legal right to the performance of some duty of a public, and not merely private, character.

Shortt, Mandamus, chap. 2, *227; *Parrott* v. *Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439; *Tobey* v. *Hakes*, 54 Conn. 274; *Chumasero* v. *Potts*, 2 Mont. 268; *State* v. *Republican River Bridge Co.* 20 Kan. 404; *State, Payser*, v. *Salem Church Trustees*, 114 Ind. 390; Merrill, Mandamus, §§ 16, 21; Spelling, Extraordinary Relief, §§ 13, 79; *Gormley* v. *Day*, 114 Ill. 185.

The by-laws create only a contract relation between the stockholders of the corporation.

1 Potter, Corp. § 76; Bacon, Ben. Soc. §§ 79, 80, 91; Morawetz, Priv. Corp. § 491; *Flint* v. *Pierce*, 99 Mass. 70, 96 Am. Dec. 691; *St. Mary's Beneficial Soc.* v. *Burford*, 70 Pa. 324; *Bergman* v. *St. Paul Mut. Bldg. Asso. No. 1*, 29 Minn. 278; *Austin* v. *Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Belfast & M. R. Co.* v. *Belfast*, 77 Me. 449; Beach, Priv. Corp. § 329; *People* v. *New York, L. E. & W. R. Co.* 104 N. Y. 67, 58 Am. Rep. 484; *State* v. *New Haven & N. Co.* 45 Conn. 343; *Burnsville Turnp. Co.* v. *State, McCalla* (Ind.) 3 L. R. A. 265, note.

Since this writ is only issued in furtherance of justice, those who seek its assistance must satisfy the court that their application is bona fide and for a proper purpose.

Merrill, Mandamus, § 68; *Hale* v. *Risley*, 69 Mich. 596; *Com.* v. *Empire Pass. R. Co.* 134 Pa. 237; *People, Hatch*, v. *Lake Shore & M. S. R. Co.* 11 Hun, 1; *State, Rosenfeld*, v. *Einstein*, 46 N. J. L. 479; *People* v. *Walker*, 9 Mich. 328; *Lyon* v. *American Screw Co.* 16 R. I. 476; *George's Creek Coal & I. Co.* v. *Allegany County Comrs.* 59 Md. 257; *State, McClellan*, v. *Graves*, 19 Md. 374, 81 Am. Dec. 639; *Effingham* v. *Hamilton*, 68 Miss. 523; *Queen* v. *Liverpool, M. & N.-upon-T. R. Co.* 21 L. J. Q. B. 284; Shortt. Mandamus, *251.

Mandamus will not be granted against the spirit of the law, although the duty to be enforced is within its strict letter.

Merrill, Mandamus, § 71; *People, Wood*, v. *Brooklyn Assessors*, 137 N. Y. 201; *State, McBride*, v. *Phillips County Comrs.* 26 Kan. 419; *Wiedwald* v. *Dodson*, 95 Cal. 450.

The applicant must show that he has been deprived of a right which will result to his pecuniary loss.

Merrill, Mandamus, § 66; *Pratt* v. *Meriden Cutlery Co.* 35 Conn. 41; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Chesebro* v. *Babcock*, 59 Conn. 214.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiffs are the owners and holders of more than 200 shares—indeed, of a majority of all the shares—of the capital stock of the Derby Rubber Company, a joint-stock corporation formed under the laws of this state, and located at Derby. The defendant William C. Atwater is the president, and William F. Askam is the secretary, of said corporation. One of the by-laws (the sixth) of said corporation provides, in respect to annual meetings, that "a written or printed notice of such annual meeting, and also of each special meeting of said corporation, specifying the place, day, and hour of such meeting, shall be given by the president or secretary to each stockholder by leaving it with him or at his residence or usual place of business, or by depositing it in some post office for transmission by mail, postage paid, addressed to him at his last known place of residence, at least five days before said meeting." Another by-law (the seventh) enacts that "special meetings of the stockholders of said corporation may be held at any time upon the notice hereinbefore specified, and the secretary or president shall give such notice upon the request in writing of stockholders holding 200 shares of the capital stock of said corporation calling for such special meeting, and shall specify therein the object and purpose of such meeting." On the 4th day of April, 1894, the plaintiffs united in a written request to the defendants, asking them to call a special meeting of the stockholders of said corporation specifying therein the object and purpose of such meeting, and also naming a place, a day, and an hour for the holding of the same, which request was on said day placed in the hands of each of said defendants. But the defendants refused to call any such meeting. Thereupon the plaintiffs made application to the superior court for a writ of peremptory mandamus requiring and commanding the defendants to call such a special meeting. An alternative writ was issued, and duly served; and on the return day the defendants appeared in court, and moved to quash the said alternative writ, alleging various reasons for such motion. The court found the application and alternative writ to be insufficient in the law, granted the motion, and quashed the alternative writ. The plaintiffs appealed.

Mandamus, although it is an extraordinary legal remedy, is in the nature of an equitable interference supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established, and no other sufficient means exist for enforcing it. When the object sought can be equally well obtained by other means, as by an action, or by some other form of proceeding, then mandamus will not lie. Thus, the enforcement of merely private obligations, such as those arising from contracts, are not within its scope. The essential conditions without which the writ will not be issued to enforce the performance of a ministerial duty are: (1) That the party against whom the writ is sought must be under an obligation, imposed by law, to perform some such duty,—that is, a duty in respect to the performance of which he may not exercise any discretion; (2) that the party applying for the writ has a clear, legal right to have the duty performed; and (3) that there is no other sufficient remedy. In the present case the alternative writ, in point of form, contains allegations which show that all these conditions exist in

favor of the plaintiffs; and as these are admitted by the motion to quash to be true, we are to inquire whether any of the allegations are insufficient in the law. The superior court found the insufficiency in the fact that the duty sought to be enforced was one imposed by the by-laws of the corporation. In its memorandum of decision that court said: "The by-laws in question do not have the force or dignity of public law. Their office is a private one, and the duties they impose are private, not public, in their nature. The individuals concerned, and not the public at large, are interested in their obedience. Disobedience of them works a private injury, not a public wrong. Breach of the duties they impose is a breach of private duty, and not of a public trust. . . . The writ of mandamus, therefore, is not a remedy appropriate to the circumstances the complaint discloses." This memorandum seems to indicate that the superior court was of opinion that a writ of mandamus was a remedy to be used only in cases where the duty sought to be enforced was one imposed by public law, and one the nonperformance of which worked a public wrong; and that the alternative writ in this case was defective in both these particulars. But is this true? To speak first of the defect last mentioned, is it true that a mandamus is to issue only to enforce a duty in the performance of which the public at large has such an interest that its nonperformance is in the nature of a public wrong? Perhaps the earlier cases —some of them—mentioned this as a necessary requirement. But even then it was not strictly insisted upon. The writ was often issued in cases where the question in controversy was rather upon some matter of private right than upon a public one. The courts then followed the rule given by Lord Mansfield in *Rex* v. *Barker*, 3 Burr. 1267, that "the value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." *Rex* v. *Turkey Co.* 2 Burr. 943; *Rex* v. *Wildman*, 2 Strange, 879; *White's Case*, 2 Ld. Raym. 1004; *Case of Schrixen and Turner*, 2 Strange, 832; *Dacosta* v. *Russia Co.* Id. 783; *Anonymous*, 1 Strange, 696. In this jurisdiction this feature is substantially disregarded, and a mandamus is issued in cases where the duty is one imposed by public authority, and its nonperformance operates only as a private wrong. Thus, a justice of the peace may be required to correct his record at the application of one who has only a private interest in it. *Smith* v. *Moore*, 38 Conn. 105. A judge of probate may be required to amend his record so as to enable a party to take an appeal, though no person in the world is interested in the suit but the appellant. *Taylor* v. *Gillette*, 52 Conn. 216; *Elderkin's Appeal*, 49 Conn. 69. See also *Daly* v. *Dimock*, 55 Conn. 579; *Gilman* v. *Bassett*, 33 Conn. 298; *American Casualty Ins. & S. Co.* v. *Fyler*, 60 Conn. 448; *Brainard* v. *Staub*, 61 Conn. 570. We understand this to be the general doctrine in America and England at the present day. Mr. High, in the very first section of his valuable work on Mandamus, says: "The object of a mandamus is to prevent disorder from a failure of justice and a defect of police, and it should be granted in all cases where the law has established no specific remedy, and where in justice there should be one. And the value of the matter in issue, or the degree of its importance to the public, should not be too scrupulously weighed." And in the 10th section: "The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, who find themselves without an appropriate remedy. And whenever the conditions above noticed coexist, the right to the extraordinary aid of a mandamus may be regarded as to that extent *ex debito justitiæ*." We think the alternative writ was not insufficient for such reason. It is not to be tolerated that where the law in precise terms directs the performance of an act it is incapable or unwilling to enforce obedience to its mandate because only one person, or a few persons, are interested in securing such obedience. *King* v. *Justices of Kent*, 14 East, 395; *Rex* v. *Archbishop of Canterbury*, 15 East, 117; *Rex* v. *Bishop of Chester*, 1 T. R. 396; *Rex* v. *Severn & W. R. Co.* 2 Barn. & Ald. 646; *People* v. *Albany Supers.* 12 Johns. 415; *Bright* v. *Chenango Supers.* 18 Johns. 242; High, Extr. Legal Rem. § 350; 14 Am. & Eng. Enc. Law, p. 102.

The other defect indicated by the superior court, and the one doubtless which had the greatest weight, seems to have been that the duty imposed on the defendants by the corporate by-laws to call special meetings was a duty imposed by a mere contract obligation, and not by law. The memorandum of decision from which we have quoted uses the expression "public law." We do not understand the court by that expression to intend anything more than to distinguish between the law—*i. e.*, the law of the land—and a mere contract obligation. If these by-laws impose no duty on the defendants other than one growing out of a contract, then it is certain that a writ of mandamus is not the proper remedy for a neglect or refusal to obey them; and for the reason, if for no other, that for the nonperformance of such a duty there is always another adequate legal remedy. *State, Ross County Comrs.*, v. *Zanesville & M. Turnp. Road Co.* 16 Ohio St. 308. We are brought, then, to the inquiry: Do these by-laws impose no obligation except such as rests wholly upon contract, and which involves no question of trust or official duty? Two or three observations may tend to elucidate this inquiry. In the first place, all corporations are the creatures of public law. Then, the duty which these by-laws command is a ministerial one. It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose. *American Casualty Ins. & S. Co.* v. *Fyler*, 60 Conn. 448; *Brainard* v. *Staub*, 61 Conn. 570. And there is no adequate remedy to enforce this duty other than this writ; at least no other one has been suggested. An action on the case for damages, if that would lie, which is by no means certain, would not be an adequate remedy, for that would bring only pecuniary compensation, and the plaintiffs are entitled to have the very duty performed. *Fremont* v. *Crip-*

pen, 10 Cal. 211, 70 Am. Dec. 711; *Re Williamsburgh Trustees*, 1 Barb. 34; *Etheridge* v. *Hall*, 7 Port. (Ala.) 47; *People, Moulton*, v. *New York*, 10 Wend. 395; *Hull* v. *Oneida County Supers.* 19 Johns. 259, 10 Am. Dec. 223; *McCullough* v. *Brooklyn*, 23 Wend. 458; *People, Livingston*, v. *Taylor*, 1 Abb. Pr. N. S. 200; Spelling, Extraordinary Relief, § 1375.

The equitable proceeding for specific performance obviously could not be brought, for that lies only where there is a contract obligation. It may be that an action in the nature of a bill in equity could be also maintained by one of the stockholders in behalf of the corporation, to compel the president and secretary to perform the duties of their trust. Morawetz, Priv. Corp. § 273 But the existence of an equitable remedy is never a bar to the issuing of a mandamus. Cook, Stock & Stockholders, § 593. The by-laws of a corporation doubtless express – as does its charter—contract relations, but it is a contract between the corporation and each of the stockholders, and not one of the stockholders with one another. The officers and directors of a corporation hold a position of trust. Especially is this so as to officers who are chosen by the command of the statute. Section 1950 of the General Statutes requires all joint-stock corporations to elect one of its directors to be the president, and also to elect a secretary; and, although these officers are chosen by the corporation, their duties may be, and often are, prescribed by the general laws of the state. Duties so prescribed, when of a ministerial character, may always be enforced by mandamus. Gen. Stat. § 1945, after providing for the calling of the first meeting of a joint-stock corporation by any two of the corporators, proceeds to declare that "a written or printed notice of each subsequent meeting of such corporation, specifying the place, day, and hour of such meeting, shall be given by the president or secretary to each stockholder, by leaving it with him, or at his residence or usual place of business, or by depositing it in some postoffice for transmission by mail, postage paid, addressed to him at his last known place of residence at least five days before said meeting." The by-laws of the Derby Rubber Company provide that the president or secretary shall give such notice of a special meeting at any time upon the written request of the holders of 200 shares of the stock of the company. The statute, by establishing the only mode in which special meetings may be called, makes it the imperative duty of the president or secretary to give the prescribed notice whenever it is properly required. It is left to each corporation to determine for itself under what circumstances a special meeting is to be held. The by-law which is relied on in this case gives the right to demand one to the holders of 200 shares of stock. Upon such a demand the duty imposed by the statute upon the president or secretary becomes an active one. It is a duty created by the laws of the state, and therefore properly enforceable by the courts of the state, although only called into exercise through the by-laws of the corporation. Morawetz, Priv. Corp. §§ 273, 491; Cook, Stock & Stockholders, § 593; *People, Walker*, v. *Albany Hospital Governors*, 61 Barb. 397; *Cummings* v. *Webster*, 43 Me. 192, 197; Potter, Corp. §§ 72, 75; *McDermott* v. *Metropolitan Police Dist. Bd.* 25 Barb. 635; *People, Miller*, v. *Cummings*, 72 N. Y. 433; *Mottu* v. *Primrose*, 23 Md. 482; 14 Am. & Eng. Enc. Law, p. 155; *Reg.* v. *Aldham & U. Parishes Ins. Soc.* 15 Jur. 1035, 6 Eng. L. & Eq. 365.

We think the superior court erred in its judgment. Various other reasons were presented in the motion to quash. As these were not passed upon by the trial court, we have not considered them. Leave to amend the alternative writ having been granted to the plaintiffs if they should see fit to do so, we suppose all ground for these reasons will be removed. There is error.

The judgment is set aside, and the cause is remanded to the superior court to be proceeded with according to law.

In this opinion the other Judges concurred, except **Hammersley, J.**, who dissented.

INDIANA SUPREME COURT.

James W. FESLER Clerk of Court, *et al.*, *Appts.*,
v.
Alembert W. BRAYTON.

(.....Ind.....)

1. **An injunction against proceeding to an election** under an alleged unconstitutional statute will not be granted where that is the only law that has not been repealed or adjudged unconstitutional under which an election of members of the legislature can be had.
2. **A constitutional amendment** repeals existing legislative enactments which are inconsistent with it.
3. **A probability that more wrong will be done** than prevented by an injunction prayed for will prevent granting it.

(May 15, 1896.)

APPEAL by defendants from a judgment of the Superior Court for Marion County in favor of plaintiff in a proceeding to enjoin defendants from holding an election under the provisions of the apportionment act of 1885. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hawkins & Smith** for appellants.

Messrs. **Miller, Winter, & Elam, M. E. Forkner,** and **A. C. Harris** for appellee.

McCabe, J., delivered the opinion of the court:

The appellee sued the appellants in the superior court to enjoin them from proceeding to hold the election in November for members of the next general assembly under the provi-

NOTE.—As to injunction against proceeding under an unconstitutional statute respecting elections, see also Fletcher v. Tuttle (Ill.) 25 L. R. A. 143, and *note*; Green v. Mills (C. C. App. 4th C.) 30 L. R. A. 90.

See also 33 L. R. A. 582; 47 L. R. A. 393.

sions of the apportionment act approved March 6, 1885. It was alleged that the appellants, being the clerk of the circuit court, the auditor, and the sheriff of Marion county, Indiana were threatening to give notice and proceed to an election under said act, which act, it was alleged, is unconstitutional, for the same reasons that the apportionment acts of 1879, 1891, 1893, and 1895 were adjudged by this court to be unconstitutional, in *Parker* v. *State, Powell*, 133 Ind. 178, and 212, 18 L. R. A. 567 and 579, and in *Denny* v. *State, Basler* (Ind.) 31 L. R. A. 726. The superior court overruled a demurrer to the complaint for want of sufficient facts, and the defendants declining to plead over, and standing upon their demurrer, the court rendered judgment perpetually enjoining said officers from proceeding to hold said election under and pursuant to said act. The ruling upon the demurrer is the only error assigned.

A motion to dismiss the appeal is made by Alonzo G. Smith, Charles A. Korbly, and John W. Kern, as *amici curiæ*, and on behalf of certain other parties who are not parties to the action, and who, it is alleged, would be injuriously affected by the litigation. In support of this motion is filed an affidavit of Sterling R. Holt, to prove the charge made in the motion that "the controversy is not real; that all the parties thereto are agreed in principle and purpose concerning the same; and that said action, from its inception, has been, and is, collusive, and the result of collusion between the parties thereto, all of whom are desirous of obtaining from this court an affirmance of the judgment appealed from, there being no adverse interest represented." If these facts were conceded or clearly shown by the affidavits and record, we should feel compelled to sustain the motion, as the law is well settled that such a litigation may and ought to be regarded as a contempt of court. *Hoover* v. *Hanna*, 3 Blackf. 48; *Brewington* v. *Lowe*, 1 Ind. 21, 48 Am. Dec. 349; *Hotchkiss* v. *Jones*, 4 Ind. 260; *Smith* v. *Junction R. Co.* 29 Ind. 546; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; *Lord* v. *Veazie*, 49 U. S. 8 How. 251, 12 L. ed. 1067; *State, Begeman*, v. *Napton*, 10 Mont. 369; *Haley* v. *Eureka County Bank*, 21 Nev. 127, 12 L. R. A. 815. Counter affidavits have been filed by the parties and counsel in opposition to the charge of collusion. Other circumstances have occurred in this court tending to overcome the charge. But we deem the merits of the controversy of so much importance to the people that we do not pass upon the conflict raised by the affidavits, and will pass the question of dismissal without decision. The brief on behalf of the appellants makes a point for reversal which is entitled to much consideration, namely, it is therein contended with much apparent earnestness that "the act of 1885 was accepted by the people, and acted upon without question, and three successive general assemblies were elected under it, before any further legislation upon the subject was attempted, and before any question of its constitutionality was raised, and . . . no attempt was ever made or suggested to test its validity or constitutionality in the courts. The law having been accepted and acted upon, as it has been without question by the people . . . we insist that it is now too late to raise the question as to its validity, upon the grounds stated in the complaint." This contention is not without weight or merit, especially as this is an attempt to invoke the equity powers of the court by injunction. "Equity aids the vigilant, not those who slumber on their rights. . . . The principle thus used as a practical rule controlling and restricting the award of reliefs is designated to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee. . . . 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence.'" 1 Pom. Eq. Jur. 1st ed. §§ 418, 419; *Brashear* v. *Madison*, 142 Ind. 685; *Jones* v. *Cullen*, Id. 335; *Rumsey* v. *People*, 19 N. Y. 41.

In addition to the fact that the appellee does not point out any other apportionment act than that of 1885, or claim that any such exists under which an election may be held, we may observe that he agrees with the contention of the *amici curiæ* that all legislative apportionment acts previous to that of 1879, under the present Constitution, including the apportionment act under which that Constitution required the first and second legislative elections to be held, were required to be, and were, based on an enumeration exclusively of the white male inhabitants of the state. Const. 1816, art. 3, § 2; Rev. Stat. 1843, p. 44; Const. 1851, art. 4, §§ 3–5; Rev. Stat. 1852, pp. 48, 49; Enumeration Act 1865, Acts 1865, p. 41 (Rev. Stat. 1881, §§ 4780, 4798; Rev. Stat. 1894, §§ 6351, 6369); Supp. Enumeration Act 1877, Acts 1877, p. 59 (Rev. Stat. 1881, § 4799; Rev. Stat. 1894, § 6370). By the amendment to the Constitution of March 14, 1881, the sections of the Constitution above referred to were so amended as to require such enumerations and apportionments to be based on the number of male inhabitants of the state over the age of twenty-one years, both white and colored. Rev. Stat. 1894, §§ 99–101 (Rev. Stat. 1881, §§ 99–101). All the apportionment acts, therefore, which preceded that of 1879, being based exclusively on the white male inhabitants of the state above the age of twenty-one years, and leaving out all colored males of that age, are wholly inconsistent with the requirements of the Constitution since its amendment above mentioned, requiring all colored as well as white males, over twenty-one years of age, to be represented in the apportionment for legislative purposes. It is settled law in this and other states that a constitutional amendment inconsistent with previous constitutional provisions and legislative enactments operates to repeal such constitutional provisions and legislative enactments. *Griebel* v. *State, Nieger*, 111 Ind. 369, and

authorities there cited; *Pierce* v. *Delamater*, 1 N. Y. 17; Potter's Dwarr. Stat. 113; Sedgw. Stat. Const. L. 107.

The learned counsel for appellee not only frankly concede, but earnestly insist, that all apportionment acts prior to that of 1879 have been repealed by the above-mentioned constitutional amendment, and that the only act not so repealed or declared by this court to be unconstitutional is that of 1885; so that it is undeniable that all legislative apportionment acts previous to that of 1879 have been effectively repealed. All apportionment acts subsequent to that of 1885,as well as the act of 1879, have been adjudged unconstitutional by this court. *Parker* v. *State, Powell*, 133 Ind. 178, and 212, 18 L. R. A. 567 and 579; *Denny* v. *State, Basler* (Ind.) 31 L. R. A. 726. There are several reasons why the act of 1885 has not been repealed: First. There has been no constitutional amendment, either state or Federal, adopted since its enactment, inconsistent with its provisions. Second. The several apportionment acts of 1891, 1893, and 1895, assuming to supersede it, have proved unconstitutional, the repeal in each one of these acts falls to the ground, by the settled adjudication of this court, because it appears from the several repealing clauses that it was only intended to repeal the former apportionment acts, upon the supposition that the new act was to take the place of the former acts upon the subject. *Denny* v. *State, Basler, supra; State, Law*, v. *Blend*, 121 Ind. 514, and cases there cited. And a third reason is that it is justly held in *Denny* v. *State, Basler, supra*, that the legislature may not wantonly sweep away all means of electing another legislature.

Thus, we are confronted with the preliminary question to be determined before we enter upon the investigation of the alleged unconstitutionality of the apportionment act of 1885; and that question is: Can the appellee have any right to invoke the power of this court to dissolve the state government? Can any citizen of this state have the right to invoke the power of the judiciary by injunction to put an end to the government that protects his life, his liberty, and his property? The proposition the appellee presents, stripped of all subterfuges, is that, unless the governor shall convene the legislature in extra session, there shall be no more elections of legislatures in this state, under our Constitution. But suppose we respond to the demand of the appellee, and, having entered the field of investigation, find the act of 1885 defective, and strike it down, and start the people of this state on a voyage that may lead them into the troubled sea of anarchy; and suppose, even, that the governor shall forego his resolution not to call an extra session of the legislature, and should actually convene it, and it should refuse to act, or, consenting, should pass another act as bad as the one passed in 1885, and which this court should be compelled to declare unconstitutional. The government of the state would be at an end. As was said in *Denny* v. *State, Basler, supra*, the people in the Constitution have provided that all officers except members of the legislature shall hold their respective offices during the term for which they were elected, and until their successors are elected and qualified. We may notice, in passing, that such provision points unerringly to the design of the framers of the Constitution that the functions of government, executive and administrative, should not come to an end for want of persons authorized to perform them. But as to members of the general assembly, for important and obvious reasons, a different rule was provided. That rule is that each member's official career and authority ends with the end of the term for which he is elected, whether his successor is elected or not. Therefore, if there is no law in force for the election of a legislature, and the existing legislature expires without enacting such a law, the legislative department of the state government is at an end. The other two departments must soon expire if there be no legislative department. A careful study of the whole subject convinces us that it was the intention of the framers of the supreme law to impress on its every feature the principle of perpetuity in the government. If the scheme of the appellee may be effectuated, that noble aspiration of the founders of our state government may be defeated at the suit of a single individual, by the invocation of the power they vested in the judiciary. As before observed, if the legislative department may be thus annihilated, the other two departments must soon perish, for want of sustenance by the legislative department. And, all departments being thus extinguished, the Constitution also must die, because in that event society must be reorganized, and the Constitution would have no force unless adopted by the new organization. As well ask this court to overthrow, not one provision of the Constitution, but every provision of the whole Constitution. The case before us, though undoubtedly not so intended, is, in reality, an attack upon the integrity of the state government. This court, while free to consider and decide causes at such times and in such manner as to it shall seem right and proper, under the Constitution and the law, yet can never be authorized so to act as to put an end to its own existence, or to the existence of any co-ordinate branch of the state government. Any law, however defective, must stand so long as such law is necessary for the continued movement of the political organization formed by the people. It was in this spirit that the framers of the Constitution provided in article 4, § 5, "that the first and second elections of members of the general assembly, under this Constitution, shall be according to the apportionment last made by the general assembly before the adoption of this Constitution." A reference to the apportionment so confirmed will show that it was not constructed in accordance with the provisions of the supreme law itself; and yet it is confirmed and adopted for the simple and all-sufficient reason that some law was necessary under which a legislature might be chosen. Even a defective law would be upheld, rather than that there should be no law for the election of a general assembly. The Constitution of the United States itself would compel the recognition of such a law for the election of a legislature as valid, at least until another could be enacted to take its place. In article 4, § 4, of the Federal Constitution, it is provided that "the

United States shall guarantee to every state in this Union a republican form of government;" and it is impossible for us to conceive of a republican form of government without the election by the people of representatives in the general assembly.

The principle which required that the last apportionment law under our old Constitution should be held valid, and which requires also that the law of 1885 should be held valid, notwithstanding any constitutional defect which might exist in either, is not essentially different from the principle in accordance with which invalid proceedings in the government of municipalities are legalized by acts of the legislature, namely, that the life of the municipality, in the one case, and of the state, in the other, should be preserved. The state cannot die; and neither this court nor any other tribunal is authorized to do aught that may endanger its existence. In like manner, in a constitutional monarchy, it is not admitted that any interval of time exists between the death of one ruler and the accession of another. The cry of the herald is the voice of the law: "The king is dead! Long live the king!" So here, also, when a great president was stricken down by the hand of an assassin, there was heard, in the voice of one destined to be his successor, that sublime and inspiring declaration, "The government at Washington still lives!" It will not be admitted, either in the nation or in the state, that the government or any of its co-ordinate branches shall ever cease to exist. The machinery set in motion by the people for the creation of the legislature, the executive, and the courts, is, so to say, a living organism, and can never cease to act. Least of all should the judiciary, the guardian of the Constitution, aid in destroying the government which has its very being in the Constitution.

The learned counsel for the appellee do not deny that these consequences would follow the overthrow of the act of 1885 in case of failure of the governor to convene the legislature in time to pass a new apportionment act previous to the approaching November election, or, in case of his convening that body, it should fail to pass a valid apportionment act; but some of them insist that the idea that the executive or legislature either will fail to do their duty is "unthinkable." We presume counsel mean by this word that it is impossible to grasp the idea with our thoughts that the governor will or might fail to convene the legislature in time, or that the legislature might fail to pass a valid apportionment law in time for the election in November next. We find no difficulty whatever in grasping the idea. The like has happened before. Both the governor and the legislature have heretofore failed in duty as to apportionment laws in a marked and startling manner, as we shall see further on. But if we are bound to presume that the governor and the legislature will perform the duty resting on each in case the act of 1885 is void and out of date, then there is no cause for interference by a court of equity by the strong arm of injunction. The court being bound not to think the unthinkable idea that those departments will fail in their duty, there is no necessity for interference by a court of equity. There must be such a necessity, or no right to such relief can be demanded. See the authorities cited further on as to this point. See also 10 Am. & Eng. Enc. Law, pp. 779–782, and authorities there cited in notes, and especially note 1, beginning on page 779. Others of appellee's learned counsel urge that we must enter the field of investigation of the unconstitutionality of the act regardless of consequences; that is, as we interpret their contention, we are bound to go forward, even though we dash the people over the precipice into the bottomless pit of anarchy, and let the consequences take care of themselves. Such a doctrine is utterly inadmissible. It is an established principle of equity jurisprudence that, if there is "a probability that more wrong will be done than prevented by the injunction prayed for, it will not be granted." 10 Am. & Eng. Enc. Law, p. 783, and authorities cited.

It is a matter of current history and common notoriety, as also appears by the record, that the persons who have finally consented to lend this suit their sanction and support saw clearly the perilous sea into which it was likely to lead the ship of state, and entered their solemn and patriotic protests, and yielded only such consent on a formal refusal of the executive of the state to a visiting committee requesting him to call an extra session of the legislature to pass an apportionment act. What right can the appellee have to invoke the power of this court by injunction to do what he cannot do directly, namely, to coerce the governor to exercise a discretionary power vested in him? One department of the government cannot coerce another to exercise a mere discretionary power. *Hovey* v. *State, Schuck*, 127 Ind. 588, 11 L. R. A. 763. He has already refused to act. This suit, therefore, means to end the state government or to coerce the governor.

The preliminary question confronting us is very different, indeed, from that presented in either of the cases of *Parker* v. *State, Powell, supra*, or *Denny* v. *State, Basler, supra*. In each of those cases the plaintiff, in his complaint, showed that the officers were threatening to proceed under an invalid law, and refusing to proceed under a valid law. Any citizen has a right to demand that public officers shall desist from proceeding under an invalid law, and proceed under a valid law, if there is such valid law, to hold elections. But that is a very different thing from a demand that no election shall be held at all, and that the wheels of government shall stop. Both of the apportionment cases above referred to proceeded upon the idea, and in fact left standing an apportionment act under which elections might be held in case the other departments of the government failed to supply a better one. This court, in *Denny* v. *State, Basler, supra*, in the principal opinion by Howard, J., said: "This court, in the case of *Parker* v. *State, Powell*, . . . expressly held that the constitutionality of the . . . act of 1885 was not before the court for adjudication, and accordingly refrained from making any decision in regard to it. Neither has the constitutionality of the apportionment act of 1885 been questioned in the case at bar. Consequently, that act is the last, and perhaps the only, expression of the legislative will upon the subject of apportionment,

and under which senators and representatives may be chosen at the general election of 1896, unless the governor should see fit to call a special session of the legislature to pass a new apportionment law." And in the concurring opinion of Hackney, Ch. J., it was said: "The act of 1885 stands upon the statute book unchallenged. . . . Whether that act shall continue unquestioned; whether the people will follow the custom in such cases, and make their election under that law; or whether that custom will be abandoned, and public officers will refuse to follow it, and thereby defeat the constitutional object to convene an assembly in 1897,—depends upon the wisdom and patriotism of the people." These words in both opinions are no idle words. They are full of meaning and relative significance. They are no mere *obiter dicta;* but they express the kernel of the principle that gave the plaintiff in that case a standing in court entitling him to invoke the power of the judiciary to declare the act of 1895 unconstitutional, and that gave the defendants the right to invoke the same power to declare the act of 1893 unconstitutional. These words show that this court did not mean to accord a hearing to one who invoked its power to strike down the last barrier between the people and helpless and almost hopeless anarchy, as is attempted to be done in this case. That holding was in accord with the holding in *Parker* v. *State, Powell, supra,* which was strictly followed in the *Denny Case.* In the *Parker Case* it was said on that point by Elliott, J., in his dissenting opinion, that "if, however, it be conceded that it is necessary to decide such questions and to adjudge either of those acts void, then it is indispensably necessary to designate a valid law, either in the statutes or the Constitution, under which legislators can be chosen, for it is inconceivable that no law exists providing for legislative elections." With this proposition the majority of the court did not disagree. It will be thus seen that the principle that gave the complainant a standing in each of those cases was that the relief demanded by him did not strike down all or the last and only law providing for legislative elections.

We are not legally called upon to decide whether the act of 1885 is constitutional or unconstitutional until the preliminary question first mentioned is decided in favor of the appellee, namely, Has he a right to invoke that power vested in the judiciary? It was further said upon this point by Elliott, J., in his concurring opinion in *Parker* v. *State, Powell,* that "constitutional questions will not be decided unless the party demanding their decision makes it evident that he has a right to require the court to decide them." To the same effect is *Henderson* v. *State, Stout,* 137 Ind. 552, 24 L. R. A. 469. In *Laughlin* v. *Lamasco, City,* 6 Ind. at page 228, it is said: "Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful, it should be exercised with great discretion, and only upon necessity." In no case can injunctive relief be awarded except to protect some right of the complainant. *Edwards* v. *Haverstick,* 47 Ind. 138; *Alexander* v. *Mullen,* 42 Ind. 398; *Sutherland* v. *Lagro & M. Pl. Road Co.* 19 Ind. 192; *McCowan* v. *Whitesides,* 31 Ind. 235. The appellee's complaint, instead of showing that he has a right to invoke the power of this court to strike down the last existing apportionment law, shows the direct contrary. That he has the right to invoke the power of this court, if, indeed, it possesses that power, to knock out the keystone of the arch that upholds the fair fabric of the state government, is self-evidently untrue. As already observed, the Constitution, as originally adopted, provided that the previous apportionment law should continue for the first and second legislative elections thereafter. This discloses the intention clearly enough that there should never be a time when there should be no apportionment law under which legislative elections might be held. Both the first and second legislatures elected thereafter failed to obey the mandate of the new Constitution to pass the apportionment law. But the third legislature was elected by the people without question under the old apportionment law, which was, by the literal words of the Constitution, only to last for the first and second legislative elections under the new Constitution, the old law having been framed before the new Constitution, and was not framed on the lines prescribed therein for apportionment acts. That third legislature was that of 1857, and it passed the first apportionment act under the new Constitution; and, though that instrument commanded that body to pass one every six years, yet it failed to pass another for ten years thereafter, the next one being that of 1867. And we note that the governor also failed to convene the legislature in extra session, if that was his duty, for the purpose of passing an apportionment law, on the occasion of each one of the legislatve failures above mentioned. And the legislature has failed on four other occasions to perform this duty, namely, in 1879, 1891, 1893, and in 1895, by passing unconstitutional and void acts. In view of these historical facts, it does not look as if the ideas of such failures of duty on the part of the executive and legislative departments of the government were altogether unthinkable.

It is again urged that if we may not respond to the demand of the appellee, to investigate the unconstitutionality of the act of 1885, because it is the only one in existence, there is no remedy against unconstitutional apportionment acts. Not by any means. We do not mean to depart in the least degree from the rigid rule laid down in *Parker* v. *State, Powell,* and *Denny* v. *State, Basler, supra,* but, on the contrary, we reaffirm them in their broadest terms. When the next apportionment act is passed, we will be free to inquire into its constitutionality, because the act of 1885 will stand until a valid law takes its place. This is the theory upon which the Constitution is built. While the framers of that sacred instrument, and the voters who adopted it, were all still living, they construed it to mean that the existing apportionment law, whether good or bad, in or out of date, must continue in force until a new one is enacted to take its place, and that the government shall not be brought to an untimely end because of the failure of the legislature to perform the duty enjoined upon it by the Constitution. Suppose the third legislative election under the new Constitution was about

to take place, and that some one, fonder of curiosities and of tinkering with a loaded gun than of the safety of himself and others, had brought suit to enjoin the holding of that election, on the ground that there was no apportionment law, the legislature having failed to enact one, and the one provided in the Constitution having expired by the express terms of the Constitution; the courts, and especially this court wherein then sat those who had helped to make the new Constitution, would have answered such demand by saying that it was no more intended by its makers that there should ever come a time under that instrument when there should be no law in existence authorizing legislative elections than that the Creator designed that in Him man should live, move, and have his being without breath. The just fame of its authors would be greatly marred if it was contemplated by them that by the failure of any officer or body of officers under that Constitution to discharge the trust reposed in them by the people, and perform the duty enjoined by its provisions, a time might come when we would have no law in existence, authorizing legislative elections, and the people have no other security against approaching anarchy, chaos, and revolution, than a mere trust in good luck, or the good will of any man or set of men. If these great men made such a rope of sand out of the Constitution their fame has been undeserved. But the contrary is true. They never intended the people should have no other security against anarchy and revolution than good luck.

Our conclusion is that as the act of 1885 is the only law that has not been repealed or adjudged unconstitutional under which an election of members of the legislature can be held in November, 1896, the appellee has no right to invoke the powers of the courts to declare it unconstitutional; and that, therefore, the complaint did not state facts sufficient to constitute a cause of action; and that the superior court erred in overruling the demurrer thereto.

The judgment is reversed, with instructions to sustain the demurrer in the complaint.

Jordan, J., concurring:

I concur in the result reached in this appeal, but not in all the reasoning of the opinion of Judge McCabe. It may be conceded that the apportionment act of 1885 is replete with the evils that were condemned by this court under the decisions in the cases of *Parker* v. *State, Powell*, 133 Ind. 178 and 212, 18 L. R. A. 567 and 579, and *Denny* v. *State, Basler* (at this term) (Ind.) 31 L. R. A. 726. I am of the opinion, however, that the appellee, who seemingly brought this action in the lower court in behalf of himself and other electors of the state, has not timely exercised the right to assail the validity of the statute in controversy, and for that reason, at least, his case is devoid of equity; and, under the circumstances, he is not in a condition to demand that the court shall interpose and award the extraordinary writ of injunction to prevent the appellants, who are public officers, from doing the acts of which he complains. The statute in dispute ran through an entire sexennial period, during which time it was acquiesced in by the people, and its validity was not challenged in any court; and, under its provisions, three successive general assemblies were elected by the voters of this state. It is true that, during the time this statute was in active operation, it was criticised and denounced by the public press, and upon the stump; yet no attempt was made to assail it in court during the running of its sexennial period, and thereby secure a judicial determination of its validity. It is a familiar maxim that equity aids the vigilant, and not those who sleep upon their rights. It promotes diligence in a suitor, and punishes his "laches," by denying his request for the relief which he might have obtained had he applied therefor in due season. I fail to recognize anything, under the circumstances in the case at bar, which will shield the appellee from the force and effect of the salutary rule to which we have referred. As stated heretofore, the great body of the state's electors seems to have accepted this statute, and biennially, for the period of six years, exercised the right to elect representatives and senators thereunder; and now, after the lapse of this period, and at a time when it is conceded by his counsel that there remains no other law under which the next general assembly can be elected, the appellee invokes the judiciary to inquire into the constitutionality of the act in question, and grant the extraordinary relief demanded, regardless of the consequences that may follow.

It is manifest, I think, that, under the status occupied by the appellee and the circumstances of the case in general, this cannot be done without violating the fundamental principles of equity. It is not apparent that any special beneficial results will inure to the appellee if the statute in question should be adjudged to be invalid, while, upon the other hand, injurious ones might result to the public; hence, under such circumstances, it is evident that equitable rules do not require a court to award the relief requested by the appellee. It is true, as contended by the eminent and learned counsel for the latter, as a general proposition, that courts have nothing to do with the consequences that follow from their decisions; yet, under the state of facts in this cause, the question of the probable results that the public may sustain if a decision should be adverse to the statute in dispute becomes a potent factor in deciding whether the relief sought by the action should be granted. Again, it may be said that if, under the existing emergency, the governor declines to convene the present general assembly in extra session, to enact an apportionment law, and thereby the electors are virtually driven to elect, under the act of 1885, members of the house of representatives and successors to the senators who were elected in 1892, it cannot, in reason, be urged that the courts ought to interpose and forbid them to exercise the right of so doing. The judgment should be reversed, and the lower court directed to sustain the demurrer to the complaint, for want of equity.

Monks, J., dissenting:

I dissent from both the reasoning and the conclusion reached in the prevailing opinion. The apportionment act of 1885, tested by the principles established in the cases of *Parker* v. *State, Powell*, 133 Ind. 178 and 212, 18 L. R. A.

567 and 579, and *Denny* v. *State, Basler* (Ind.) 31 L. R. A. 726, where this court held the apportionment acts of 1879, 1891, 1893, and 1895 unconstitutional, is clearly and without doubt unconstitutional and void. It is not a law, and is inoperative for any purpose. It confers no rights; it imposes no duties; it affords no protection; and is the same as if it had never been passed. *Johnson* v. *Randolph County*, 140 Ind., on page 156; *Strong* v. *Daniel*, 5 Ind. 348; *Sumner* v. *Beeler*, 50 Ind. 341, 19 Am. Rep. 718; Cooley, Const. Lim. 6th ed. 222; Black, Const. Law, p. 64, § 37. It is not the judgment of a court that renders a statute unconstitutional, but the fact that it is in conflict with some provision of the Constitution. A statute, therefore, that is repugnant to any provision of the Constitution, is void before as well as after it is so adjudged. The fact that no court has ever passed upon the question does not render such statute constitutional and valid. Therefore, the apportionment act of 1885 is no more valid and binding than the apportionment acts of 1891, 1893, and 1895, which have been adjudged unconstitutional by this court. This court has uniformly held that, when it clearly appears that a statute is repugnant to or is in conflict with any provision of the Constitution, it is the plain duty of the courts to declare it null and void. *Campbell* v. *Dwiggins*, 83 Ind., 473, 480; *Parker* v. *State, Powell*, 133 Ind., on pages 187 and 212, 18 L. R. A. 567 and 579; *Denny* v. *State Basler*, *supra*. Indeed, it is not claimed in the prevailing opinion that the apportionment act of 1885 is constitutional, but it is not held invalid for the sole reason given that it is the only statute on that subject, and that, if held invalid, the governor may not call a special session of the general assembly, or, if it does, the general assembly may not enact a constitutional apportionment law, and anarchy may follow. In response to a suggestion of like character in *McPherson* v. *Blacker*, 146 U. S. 1, 36 L. ed. 869, the court, by Chief Justice Fuller, said: "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or finally, Congress. . . . The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own." This doctrine was approved by the supreme court of New Jersey in *State, Morris*, v. *Wrightson*, 56 N. J. L. 126, 22 L. R. A. 548.

It is the duty of each department of the state government to act in the discharge of all duties upon the presumption that the other departments will properly perform all duties incumbent upon them. It is only when the action of the several departments of the state government is governed by this rule that its perpetuity and safety are assured. Any other course tends to bring confusion and anarchy. This court, therefore, should decide all questions properly presented upon the presumption that the executive and legislative departments of the state government will not neglect any duty, or fail to perform any function imposed upon them by the Constitution. There is much less danger of anarchy by this course than for this court to declare an unconstitutional law valid, or decline to pass upon the question of its constitutionality, for the reason that the other departments named might fail or refuse to perform the duties imposed by the organic law. The suggestion that either the legislative or executive department of the state government might fail or refuse to perform the duties imposed by the Constitution, as a reason why this court should not adjudge the apportionment act of 1885 unconstitutional, as it clearly is, or as a reason why this court should decline to pass upon that question, is certainly, in the language of Chief Justice Fuller, "inadmissible," and should not be considered by the court. To do so is an unwarranted reflection on the co-ordinate branches of the state government. In *Parker* v. *State, Powell* (decided in December, 1892), 133 Ind. 178, 18 L. R. A. 567, before the meeting of the general assembly in January, 1893, this court said: "If, at the next ensuing election, the state is without a valid law creating senatorial and representative districts under the enumeration of 1889, the responsibility must rest with the legislature, and not with the judicial department of the state government." This same argument was also considered and answered in the apportionment cases decided by the supreme courts of Michigan and Wisconsin. In *Giddings* v. *Blacker*, 93 Mich. 1, 16 L. R. A. 402, Morse, Ch. J., said: "We do not care to go further, since there is a remedy in the hands of the executive and legislature. The consequences of this decision are not for us. It is our duty to declare the law, to point out the invasion of the Constitution, and to forbid it." In *State, Atty. Gen.*, v. *Cunningham*, 81 Wis. 440, 15 L. R. A. 561, Pinney, J., said: "No difficulty, it is believed, need be apprehended as to the result of the decision the court has felt it to be its imperative duty to make; and our respect for the executive of the state, whose duty it is to 'take care that the laws are faithfully executed,' forbids any apprehension that he will fail in the least in meeting the present emergency, or to take such measures as in his wisdom seem best to give full effect to the Constitution and the laws." In the same case, Lyon, Ch. J., said: "Neither is the jurisdiction of the court affected, or the exercise thereof embarrassed, by the fact that this decision may leave the state without a valid legislative apportion ment law, and hence without any law for the election of another legislature. The governor may convene the present legislature, if he deems it his duty to do so, and when so convened there can be no doubt of its power to enact a valid legislative apportionment law." In the *Legal Tender Cases*, 79 U. S. 12 Wall. 457, 20 L. ed. 287, Mr. Justice Strong, in delivering the opinion of the court, referred to the situation of the country when the acts

were passed, and the "great business disarrangement, widespread distress, and rankest injustice" that would result if said acts were held invalid, but he added: "The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts."

The proposition that this court should hold an unconstitutional law valid, or refuse to pass upon the question of its validity, because some other department of the government might fail or refuse to perform the duties imposed upon it by the organic law, is a dangerous and vicious doctrine, and is not, I think, sustained by reason, and is clearly against the great weight of the authorities. Neither can I concur in the proposition that the people, having acted upon the apportionment of 1885, by electing three successive general assemblies under it, it is now too late to raise the question of its validity. The authorities cited in support of this doctrine have reference to actions to enforce private rights concerning property, and can have no application in a case like the one before us. This court, in *Denny* v. *State*, *Basler* (Ind.) 31 L. R. A. 726, said: "Neither do we think there is any estoppel here, as in the case of *Vickery* v. *Hendricks County Comrs.* 134 Ind. 554, to which we are referred. There, the party bringing suit to enjoin a levy of taxes to pay for bonds issued on purchase of a toll road, had waited until he received the benefit of the bonds before asking the court to declare unconstitutional the law under which they were issued. Here, while there may be some question of private or personal benefit, yet the issue before the court is much broader. The action concerns all the people of the state, in their most enlarged and sacred relations of citizenship and government, and the case cannot be tied up with the purely private rights of anyone. It is true that an action to test the constitutionality of the law, if brought at all, should have been pressed to a final determination in the first place. . . . Yet the people of the state, in their sovereign capacity, cannot for such reasons be estopped from asking for a determination of the validity of a law under which it is now proposed that they shall elect their next legislature. When the people of the state appear at this bar with such an issue, there can be no question of estoppel. The inquiry is one reaching the foundations of government." In *Parker* v. *State*, *Powell*, *supra*, this court held that the apportionment act of 1879 was unconstitutional, notwithstanding three successive general assemblies had been elected thereunder, and more than thirteen years had elapsed since its enactment. Yet it has only been eleven years since the apportionment act of 1885 was passed. Lapse of time, however, cannot, in a case like the one at bar, render an unconstitutional statute valid or secure from attack, or deprive the people of their right to question its validity. We think the correct doctrine was declared in *State*, *Morris*, v. *Wrightson*, 56 N. J. L., on page 208, 22 L. R. A. 548, quoting the language of Judge Cooley: "Acquiescence for no length of time can legalize a clear usurpation of power, when the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it." The subject of acquiescence in unconstitutional apportionment statutes, as affecting the right of an elector to have the validity of the act determined, was considered by the supreme court of New Jersey, in *State*, *Morris*, v. *Wrightson*, *supra*, where it was claimed that a particular method of apportionment had been acquiesced in ever since the adoption of the Constitution by all parts of the state government, and by the people, and that, therefore, it was no longer subject to question. But it was held by the court that this doctrine had no application whatever in a case where it appeared that the mandates of the Constitution had not been obeyed. The court said: "The Constitution contains the permanent will of the people. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Popular government can be maintained only by upholding the Constitution at all times and on all occasions as it was when it came from the hands of the people, by whose fiat it was established as the fundamental articles of government, to abide until altered by the authority which created it. To adopt the language of Chief Justice Bronson, in *Oakley* v. *Aspinwall*, 3 N. Y. 568: 'There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined, and finally overthrown. . . . One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.' Within the domain of construction there is room for argument and discussion,—nay, even for a diversity of opinion; but when the meaning of the Constitution, interpreted by its letter and in its spirit is ascertained, extraneous considerations are of no avail. In the process of construction, long use and practical interpretation are entitled to great weight if the language be obscure or doubtful; but such extraneous considerations cannot be allowed 'to abrogate the text' or 'fritter away its obvious sense.' I have already said that on a construction of the words of the constitutional provision regulating this subject, fortified by the policy and institutions which prevailed in this state prior to the framing of the Constitution, and a comparison of other of its provisions, the constitutional mandate requires the election of members of the general assembly by the legal voters of the counties respectively, and that the division of counties into assembly districts, and the distribution of the members among these districts for the purpose of electing such members is in conflict with the constitutional mandate. No one can examine the legislation on this subject from 1871 to the present time and contemplate the results without realizing the evils which have been fostered

under this system. Relief from these wrongs through the ballot box cannot be assured, the majority in the legislature being elected under this system by a minority of the legal voters of the state. Precedent has been followed by retaliation, to be repeated from time to time as supremacy in the legislature has passed from one political party to the other. For this condition of affairs the only remedy is by a return to constitutional methods." *State, Morris*, v. *Wrightson*, 56 N. J. L. 214, 22 L. R. A. 548. It is said in Cooley, Const. Lim. 87, note, in criticising the action of certain courts in declaring a statute to be constitutional which was not: "But it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded, not the least of which is, the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that, if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the supreme court of Indiana, that, in construing constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not "bend the Constitution to suit the law of the hour.' *Greencastle Twp.* v. *Black*, 5 Ind. 557, 565, and with Bronson, Ch. J., in what he says in *Oakley* v. *Aspinwall*, 3 N. Y. 547, 568."

It is now more than five months to the next general election, and ample time remains for the proper authorities to take such steps as may be deemed necessary to protect the rights of the people, and see "that the laws are faithfully executed." If, however, the election were so near at hand that such steps could not reasonably be taken, the court might properly withhold its decision until after the election was held; but in no event would the court be justified in adjudging that an unconstitutional apportionment act was valid, or in refusing to pass upon the question of its validity. To do so is to disregard the provisions of the Constitution, which every officer is sworn to support. It is proper to say that the quotation made in the prevailing opinion from the separate opinion of Elliott, J., in *Parker* v. *State, Powell, supra*, is from that part of the opinion in which he expresses his dissent from the action of the majority in declaring the apportionment act of 1891 unconstitutional, and that the language quoted gives one of the reasons he urged why the court should not pass upon the question. The majority of the court, however, passed upon the question, and held said act unconstitutional. The judgment should be affirmed.

Thomas TAGGART, Auditor, *et al.*, *Appts.*,
v.
Jefferson H. CLAYPOLE.

(.....Ind.....)

1. The grant of the right of appeal in annexation proceedings to resident freeholders only does not deny to nonresident holders equal privileges or immunities.

2. The annexation of territory to a city is not a taking of the property therein situated nor does it deprive any person of property within the constitutional provision as to due process.

3. A statute treating all owners of land in territory to be annexed to a city alike under like circumstances and conditions does not deprive anyone of the equal protection of the laws, although it permits an appeal only by residents of the territory to be annexed.

4. The elimination of a provision giving a right of appeal to resident owners only from a statute providing for annexation may be made, if that provision is unconstitutional, without destroying the whole statute.

(May 26, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action to enjoin defendants from placing certain property on the tax duplicate of the city of Indianapolis as city property. *Reversed.*

The facts are stated in the opinion.

Messrs. **J. E. Scott** and **James B. Curtis** for appellants.

Mr. **A. J. Beveridge** for appellee.

McCabe, J., delivered the opinion of the court:

The appellee and another, whose death was suggested of record in the court below, before judgment, sued the appellant Taggart, as auditor, and the appellant the city of Indianapolis, to enjoin each of them from extending certain described lands upon the tax duplicate of the county and city as city property. It is shown that the threatened extension was about to be made by virtue of the annexation of certain contiguous territory to said city, which included 75 acres of unplatted farm land belonging to the plaintiffs; that such annexation was claimed by the defendants to have been effected by virtue of an ordinance adopted and passed by the common council of said city November 8, 1893, under and pursuant to the provisions of §§ 37 and 38 of the charter of said city approved March 6, 1891 (Acts 1891, p. 137; Rev. Stat. 1894, §§ 3808, 3809). The circuit court overruled separate demurrers by each of the defendants to the complaint, assigning insufficiency of the facts stated therein to constitute a cause of action against each; and said defendants declining to plead over, and standing on their demurrers, the court entered a decree perpetually enjoining both defendants from entering said lands upon said duplicates for the purposes of city taxation, as prayed for in the complaint. The right to tax the property for city purposes is not questioned on account of any formal or substantial defect in the ordinance of annexation, or for want of the observance of any legal requirements in the passage of the ordinance either formal or substantial, but it is claimed that the defect is in the sections of the statute above referred to, constituting a part of the city charter. The

NOTE.—As to proceedings to annex territory to a city, see also Forsyth v. Hammond (Ind.) 30 L. R. A. 576.

As to the legislative power to annex territory to municipal corporations, see *note* to State, Richards, v. Cincinnati (Ohio) 27 L. R. A. 737.

contention is that said sections are void because they violate the Constitution of the state and the United States. The 1st section above mentioned provides that "the common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city. . . . Such ordinance . . . may include contiguous territory, whether platted or not, not previously annexed. . . . Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, to such city, and . . . shall be conclusive evidence . . . that the territory therein described was properly annexed, and constitutes a part of such city except as provided in the next section." The next section provides, among other things, that "whenever such . . . territory . . . is unplatted ground, an appeal may be taken from such annexation, by one or more resident freeholders in the territory sought to be annexed, filing their remonstrance in writing against such annexation, together with a copy of such ordinance, in the circuit or superior courts of the county where such territory is situated. . . . Such written remonstrance or complaint shall state the reason why such annexation ought not in justice to take place. . . . The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce, relevant to the issue. If the court shall be satisfied upon the hearing that less than 75 per cent of the resident freeholders of the territory sought to be annexed have remonstrated, and that the adding of such territory to the city will be for its interest, and will cause no manifest injustice to the persons owning real estate in the territory sought to be annexed, he shall so find, and said annexation shall take place. If the court shall be satisfied that 75 per cent or more of the resident freeholders of the territory sought to be annexed have remonstrated, such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded, and the safety of the inhabitants and property thereof endangered without such annexation."

The complaint alleges that the plaintiffs, though owners of the unplatted ground in question, included in the territory annexed, were and are not residents within said territory, but were and are residents within the city of Indianapolis. It is contended, therefore, that as the right of appeal is given only to resident freeholders in the territory sought to be annexed, and the same right impliedly denied to owners of land in the territory who do not reside therein, they are denied the equal protection of the law, their property taken without due process of law, and that privileges and immunities are granted to such resident owners which are denied to the plaintiffs on the same terms. It is urged at great length and with much ability that the sections are void, because they violate section 23 of article 1 of the state Constitution, which provides that "the general assembly shall not grant to any citizen, or any class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." If we were to concede that the statute in question, giving the right of appeal to residents, and in denying the same right to land owners not residing within the territory in question, is a violation of the constitutional provision quoted, it does not follow that the appellee's contention can be upheld, that the whole of both sections of the charter are void. A statute may be unconstitutional in part and valid as to the residue. *Clark* v. *Ellis*, 2 Blackf. 8; *Madison & I. R. Co.* v. *Whiteneck*, 8 Ind. 217; *State* v. *Newton*, 59 Ind. 173; *Wallace* v. *Marion County Comrs.* 37 Ind. 383; *Campbell* v. *Dwiggins*, 83 Ind. 473; *Ingerman* v. *Noblesville Twp.* 90 Ind. 393; *Indianapolis* v. *Bieler*, 138 Ind. 30. If the unconstitutional portions of a statute can be stricken out, and still leave a complete statute, the unconstitutional portions must be regarded eliminated, and the remainder of the statute must be enforced. *State, Law,* v. *Blend*, 121 Ind. 514; *State, Collett,* v. *Gorby*, 122 Ind. 17. The only part of the statute here in question that can at all be regarded as in conflict with the constitutional provision quoted is that part giving a right of appeal only to the resident freeholders. That part of the statute may be eliminated without in any way impairing the force of the provisions authorizing the common council to annex the territory. That part of the statute being eliminated, there is no discrimination between resident and nonresident owners of unplatted land within the territory to be annexed. They are all treated as the owners of platted ground within the territory to be annexed, are, namely, given no right of appeal whatever. It is established law that territory may be annexed to a city with or without the consent of the inhabitants of the territory affected. 15 Am. & Eng. Enc. Law, pp. 1007–1009, and authorities there cited; *Stilz* v. *Indianapolis*, 55 Ind. 515, and authorities there cited. Appellee's learned counsel concede this to be the law, but contend that, the right of appeal being given to one class of owners, such right must be given to all, or the statute will be unconstitutional and void. But we are of opinion that the provision as to appeal is not in conflict with the section of the Bill of Rights quoted above. The ultimate right of annexation is made to depend practically upon the voice of 75 per cent of the resident freeholders of the territory to be affected. It is the convenience, safety, and well-being of the inhabitants of the territory to be affected on the one hand, and that of the city on the other, that the statute makes the criterion for determining the question of annexation. And, in order to insure permanency of interest in the inhabitants that are given a voice on the question, they are required to be freeholders. The convenience, safety, and protection of a resident land owner in the territory may be, and very likely is, different from that of a nonresident land owner in the territory. The one may be interested in, and need, police and fire protection, water, light, and gas, which the city might afford to him on slight cost; whereas the nonresident might not desire or have any use for such things, and hence ought no more, in justice, to have a voice in preventing the residents from securing these

advantages than he should be allowed a vote on the levy of a local school tax in that territory, simply because he owned property therein. Therefore the grant of the right of appeal to the resident freeholders only is not a grant to any citizens or class of citizens of privileges or immunities which, upon the same terms, do not equally belong to all citizens. The terms upon which they are to have a voice in the annexation are such an interest therein as a resident has.

But it is insisted that the nonresident has an interest as a taxpayer. His relation to the public or to the state as a taxpayer is not changed by being transferred from one political subdivision of the state to another. *Stilz* v. *Indianapolis, supra.* It is true, such transfer makes him liable to taxation in the city, but it only changes his liability as to local taxation. His liability to state and county taxation remains unchanged. While annexation makes him liable to city taxation for local purposes, he is freed from local taxation in the township or political subdivision wherein he was taxed before annexation. But it is earnestly urged that city taxation must be so much higher in the city than outside of it that his rights as to the burdens of taxation are seriously and materially affected by annexation. That, however, is a matter that the courts can take no judicial cognizance of, unless they also take cognizance of the fact that the benefits to be derived from the expenditure of public money raised by taxation in the city would be correspondingly increased; so that in either event the rights of such taxpayer are not affected by such transfer. *Stilz* v. *Indianapolis, supra; Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.

What we have already said almost disposes of the alleged conflict of the statute with the clause in the 14th Amendment to the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Due process of law and equal protection of the laws are distinct and independent rights, secured to each individual by this constitutional provision, as appellee's learned counsel contends. But it results almost inevitably from what we have before said, that annexation of territory to a city is not a taking of the property, nor does it deprive any person of his property. Such is now the settled law in this state, and by the Supreme Court of the United States. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, *supra; Stilz* v. *Indianapolis, supra;* 1 Beach, Pub. Corp. § 398, and authorities there cited. Therefore there is no question of due process of law involved in the case. The Constitution of Missouri gives the right of appeal from the circuit to the supreme court of the state except in certain counties, including St. Louis and some others adjacent thereto, named, and the city of St. Louis. In those counties and in that city an appeal lies to the St. Louis court of appeals instead of the supreme court of the state. The Supreme Court of the United States held this no denial of the equal protection of the law. *Missouri* v. *Lewis*, 101 U. S. 29, 25 L. ed. 991. In *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, Mr. Justice Field, speaking for the court, said: "The 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed." To the same effect are *McPherson* v. *Blacker*, 146 U. S. 39, 36 L. ed. 879; *Soon Hing* v. *Crowley*, 113 U. S. 709, 28 L. ed. 1147. We have already seen that all owners of land in the territory to be annexed are by the statute in question treated alike under like circumstances and conditions, and hence it does not deprive anyone of the equal protection of the laws. Therefore the statute does not violate the 14th Amendment to the Constitution of the United States.

It follows from what we have said that the complaint of the appellee did not state facts sufficient to constitute a cause of action, and therefore the circuit court erred in overruling the demurrer thereto.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint.

MAINE SUPREME JUDICIAL COURT.

Almeda J. WADSWORTH
v.
Fred P. MARSHALL.

(88 Me. 263.)

1. The frightening of horses by the noise of an explosion in blasting rock is one of the dangers which it is intended to guard against by Rev. Stat. chap. 17, § 23, requiring reasonable notice of the explosion, and § 24 declaring liability, in case the provision is violated, for all damages caused by the explosion.

2. Persons "approaching," to whom notice is required by Rev. Stat. chap. 17, § 23, by persons blasting rock, include those who have passed the point nearest the blasting and are receding from it, if they are in near proximity and not a safe distance from the place of explosion.

3. Driving a vicious horse not properly broken, and unsafe for the purpose, may contribute to the injury when the horse is frightened

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NOTE.—As to the duty of those engaged in blasting in respect to the safety of other persons, see Blackwell v. Moorman (N. C.) 17 L. R. A. 729.

As to injuries to land and buildings from blasting, see Benner v. Atlantic Dredging Co. (N. Y.) 17 L. R. A. 220, and *note;* also Booth v. Rome, W. & O. R. Co. (N. Y.) 24 L. R. A. 105.

As to liability for acts of independent contractors in blasting, see that part of *note* to Hawver v Whalen (Ohio) 14 L. R. A. beginning on page 830.

by blasting rock, so as to constitute a defense to the statutory liability for failure to give notice of the explosion.

(January 10, 1896.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Knox County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Sustained.*

Plaintiff was riding along a public highway near which defendant was operating a quarry. He exploded a blast without giving notice thereof as required by statute. Plaintiff's horse took fright and injury to plaintiff resulted. The testimony showed that at the time the blast was fired the horse was 465 feet distant from the point where the blast was fired; that the point of the blast was 77 feet below the street level and 290 feet from the line of the street. At the time the blast was fired plaintiff was going away from and not toward the place of the blast.

Further facts appear in the opinion.

Messrs. **C. E. Littlefield** and **A. S. Littlefield,** for plaintiff:

The court is to bear in mind the circumstances under which the act was passed, as "the object which the lawmakers had in view, the mischief sought to be remedied, together with the remedy itself, are to be considered." *Donnell* v. *Joy*, 85 Me. 119.

It is impossible to use the term "explosion" without having in mind the fact that its principal characteristic is as defined, "a sudden and loud discharge, as the explosion of powder." What legal distinction is there as to cause and effect between frightening the plaintiff's horse by striking him with a piece of rock from a blast and frightening him by "a sudden and loud discharge, as the explosion of powder?"

Herrington v. *Lansingburgh*, 110 N. Y. 145.

Mr. **W. H. Fogler** for defendant.

Strout, J., delivered the opinion of the court:

The exceptions in this case required a construction of chapter 17, § 23, of the Revised Statutes, which provides that "persons engaged in blasting lime rock or other rock shall, before each explosion, give seasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance from the place of said explosion; and no such explosion shall be made after sunset."

Section 24 provides a penalty against any one violating the provision, and makes such person "liable for all damages caused by any explosion."

Statutes are to receive the construction intended by the legislature. "To ascertain this, we may look to the object in view, to the remedy intended to be afforded, and to the mischief intended to be remedied." *Winslow* v. *Kimball*, 25 Me. 495. "The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction." *Oates* v. *First Nat. Bank*, 100 U. S. 244, 25 L. ed. 582. "And we should discard any construction that would lead to absurd consequences." *Gray* v. *County Comrs.* 83 Me. 435. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." *United States* v. *Freeman*, 44 U. S. 3 How. 565, 11 L. ed. 728. So, in *Murray* v. *Baker*, 16 U. S. 3 Wheat. 541, 4 L. ed. 454, the words "beyond seas," in a state statute of limitations, were held to mean "out of the state."

To apply these principles: When the law was enacted, it was well known that extensive quarrying of lime and other rocks, in close proximity to much traveled highways, was done, and that persons traveling on such highways were thereby greatly endangered, not only from flying rocks, but from the frightening of horses by the noise of the explosion. The intention of the legislature, in passing the act, was to insure safety from these dangers. Hence, notice of the "explosion" was required to be given to travelers in time for them to "retire to a safe distance." It is argued that the mischief intended to be remedied was that of flying rocks or other *débris,* and that the frightening of horses by the noise of the explosion is not covered by the statute. We cannot concur in this view. The safety of the traveler was intended to be secured. Many of the quarries are so far below the surface of the ground that there is little danger of flying rocks reaching the highway. The traveler's danger from missiles is much less than that from the frightening of horses from the noise of the explosion. Both these dangers were present in the minds of the legislature, when a remedy was proposed, and they evidently intended by this statute to guard against both. One of Webster's definitions of the word "explosion" is "a bursting with violence and loud noise, because of internal pressure." The remedy given by § 24 is for "all damages caused by any explosion." Whether the damage is caused by the noise of the explosion or by flying substances is immaterial. Whatever damage may be caused by the explosion, whether by noise and its effect on horses, or otherwise, is within the statute protection, and the basis of liability.

It is claimed that the statute protection applies only to those "approaching" the point of explosion, and does not include those who have passed the point nearest the blast, and are receding from it, though they may be in near proximity, and not "a safe distance from the place." Such construction leads to absurd results, and cannot be accepted as the meaning of the legislature. The word "approaching" in the statute, when considered with reference to the danger guarded against, and the remedy provided must be regarded as equivalent to "in proximity to the place of explosion," "within the limit of danger."

The requested instructions were rightfully refused.

Exceptions are taken to the exclusion of testimony, offered by the defendant, to prove that the horse with which plaintiff was riding at the time of the injury was vicious, but properly broken, and unsafe for the purpose for which it was then being used.

While the statute affixes a penalty to its violation, and is so far penal in character, the damages to be recovered by an injured party are only the actual damages suffered, and in this the provision is remedial, and to be construed as such.

The statute requires seasonable notice of an explosion. Failure to give it is negligence, which subjects the delinquent to the payment of damages caused by his negligence. But it does not follow that the injured party is thereby relieved of all obligation to exercise due care on his part. It is possible that the explosion, of which no notice was given, may have frightened plaintiff's horse, and the vicious character or untrained habit or negligent driving of the horse after the fright, which might have been slight, contributed to the injury, or might have been the proximate cause. The instruction proceeded upon the ground that, if no notice of the explosion, such as the statute required, was given, the defendant would be liable, regardless of the character of the horse or any other negligence of the plaintiff. In *Hussey* v. *King*, 83 Me. 571, which was an action under Rev. Stat. chap. 30, § 1, to recover for injuries caused by the bite of a dog, it was held that the owner or keeper of a dog was prima facie, absolutely liable for injury inflicted by the animal, and that the plaintiff need not allege or prove, in the first instance, either his own care or the defendant's negligence. But the court carefully reserved as undecided, the question whether the acts of the injured person provocative of the dog could be successfully shown in defense.

Under the statute subjecting towns to liability for injuries caused by defective highways, it has uniformly been held, in this state, that the plaintiff cannot recover unless he was in the exercise of due care, and that this must be shown affirmatively by the plaintiff. In *Taylor* v. *Carew Mfg. Co.* 143 Mass. 470, which was a case under a statute making corporations owning factories liable for damages to an employee if the openings of elevators were not protected in a manner specified, the court held that, "where a statute does not otherwise provide, . . . the rule requiring the plaintiff, in an action for negligence, to show that, at the time of the injury complained of, he was in the exercise of due care, is the same, whether the action is brought under a statute or at common law. The doctrine of contributory negligence governs both classes of actions." And this court said, in *Hussey* v. *King*, 83 Me. 572, the "rule applies not only to actions given by the common law, but also to those given solely by statute, where the gist of the action is the default, omission, or carelessness of the defendant." Whether the same rule should apply to the class of actions to which the present suit belongs, need not be decided, as the defendant did not raise the question, but proceeded upon the ground that, when the plaintiff had shown the absence of sufficient notice of the explosion, and an injury resulting, she had made a prima facie case, and that the burden then rested upon the defense to show plaintiff's contributory negligence.

That the action in this case is based upon the omission and neglect of the defendant does not admit of doubt. If he had given the notice as required, and had not been guilty of any other fault, no liability would have arisen, even if plaintiff had suffered an injury. What would be a "safe distance" does not necessarily or probably mean "absolutely beyond all sound of the explosion." The plaintiff might have driven to a point so far removed as to properly be considered a safe distance, and yet an unbroken or vicious horse might have been frightened by the noise of a distant explosion, which would not have had that effect upon a horse suitable to drive. In such case, the fault of the horse would contribute to the injury, if, indeed, it might not be regarded as the proximate cause. It would be a harsh construction of the statute to hold that the negligence of the quarryman in not giving notice subjected him to liability for damages largely, if not wholly, resulting from the negligence of the traveler in riding with an unsuitable horse. An animal suitable to drive might, notwithstanding a fright, be immediately controlled, and no injury occur, while an untamed or vicious horse might not be amenable to control, and hence an injury. Both law and sound reason concur in the proposition that a negligent party is liable for injuries caused by his own negligence to a person who is not guilty of negligence which contributes to the injury, and not otherwise. The statute, affording this remedy to an injured party is little more than a reiteration of the common law; the only difference being that the failure to give notice of an explosion is made negligence *per se*, and is not excused by any amount of care in other respects.

This action, under the statute, is remedial. Defendant is liable for the consequences of his negligence, if no negligence of the plaintiff contributed to the injury. If it did, plaintiff cannot recover. The established doctrine of contributory negligence, as a defense, applies to this class of actions.

The evidence in the case is not reported, and we cannot know whether the offered proof as to the character of the horse, in connection with the other evidence in the case, would have shown contributory negligence of the plaintiff. But it was an element in that proposition, and should have been admitted.

Exceptions sustained.

John WHITE
v.
James N. CUSHING.

(88 Me. 339.)

1. An order on a savings bank is not negotiable when upon its face, although below the signature, it says: "The bank book of the depositor must accompany this order," since this constitutes a contingency which may impair its circulation.

2. It is common knowledge that all savings banks in the state have a by-law requiring the production of the depositor's book in order to obtain any money deposited.

NOTE.—Closely similar to the above case is that of Iron City Nat. Bank v. McCord (Pa.) 11 L. R. A. 559.

(January 13, 1896.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Piscataquis County made during the trial of an action by the indorsee of an order on a savings bank which resulted in a judgment in plaintiff's favor. *Sustained.*

The facts sufficiently appear in the opinion.

Mr. **J. B. Peaks,** for defendant:

The order is not negotiable.

Cushing v. *Field,* 70 Me. 50, 35 Am. Rep. 293; *Davlin* v. *Hill,* 11 Me. 434; *Johnson* v. *Heagan,* 23 Me. 329.

White took the order subject to all the equities which Cushing would have in the hands of Lawler.

Costelo v. *Crowell,* 127 Mass. 293, 34 Am. Rep. 367; *Iron City Nat. Bank* v. *McCord,* 139 Pa. 52, 11 L. R. A. 559.

In 1891 the Pennsylvania supreme court had the matter before it upon an order precisely like the one in the case at bar. The court says: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency."

See also *Johnson* v. *Heagan,* 23 Me. 329.

Mr. **T. W. Vose,** for plaintiff:

To be within the rule that prevents negotiability, the contingency or conditions must be such as will embarrass the paper in its course of circulation; but a memorandum which is merely directory or collateral will not affect it.

Overton v. *Tyler,* 3 Pa. 346, 45 Am. Dec. 645; *Hodges* v. *Shuler,* 22 N. Y. 114; *Arnold* v. *Rock River Valley Union R. Co.* 5 Duer, 207; *Hosstatter* v. *Wilson,* 36 Barb. 307; *Dennett* v. *Goodwin,* 32 Me. 44; *Smilie* v. *Stevens,* 39 Vt, 315; *Dorsey* v. *Wolff,* 142 Ill. 589, 18 L. R. A. 428; *Summers* v. *Hibbard, S. B. & Co.* 153 Ill. 102.

The words in the margin of this order are no part of the contract between the maker or drawer and the payee; they create no contingency between them.

Edwards, Bills & Notes, 141; Ames, Bills & Notes; Bigelow, Lead. Cas. on Bills & Notes; *Dorsey* v. *Wolff, supra; Cota* v. *Buck,* 7 Met. 588, 41 Am. Dec. 464; *Byram* v. *Hunter,* 36 Me. 220.

Foster, J., delivered the opinion of the court:

The plaintiff sues as indorsee of an order, signed by the defendant, of the following tenor:

$120. Dover, Oct. 27, 1893.

Piscataquis Savings Bank.

Pay James Lawler, or order, one hundred and twenty dollars and charge to my account on book No. ———.

N. J. Cushing.

Witness, ———

The bank book of the depositor must accompany this order.

The order was indorsed in blank, on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real question presented is whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order, or bearer. It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those that are simply chargeable to a particular account. In the latter case the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circulation, and imposes a restraint upon its negotiability, by means of these words, contained upon the face of the order: "The bank book of the depositor must accompany this order." Although these words are upon the face of the order, below the signature of the drawer, they were there at the time of its inception, became a substantive part of it, and qualified its terms as if they had been inserted in the body of the instrument. *Littlefield* v. *Coombs,* 71 Me. 110; *Cushing* v. *Field,* 70 Me. 50, 54, 35 Am. Rep. 293; *Johnson* v. *Heagan,* 23 Me. 329; *Barnard* v. *Cushing,* 4 Met. 230, 38 Am. Dec. 362; *Heywood* v. *Perrin,* 10 Pick. 228, 20 Am. Dec. 518; *Benedict* v. *Cowden,* 49 N. Y. 396, 10 Am. Rep. 382; *Costelo* v. *Crowell,* 127 Mass. 293, 34 Am. Rep. 367, and cases there cited.

Was the order negotiable? The answer to that depends upon the effect of the words: "The bank book of the depositor must accompany this order." If not negotiable, the plaintiff, as indorsee, cannot maintain an action upon it. *Noyes* v. *Gillman,* 65 Me. 589. If their effect is such as to constitute a contingency in relation to the payment of the order, dependent upon the production of the drawer's bank book by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such a restriction upon its circulation for commercial purposes as to render it nonnegotiable. Without these words, the order is payable absolutely, and there is no apparent uncertainty affecting its negotiability. With them the order is payable only upon contingency or condition, and that is upon the production of the drawer's bank book. This is rendered imperative from the language employed, and the bank upon which the order was drawn would have the right to insist upon such production of the book in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order, for the reason that it was not accompanied by the bank book. It cannot, therefore, be regarded as payable absolutely, and without any contingency that would embarrass its circulation. The drawer has it in his power to de-

feat its payment by withholding the bank book. Certainly, the bank book of the depositor is within his own control, rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs, and the inconveniences which would result if commercial paper incumbered with conditions and contingencies, that led to the establishment of an inflexible rule that, to be negotiable, they must be payable absolutely, and without any conditions or contingencies to embarrass their circulation. *American Exchange Bank* v. *Blanchard*, 7 Allen, 333. In that case the words "subject to the policy," being included in a promissory note, were held to render the promise conditional, and not absolute, and so the note was held not to be negotiable. *Noyes* v. *Gillman*, 65 Me. 589, 591; *Hubbard* v. *Mosley*, 11 Gray, 170, 71 Am. Dec. 698.

A case in every essential like the one we are considering was before the supreme court of Pennsylvania in 1891. A fac simile of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer, as in this case. There, as here, the order contained a statement upon its face, but, below the signature of the drawer, that the "deposit book must be at bank before money can be paid." In discussing the question of its negotiability, cases are cited from the courts of Maine, Vermont, Massachusetts, and New York, as well as from Pennsylvania. In the course of the opinion the court says: "It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, *viz.*, previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit book at the bank, so that the payment might be entered therein. . . . It is, in substance, merely an order on the Dollar Savings Bank to pay W. J. Quinn, or order, $900 in nine weeks from date, or February 1, 1888, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce at and before the time of payment the drawer's deposit book. As already remarked, these are undoubtedly prerequisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also prerequisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply." *Iron City Nat. Bank* v. *McCord*, 139 Pa. 52, 11 L. R. A. 559.

The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this state have a by-law, which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book, that such payment may be entered therein." This court, in the case of *Sullivan* v. *Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500, has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule, needed for the protection of depositors in our savings banks, now numbering more than 160,000, and where deposits aggregate nearly $60,000,000.

Inasmuch as this order is not negotiable, and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

Agnes WHITE
v.
George H. OAKES *et al.*

(88 Me. 367.)

1. **There is no implied warranty of the safety of a folding bed** by a dealer who did not manufacture it and did not know that it was dangerous, when the sale is made in writing with full opportunity of inspection of its mechanism by the purchaser as well as by the vendor.
2. **A gratuitous warranty of an article** made by the vendor on repairing it after it had broken when he was not obliged to repair it or take it back is not binding.
3. **An article sold on instalments** by a so-called lease retaining title until full payment is made can be retaken on default without returning the partial payments that had been received.

(January 23, 1896.)

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full bench of an action to recover damages for breach of warranty of the safety of a folding bed. *Judgment for defendants.*

The contract under which the folding bed was delivered by defendants to plaintiff was as follows:

Leased of Oakes & Chandler the following articles: One folding bed, ash, $38, which article is to be used by me at No. 7 Washington street, and for which I agree to pay to the said Oakes & Chandler, or order, as follows: On delivery the sum of $10, and every month thereafter the sum of $8, until the said Oakes & Chandler shall receive the full sum named above. It being expressly agreed that the right of property shall remain in said Oakes & Chandler until the same is wholly paid for; and, in case of failure to pay any one of said instalments after the same have become due, all of said instalments remaining unpaid shall immediately become due and payable; and the said Oakes & Chandler may take, or cause to be taken, the said property, either with or without process of law, from the possession of the said subscriber or other representative to whom he may have delivered the same, without recourse against said Oakes & Chandler or any money paid on account thereof. It being expressly understood that the money so paid on account shall be for the use and wear of said property. The articles leased cannot be sold or removed from the place designated in the lease without the lessors' written consent.

NOTE.—As to the liability for selling a folding bed with knowledge that it is dangerous, see Lewis v. Terry (Cal.) 31 L. R. A. 220.

See also 37 L. R. A. 799.

Selling conveying, concealing, or aiding in concealing, said property, will subject the subscriber to liability under the provisions of the law.

Witness my hand, this tenth day of June, 1893, in presence of G. H. Oakes.

Agnes White.

Mr. **P. H. Gillin** for plaintiff.
Mr. **Jasper Hutchings** for defendants.

Haskell, J., delivered the opinion of the court:

The defendants, being dealers in furniture, and not manufacturers, sold a folding bed to the plaintiff, without express warranty of any kind. The bed proved dangerous to the persons using it, not from defective parts, but from faulty design. It proved to be a trap, suited to crush its occupants by shutting up like a jackknife when slept upon. The weight of its occupants, if sufficient to overcome the gravity of the upright headpiece, would trip that forward, and the bed collapse. This bed did so, injuring a man sleeping in it so that he became partially paralyzed. The defendants had no knowledge of this danger. If, therefore, the plaintiff may recover in this case, it must be from an implied warranty against the dangers of its contrivance.

The mechanism of this bed could be observed by the purchaser as well as by the vendor. Neither, unless skilled in mechanics, would be likely to discover the dangers of it, unaided by any object lesson. The hinge or flexible joint upon which the bed hung was a contrivance of folding iron straps that really brought the point of support much further front at the head than they seemed to, thereby overcoming the gravity of the headpiece, and tending to pitch it forward. The bed, when sufficiently loaded, would bring the center of gravity of the upright headpiece so far outside its base, or so nearly so, that any unusual disburbance might work that result, especially when the casters were turned under.

In the sale of chattels by the manufacturer for specific uses, an implied warranty arises that the article is fit for the use intended. *Downing* v. *Dearborn*, 77 Me. 457. In the sale of chattels without express warranty and without fraud, *caveat emptor* applies, and there is no implied warranty. *Briggs* v. *Hunton*, 87 Me. 145; *Kingsbury* v. *Taylor*, 29 Me. 508, 50 Am. Dec. 607; *Winsor* v. *Lombard*, 18 Pick. 57; *Mixer* v. *Coburn*, 11 Met. 559, 45 Am. Dec. 230; *French* v. *Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Howard* v. *Emerson*, 110 Mass. 320, 14 Am. Rep. 608. If the sale be by description, without opportunity for inspection, the description must be met.

The sale of this bed was with full opportunity of inspection. It was shown to the purchaser, and the terms of sale were put in writing. She therefore took no implied warranty, or an equivalent right, unless facts were concealed from her that made the transaction fraudulent. No concealment is shown. It does not appear that the defendants knew of the dangerous contrivance that operated the bed. They deny such knowledge. But it is said that after the sale the bed broke down; that the defendants were called upon to take it back; and that they said they would fix it, and warrant it all right. One of the iron straps had broken, and the defendants put on a new one. The defendants were neither bound to repair the bed nor take it back. They gratuitously repaired it, and any warranty they might have then made would have been without consideration, and not binding. But the conversation testified to does not amount to a warranty of its safety in use. At most, it can only be considered an assurance that its mechanism had been made sound. It does not appear that they were then informed of any inherent danger in its use from faulty contrivance. Had they been aware of this, and concealed the danger, and allowed the plaintiff to further use the bed when they knew of its dangerous character, other considerations would arise, not material here. There is no phase of the case as presented that can cast any liability upon the defendants.

The plaintiff asks to amend by inserting a count for the purchase money paid. The amendment could do the plaintiff no good. The bed was bargained on instalments. The plaintiff says that, after the shocking disaster with the bed, the defendants demanded payment of money overdue, which being refused, they took the bed. The defendants deny the demand, but say that they retook the bed by plaintiff's consent. In either case, under the terms of sale, they might do so. They have both part payment and the bed. That was their legal right, and a more generous course cannot be demanded by law.

Judgment for defendant

MINNESOTA SUPREME COURT.

BROWN & HAYWOOD COMPANY, *Respt.*,
v.
John WUNDER, *Appt.*

(.....Minn.....)

***1. A verbal contract for the manufacture of articles** of special and peculiar design, not suitable for the general trade, and for the price of more than $50, is not a contract for the sale of goods and chattels within the statute of frauds. Gen. Stat. 1894, § 4210.

2. A verbal contract to furnish material, and, after performing labor thereon, attach it to the realty, as a part of a building in the course of construction, is not a sale of goods or chattels, and is not within said statute.

*Headnotes by CANTY, J.

(May 20, 1896.)

NOTE.—As to the distinction between sales of personalty and agreements for work and labor under the statute of frauds, see Flynn v. Dougherty (Cal.) 14 L. R. A. 230, and *note*.

APPEAL by defendant from an order of the District Court for Hennepin County deny-

ing motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for breach of contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. C. Garrigues** and **John B. Atwater,** for appellant:

Where the contract is intended to result in the transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel.

Browne, Stat. Fr. §§ 308–310; 1 Benjamin, Sales, §§ 108, 117; 8 Am. & Eng. Enc. Law, pp. 704–709; *Brown* v. *Sanborn*, 21 Minn. 402; *Russell* v. *Wisconsin, M. & P. R. Co.* 39 Minn. 145; *Hanson* v. *Marsh*, 40 Minn. 1.

Where the contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the same time a manufacturer and a dealer in them, or a merchant, so dealing, has them manufactured for his trade by others, and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware, the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor' general stock in trade,—the contract is one of sale, and within the general statute of frauds, although the goods are not *in solido* at the time of the contract, but are thereafter to be made and delivered.

Pratt v. *Miller*, 109 Mo. 78; *Meincke* v. *Falk*, 55 Wis. 427, 42 Am. Rep. 722; *Cooke* v. *Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Wolfenden* v. *Wilson*, 33 U. C. Q. B. 442; *Mead* v. *Case*, 33 Barb. 202.

Messrs. **J. H. Cook** and **F. B. Hart,** for respondent:

The test that the article is to be manufactured without any special shape or model furnished, and that without the particular contract the article would in all probability have been made any way, or that if the same was made by virtue of the contract that it would be such an article that the vendor could readily sell to his trade, would have no force or effect in this case, as the offer shows that this glass was to be furnished and made by plan and specification, and when put in form and shape was then to be set and fitted in the apertures and frames provided for it in the syndicate block.

Phipps v. *McFarlane*, 3 Minn. 109, 74 Am. Dec. 743.

If the article is to be manufactured upon a certain plan or model furnished, and without the particular contract the article would never have been manufactured in the particular manner, shape, or condition required by the contract, the statute of frauds would not apply.

Hight v. *Ripley*, 19 Me. 137; *Meincke* v. *Falk*, 55 Wis. 427, 42 Am. Rep. 722; *Mixer* v. *Howarth*, 21 Pick. 205, 32 Am. Dec. 256; *Goddard* v. *Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Sawyer* v. *Ware*, 36 Ala. 675; *Atwater* v. *Hough*, 29 Conn. 508, 79 Am. Dec. 229.

This is not a contract for the sale and purchase of movable chattels. It is a contract to make up materials and to affix them, and until they are affixed, by the nature of the contract the property will not pass, and the contract is not complete with reference to the glass until it is affixed to the building and made a part of the freehold.

Wood, Stat. Fr. § 284; Benjamin, Sales, 4 Am. § 108; *Tripp* v. *Armitage*, 4 Mees. & W. 687; *Clark* v. *Bulmer*, 11 Mees. & W. 243.

Canty, J., delivered the opinion of the court:

This is an action for damages for loss of plaintiff's anticipated profits, caused by the breach by defendant of an executory agreement between the parties. Defendant was about to bid for a contract to rebuild a burnt portion of a building in Minneapolis, and received from plaintiff the following proposition to furnish the glass for the same:

Minneapolis, Minn., Feb. 6th, 1894.

John Wunder, Esq., City—

Dear Sir: We will furnish all plate glass, double strength glass, beveled plate, set in metallic sash, and crystalline glass, as per plans and specifications, for the burnt portion of the Syndicate Block, set complete in place, for thirty-one hundred dollars. This includes glass for water closets and crystalline glass in skylights; also, mirrors around show-window posts. Yours faithfully,

Brown & Haywood Co.

The evidence tends to prove that defendant then and there orally promised plaintiff that, if he should be awarded the contract to reconstruct such portion of the building, and plaintiff's bid for the glass work was the lowest received by him, he would award the glass work to plaintiff; that the contract for reconstruction was so awarded him, and the plaintiff's bid for the glass work was the lowest, but that he refused to permit plaintiff so to furnish the glass work, and let the furnishing of the same to others. On the trial the jury found for plaintiff in the sum of $325, and from an order denying a new trial, defendant appeals.

The only question raised on this appeal is that defendant's verbal promise to award the contract for the glass work to plaintiff is void under the statute of frauds. Gen. Stat. 1894, § 4210, provides: "Every contract for the sale of any goods, chattels, or things in action for the price of $50 or more shall be void unless—First, a note or memorandum of such contract is made in writing, and subscribed by the parties to be charged therewith," or unless there has been a part performance. It is contended by appellant that this contract is one for the sale of goods and chattels, and therefore within the statute. We cannot so hold. In our opinion it appears from the evidence to be a contract for the manufacture of articles of special and peculiar design, not suitable for the general trade. Such a case is not within the statute. Browne, Stat. Fr. §§ 304, 305, 307, 308; 1 Reed, Stat. Fr. § 247; *Phipps* v. *McFarlane*, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743. The testimony tends to prove that, in the usual course of business, the glass is carried in stock in sheets of standard sizes, and is cut up to fit the particular sash frames. The witness

Brown testified: "*Q.* Now explain these bevel-plate transoms, Mr. Brown,—what they are and what you do to them. *A.* In those, in the case of metallic sash and bevel-plate, we cut the plate to the smaller shapes; that is, I think, in this case, a triangular, or, possibly, a square. We cut them with a diamond, and send them upstairs to the beveling department, and they grind these edges over a succession of wheels resembling grindstones. Some are coarser and some are finer. They pass over two or three wheels, and after they have been ground on those wheels, they are polished off on the ruble wheel, which gives them a final smoothing and polishing. After they are prepared in that way, then we get this metallic sash bar in, and we now have a machine which cuts it off into suitable lengths to put this glass together with, and then those joints are all soldered, cemented, and cleaned. *Q.* Well, the result of that work, when it is done, is to give you a window of a certain size, made up of small pieces of glass, with the necessary rims of metal, or something of that sort? *A.* The metal and beveling. The beveling is the important item. . . . In regard to the item of $431 for the beveled plate, the labor in that particular item would, perhaps, be $300. In regard to the item of chipped glass of $450, the labor would, perhaps, cost from $100 to $150. We estimated the work of setting all the glass in the building to be $200. . . . The performance of the contract required us to come there and put these plates of glass in the apertures or frames that were prepared by the contractors. . . . As regards the plate glass, the sash are usually in place in the building, so that, when the glass is put in, the building is inclosed. . . . In my estimate I figured the plate glass at $671, and that included 10 per cent for cutting and waste."

Not only was this a contract to manufacture articles of a special and peculiar design, not suitable for the general trade, but it appears from the contract that the glass was to be "set complete in place." Then it was a contract to make improvements on the land, to erect portions of a building attached to the realty, not to sell chattels. Such a contract is not within the statute. Benjamin, Sales, 6th ed. § 108.

This disposes of the case, and *the order appealed from is affirmed.*

CALIFORNIA SUPREME COURT (Department 2).

Re Catherine M. GARCELON'S ESTATE.

APPEAL OF MERRITT.

(104 Cal. 570.)

1. Error in dismissing a petition upon the setting up of a compromise agreement, the genuineness of which is admitted by failure to file an affidavit denying it, without giving an opportunity to show lack of consideration, fraud, rescission, or waiver, cannot be set up for the first time on appeal where no such ground of attack was made on the trial.

2. A covenant by the heir apparent to relinquish his expectancy in certain

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NOTE.—*Validity of transactions between an heir and his ancestor relating to the former's expectancy.*

I. *General rule.*
II. *The question of intention.*
III. *Inadequacy of price.*
IV. *The statute of frauds.*
V. *Parol evidence to vary such contracts.*
VI. *The doctrine of estoppel.*
VII. *State statutes.*
VIII. *Such agreements enforced.*
IX. *Not enforced.*
X. *English authorities.*
a. *General rule.*
b. *Agreements enforced.*
c. *When not enforced.*

The question of the validity of the sale of an expectancy by a prospective heir to a stranger will form the subject of a *note* to the cases of McBall v. Hampton (Ky.) and Clendening v. Wyatt (Kan.) *post*, —.

Upon the subject of what expectant and contingent interests in real property are subject to attachment or levy on execution, see *note* to Young v. Young (Va.) 23 L. R. A. 642.

I. *General rule.*

The interest which a child has in his orphanage part is a mere contingency and no present right, and therefore a release of it is not valid in point of law, but if founded on a valuable consideration it will operate as an agreement and be binding in equity. Power's Appeal, 63 Pa. 443.

A father can make a contract with his son which will entirely bar the latter's claim as heir to any part of his parent's estate. *Ibid.*

Therefore where the assignment is supported by a sufficient consideration, it will be enforced as an executory agreement to convey. Fritz's Estate, 160 Pa. 156, in which case a son conveyed his expectant estate to his father, in consideration of the sum of $625, the value of the interest being $771.

And the assignment of an expectancy from a father to a son has been upheld, where both the grantor and grantee testified that such conveyance was made upon valuable consideration, there being no other evidence impeaching the credibility of the witnesses. Fritz's Estate, *supra.*

A relinquishment by an heir to his ancestor of the former's expected inheritance is in its nature a relinquishment in favor of the other heirs, whether they are mentioned in the instrument by which the relinquishment is made or not, and after the death of the ancestor such relinquishment will be enforced in their favor. Crum v. Sawyer, 132 Ill. 443, 460.

Equity will give effect to an agreement made between a parent and a child, whereby in consideration of moneys then advanced by the parent to such child the latter contracts not to make any claim to share of the parent's estate in case the former should die intestate, and so carry out the intention of the parties. Havens v. Thompson, 26 N. J. Eq. 383.

So, equity will enforce an agreement entered into between a father and a child, whereby the father conveys a portion of his real estate to such child, who accepts the same and enters into possession thereof under the express parol understanding that he takes the same in lieu of all share and further claim to his father's estate, and agrees to release

property of a relative is not invalid under Civ. Code, § 700, providing that "a mere possibility, such as the expectancy of the heir apparent, is not to be deemed an interest of any kind," and § 1045 declaring that "a mere possibility not coupled with an interest cannot be transferred;" which provisions are merely declaratory of the common law.

3. A covenant not to contest the will of a relative may be given effect as a release of the contingent right to make such contest, and enforced, when fairly obtained and for an adequate consideration.

(December 1, 1894.)

APPEAL by petitioner from a judgment of the Superior Court for Alameda County, dismissing a petition filed to procure a revocation of the probate of an instrument purporting to be the last will and testament of Catherine M. Garcelon, deceased. *Affirmed*

Statement by **De Haven, J.:**

The appellant is a nephew of Catherine M. Garcelon, deceased, and this appeal is taken from an order of the superior court of Alameda county dismissing his petition contesting the validity of a document theretofore admitted to probate in that court as the last will and testament of said decedent, and praying that the probate thereof be revoked. The petition avers that the document so admitted to probate is not the will of said decedent, by reason of the fact that she was of unsound mind and incompetent to make a will at the time she signed it, and upon the further ground that the execution of the same was procured by undue influence exerted upon the decedent by Stephen W. Purrington, one of the residuary legatees named therein, and by other persons unknown to the petitioner; and, in its statement of the facts constituting the alleged undue influence, the petition avers, in substance, that at the date of the said will, and long prior thereto, Catherine M. Garcelon was "a very aged woman, feeble and weak in body and mind, and mentally incompetent to manage, care for, or dispose of her property, and was unaware of the extent, amount, or nature of her property, or of its value, and was obliged to rely entirely upon other persons for the management of her property and affairs;" and that during all that time the said Purrington and other persons unknown to petitioner were in constant intercourse with her, and exercised an actual authority and dominion over her mind, and said persons, for the purpose of preventing the petitioner, as heir and next of kin, from coming into any portion of her estate by succession, or under her will, "had, prior to the making of said will, poisoned the mind of said Catherine M. Garcelon against the petitioner, and so induced her to dispose of almost all her property in trust, and to appoint the said Stephen W. Purrington and others as trustees thereof." Immediately following this statement the petition alleges: "The said Catherine M. Garcelon obtained all of her said property from the estate of her brother, Dr. Samuel Merritt, who died on or about the 14th day of August, 1890, and prior to that date she had not been, and was not, possessed of any property, real or per-

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all further claim to such residue; and such a contract is not within the statute of frauds. Galbraith v. McLain, 84 Ill. 379, 382.

And such a contract, if made upon valuable consideration and without fraud, will be enforced in equity upon proceedings for a partition of such ancestor's estate. Kershaw v. Kershaw, 102 Ill. 307, 312.

The receipt of a share of a parent's estate in advance, being advantageous to the child, may be held a valid bar to any legal claim to any share of real as well as personal estate. Nesmith v. Dinsmore, 17 N. H. 515, 518.

If a minor entering into a contract with his ancestor or parent with respect to his share in the estate fails to disaffirm the same within a reasonable time after he comes of age, he will be held bound thereby. Jones v. Jones, 46 Iowa, 466.

In the above case of Jones v. Jones, the heir, who neglected to disaffirm such contract for six months after his ancestor's decease, was held bound thereby.

Where there is no fraud or imposition, a child of full age will be permitted to judge what shall be a full advancement, and such contracts, made in relation to real estate, will be held binding. Nesmith v. Dinsmore, *supra*.

The question as to whether or not an advancement by an ancestor to his son is to be taken as a discharge or renouncement of his son's share or right in the distribution of such ancestor's estate has been held to be within the jurisdiction of the court of probate, the decree of such court, affirmed by the supreme court, being conclusive both at law and in equity. Robinson v. Swift, 3 Vt. 283.

II. *The question of intention.*

A satisfactory intention must be shown coincident with the transaction in order to treat it as between the heir and ancestor as a portion or settlement in life or, as an anticipation of the child's share of the donor's estate if he died intestate. Booth v. Foster (Ala.) 20 So. 356.

Where there is no well-defined intention on the part of the ancestor to treat the transaction as a portion or settlement in life upon such child, the transaction will not be considered as an advancement or as a release by such heir of his expectant interest. *Ibid.*

What a parent says at the time he gives property to a child is competent evidence of the intention with which the gift is made. Fennell v. Henry, 70 Ala. 484, 487, 45 Am. Rep. 88; Lawson's Appeal, 23 Pa. 85; Phillips v. Chappell, 16 Ga. 16; Mitchell v. Mitchell, 8 Ala. 414; Butler v. Merchants' Ins. Co. 14 Ala. 777; Merrill v. Rhodes, 37 Ala. 449; Autrey v. Autrey, Id. 614.

In Robinson v. Robinson, 1 Brayton (Vt.) 59, it was held that the receipt of a son for a certain sum in full of his share as heir to his father's estate was only evidence of an advancement, and would not be taken as a bar to the son's share of the estate.

So, in Long v. Long, 118 Ill. 638, the mere fact that a grandson executed and delivered a quitclaim deed to his grandfather was held not of itself sufficient to show a release of his expected inheritance from his grandfather.

The words "hereditary portion," used in a conveyance by the father to a son, have been held to possess neither the force nor the form to cut off all future participation in the father's estate, there being neither a will of the father nor a contract of the son to bar such participation. Miller's Appeal, 31 Pa. 337, 340. See also *infra*, IX.

III. *Inadequacy of price.*

Mere inadequacy of price without fraud will not

sonal, but was dependent upon the said Samuel Merritt for her support and subsistence." The petition then proceeds to state certain alleged false representations which were made to the decedent for the purpose of injuring the petitioner in her estimation, and to cause her to make the will in question, and alleges "that the said Catherine M. Garcelon, being thereby influenced and not otherwise, and not of her own voluntary act or will, made the said purported will." The petition further states that the said Purrington and others, for the purpose of securing a great benefit to themselves, "coerced and caused" the said decedent to subscribe her name to said will, and finally avers that she, at the time the "said purported last will and testament was made, was mentally unable to resist the said dominion and controlling influence of said persons, and was unable to understand the contents of said document, and never did understand or know the same." The petition also alleges that the petitioner and his brother, Frederick A. Merritt, are the nephews and the only next of kin of said Catherine M. Garcelon, and this averment is not denied.

The executor and the administrator with the will annexed answer separately, but both answers are in all respects the same, and deny that the said Catherine M. Garcelon was of unsound mind, or incompetent to make a will, or that the will probated as her last will and testament was executed under undue influence; and, in addition to these denials, state the following facts as a separate defense to the matters alleged in the petition: On or about August 17, 1890, one Samuel Merritt, a brother of Catherine M. Garcelon, died, leaving a large estate and a will by the terms of which the greater part of his estate was given to his said sister, and only a small portion thereof to his nephews, the petitioner here, and his brother, Frederick A. Merritt. This will was duly admitted to probate on September 15, 1890. The petitioner and his brother were dissatisfied with its terms, and threatened to contest the probate thereof, and employed a lawyer for that purpose; but a compromise was effected, and said Catherine M. Garcelon and the petitioner and his brother entered into a written contract, by the terms of which the former was to pay to her said two nephews the sum of $125,000, and also to convey certain real property to a trustee upon a certain condition subsequent, the trustee to collect and pay over the income to the nephews, and in consideration of which the latter were to release to their said aunt their claims as heirs of her brother, Samuel Merritt, and for that purpose were to execute to her a proper deed of conveyance of their interest in said estate; and it was further agreed that this deed should "contain such apt words of warranty and covenant as may be prescribed and approved by the counsel of the parties of the first and second parts respectively, to the end of securing to the party of the first party full right and ample power to dispose of all the property derived by her from the said Samuel Merritt, or by the deed of conveyance and transfer herein provided for; also of all the income to be derived therefrom, and of all the property, real and personal, which the party of the first part now

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affect a contract entered into between parent and child. Haines v. Haines, 6 Md. 435.

Where the husband had procured a mortgage from his wife, apparently for the purpose of securing the purchase money on land, but really for the purpose of protecting his interest therein, and after the wife's death he and his attorney informed his son that such an instrument was a lien upon the lands, and so induced the son to convey his interest to his father, the transaction was set aside as false and fraudulent, the consideration being inadequate, although, had the consideration been of full value, or all that such property was reasonably worth, it would have been otherwise. Grindrod v. Wolf, 38 Kan. 292.

IV. *The statute of frauds.*

In Galbraith v. McLain, 84 Ill. 379, 382, it was stated that neither the statute of frauds nor the statute of wills could be invoked against the transaction which had been made between the father and son, for the reason that the expectancy of an inheritance could not be said to be an interest in land which might not be surrendered by parol.

As to the statute of wills, see also *infra*, VII.

And in Kershaw v. Kershaw, 102 Ill. 307, 312, the court followed its prior decision in the case of Galbraith v. McClain, *supra*, to the effect that such agreements are not within the provisions of the statute of frauds.

In both the above cases the parol agreement by the heir to release his expectant interest was made in consideration of a present conveyance.

See also Stokesberry v. Reynolds, *infra*, IX.

V. *Parol evidence to vary such contracts.*

When, by his acceptance of the property conveyed to him by a deed in release of his expectant interest, the heir enters into the enjoyment of the property, he cannot subsequently, where no fraud or mistake is shown, contradict or explain such contract or deed by parol evidence. Kershaw v. Kershaw, 102 Ill. 307, 312. And see further hereon Jones v. Jones, 46 Iowa, 466, *infra*, VIII.

VI. *The doctrine of estoppel.*

A deed executed by a son providing that "said land is deeded as an advancement to said [son] out of the estate of said [father], and the deed is accepted by said [son] as his full and entire share of his father's estate," which deed is recorded, will operate as an estoppel upon such heir and his grantees as against any further claim upon his ancestor's estate, when the property has been enjoyed by him. Kershaw v. Kershaw, *supra*. See also Barham v. McKneely, 89 Ga. 812, and Miller's Appeal, 31 Pa. 337, *infra*, VIII.

VII. *State statutes.*

The provisions contained in §§ 63 and 164 of the Illinois Revised Statutes relating to wills do not apply to the case of a release in writing given by a son to his father, made upon valuable consideration without fraud. Bishop v. Davenport, 58 Ill. 105, 110.

See also, as to this statute of wills, the decision in Galbraith v. McLain, *supra*, IV.

VIII. *Such agreements enforced.*

In Barham v. McKneely, 89 Ga. 812, it was held that a receipt under seal, given by a daughter to her father, acknowledging that she had received a specific sum as an advancement in full of her prospective share in his estate at or after his death, and relinquishing both real and personal estate, and all her right, title, and interest to the same, was a valid and binding contract and would bar and estop

owns or hereafter may acquire, either by deed or last will and testament, without any right, power, or authority of the parties of the second part hereto, or either of them, or their respective heirs or assigns, to question, dispute, or contest the same in any manner or to any extent whatever." And it was further provided that said nephews should also execute any other separate agreements and covenants which might be deemed necessary to secure to the said Catherine M. Garcelon the right to dispose of the property mentioned in the deed, either by deed or will, free from any possibility of contest by them. On the same day the petitioner and his brother executed to the said Catherine M. Garcelon an agreement which, after referring to the death of Samuel Merritt, and the fact that he had left a large estate and a will by which the great bulk of it was devised and bequeathed to their aunt, and that they were dissatisfied with said will, and had threatened to contest the same, proceeded as follows: "And whereas, the undersigned and said Catherine M. Garcelon have mutually agreed upon a settlement and adjustment of their respective property rights and interests in the property and estate of which the said Samuel Merritt was seised or possessed, and in such settlement and adjustment the said Catherine M. Garcelon has made satisfactory provision for the undersigned; and, whereas, the said Catherine M. Garcelon has been induced to make such settlement and adjustment and such provision for the undersigned in reliance upon their respective promises and agreements that they, nor either of them, would never, at any time hereafter, in any manner, or to any extent, question, dispute, or contest, as her heirs at law or otherwise, any disposition which she may have made, or may hereafter make, by deed or will, of any or all of the property derived by her from the estate of the said Samuel Merritt: Now, therefore, for and in consideration of the premises, the undersigned do hereby promise, covenant, and agree to and with the said Catherine M. Garcelon, her devisees, legatees, and assigns, that they, nor either of them, nor their respective heirs, shall or will, at any time hereafter, assert any right, title, or interest, as the heirs or heirs at law of the said Catherine M. Garcelon, to the property, real and personal, derived by her under the said last will and testament of the said Samuel Merritt." In addition to the foregoing agreement, the petitioner and his brother also executed to their aunt a deed purporting to convey and assign to her all their interest in the property of the estate of Samuel Merritt, real, personal, or mixed, or in which they could have an interest as heirs at law of said Merritt. This deed also contained a covenant on their part whereby they agreed "with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns," not to question or contest any disposition of any of the property belonging to said estate which the said Catherine M. Garcelon "may have made, or may hereafter make, either by deed or by her last will and testament," and that neither of them would ever make any claim to any portion of the property derived by her under the will of Samuel Mer-

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such daughter from claiming or taking any part of his estate after his death, intestate, leaving other heirs and distributees, in a contest with the administrator.

Where the sums received by the heir were not charged to him by the intestate, and were not properly made by way of advancement, but were received in full payment and satisfaction of his share and portion of the estate by express agreement in writing, it was held that the release thus executed by the son of his expectant interest would be upheld against him. Bishop v. Davenport, 58 Ill. 105, 110.

Again, where a son took a conveyance of real estate from his father in satisfaction of his share as prospective heir, it was held that his right to share in the distribution of his father's estate was barred by such conveyance, as was also the right of his children or heirs in case he predeceased his father. Simpson v. Simpson, 114 Ill. 603.

And in Crum v. Sawyer, 132 Ill. 443, 460, the court held that the contingent interest or expectancy of the husband as heir of his wife in her real and personal estate was a proper subject of contract, and such contract, having been made upon a valuable consideration by parties capable of contracting with each other with entire fairness, was enforceable according to its terms.

In Gray v. Bailey, 42 Ind. 349, one of several residuary legatees of personal estate died, and some of the others gave receipts to their father for a sum of money in full of all their interest in the estate. It was held that another daughter was entitled to the residue of the personal estate, one legacy having lapsed and the other been adeemed in the lifetime of the testator.

Where the instrument showed that, in consideration of the conveyance of specified property, the grantee agreed to release by deed his interest in his father's estate in case the latter died intestate, and not to claim anything further from the estate, it was held that such an agreement did not amount to a release, but a contract, to contradict or vary which parol evidence could not be admitted. Jones v. Jones, 46 Iowa, 466.

In Cushing v. Cushing, 7 Bush, 259, a son gave the following receipt to his father: "Received . . . of my father . . . $2,000, which I freely accept as my full proportion of his estate, and I hereby bind myself, my heirs, executors, administrators, and assigns, never to set up any claim against him or his estate." It was held that the son was barred from making any claim against his father's estate, inasmuch as he thereby acknowledged that he had received his full proportion.

In Smith v. Smith, 59 Me. 214, a father conveyed by warranty deed real estate to his son, taking from the latter an acknowledgment and receipt for the value of such land as his full share of his father's estate, and relinquishing all his right, title, and interest in and under his father's estate at the time of the father's decease. The son dying shortly after the father, intestate, it was held in an action by the heirs of the son to recover their share of the grandfather's estate that the transaction amounted to an advancement to the son in full, and therefore barred the claims of the grandchildren.

The same point was decided in the case of Quarles v. Quarles, 4 Mass. 680, which was followed by the court in Kenney v. Tucker, 8 Mass. 142; Parker v. McCluer, 3 Keyes, 318; and Summerville's Estate, 129 Pa. 631.

Where a son gave a receipt to his father as follows: "Received of [the father] the sum of $600 in full in lieu of dowery,"—it was held that such receipt amounted to an agreement by which the son excluded himself from claiming any share to his father's estate in case of the latter's dying in-

ritt, except such as he might be able to assert as a devisee or legatee under her last will and testament. The answers further aver that the said Catherine M. Garcelon fully complied with all the terms of the compromise agreement on her part to be kept and performed, and that all of the estate of which she died posssessed was derived from her deceased brother, the said Samuel Merritt, and under the terms of his will. The genuineness and due execution of the several contracts and writings set out in the answer were not denied by the petitioner; but he moved to strike from the answers all the averments relating to the same as irrelevant and immaterial, and also demurred to the separate defense based upon the said alleged contracts. The motion to strike out was denied, and the demurrer overruled. The petitioner also filed in due time a written request that the issues of fact relating to the competency of the decedent and her freedom from undue influence be tried by a jury. This request was denied; and thereafter the case came on for trial before the court without a jury, and upon the hearing the defendants "offered in evidence" the original contracts and deeds referred to in their answers, and also offered to prove the truth of the recitals therein contained, and that said terms were fully performed by the said Catherine M. Garcelon. The court ruled that none of said evidence was necessary or proper, the genuineness and due execution of said contracts and deeds being admitted; and thereupon the defendants moved to dismiss the petition of the appellant upon the ground that he was estopped by said contracts and deeds from questioning the validity of the will of said Catherine M. Garcelon, and upon the further ground that it appeared that he had no interest in the estate of said decedent. This motion was opposed by the petitioner upon certain specific grounds, which will be hereafter stated. The objections of petitioner were overruled, and the court made an order dismissing the petition upon the grounds stated in the motion of defendants.

Messrs. **J. C. Martin, Van R. Paterson,** and **A. A. Moore,** with *Messrs.* **Horace W. Philbrook** and **Alfred H. Cohen** for appellant.

Messrs. **H. C. Campbell, Warren Olney, E. Nusbaumer,** and **John Garber** for respondents.

De Haven, J., delivered the opinion of the court:

1. Notwitstanding the genuineness and due execution of the compromise agreement as contained in the several instruments set out in the answers were admitted by the failure of petitioner to file an affidavit denying the same (Code Civ. Proc. § 448), he still insists that the court erred in dismissing the petition without giving him an opportunity to show that such agreement was in fact without consideration, or that his consent thereto was obtained by fraud, or that it had been extinguished by rescission, or that performance thereof had been waived by the deceased. It is true that by the terms of § 462 of the Code of Civil Procedure

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testate, the consideration therefor being sufficient. Havens v. Thompson, 26 N. J. Eq. 383.

So, in Fisher v. Bolton (N. J.) 5 Cent. Rep. 116, the son had in the father's lifetime received his share, and had by quitclaim to the father and his heirs so parted with all his interest in the land as to be barred from claiming a right therein as heir at law.

Where a son released all claims that he would have upon his father's estate as part of the consideration for a conveyance made to him by his father prior to the latter's second marriage, and the agreement was executed by an abandonment by the son of all claim on his father's death, it was held that the conveyance was supported by a sufficient consideration and barred the son's right to any share in the distribution of the estate. Firestone v. Firestone, 2 Ohio St. 415.

So, where the father sold his son a farm at a certain consideration, and a certain amount was paid down and bonds given for the residue under the following stipulation: "And the remainder to be divided into three equal shares, the one share shall be [the son's] his hereditary portion from his father . . . the other two shares shall be divided into eight equal yearly payments to be paid in equal proportions to a son and daughter, his remaining children,"—the court held that the agreement showed a clear intention upon the part of the intestate, the father, to divide his estate equally among his three children, and that the conveyance to the son operated as an advancement to the extent of one third, and that the deed did not estop the son from taking his proportion of the estate after accounting for such advancement. Miller's Appeal, 31 Pa. 337.

Again, where the sealed instrument executed by the son was clear and explicit, and acknowledged the receipt from the father of a specified sum for land, for which the father executed to the son, his heirs and assigns, a conveyance in full satisfaction and payment "of all such sum or sums of money, share or shares, purparts and dividends, which may or might hereafter become due, owing, payable, or belong to me by any means whatever, for or on account of my full share, part, or dividend of the real and personal estate of my said father," the deed containing a release by the son to the father of such shares or dividends on his estate and all claims in respect thereof, it was held that the son's claim upon the father's estate after his death was barred. Power's Appeal, 63 Pa. 443.

And in Summerville's Estate, 129 Pa. 631, upon partition by the children and grandchildren of a decedent, it was sought to put in evidence a paper signed by four of the children of the decedent, whereby they acknowledged they had received from the deceased all the portion of his estate, real, personal, or mixed, which might be due or coming to them as heirs, unless otherwise arranged by his will. It was held that such paper was a valid release and as such had a binding effect upon the distribution of his estate.

In Price v. Winston, 4 Munf. 63, property was devised to a sister "during her life, and after her decease, . . . to the children . . . which she shall leave at her death, to be equally divided among them, to them and their heirs forever," and an agreement under seal was entered into by all the children then living, in the sister's lifetime, "to stand to a fair and equal division of said estate, between the children . . . who shall be living at her death, and the issue of such as have or may die before her." It was held that such contract was upon good consideration and binding as between the parties.

Where the heir by a receipt acknowledged "payment in full up to date for all services rendered,

new matter in an answer is deemed to be controverted without any special replication, and under that section a plaintiff has the right, while not denying the genuineness and due execution of an instrument set out in an answer, to show other matters in confession or avoidance thereof. But, unless he brings to the attention of the trial court his purpose to offer such evidence, that court cannot assume that he desires to make any such defense; and in this case the motion of defendants for a dismissal of the petition was not opposed upon the ground that the petitioner desired to offer any proof tending to show that the contracts and deeds set out in the answers were not freely entered into by the parties thereto, and for an adequate consideration, or that the same were superseded by any subsequent agreement, or that Mrs. Catherine M. Garcelon had ever waived performance of the agreements therein contained. On the contrary, the motion was opposed upon the grounds—First, that the instruments set out in the answer contained no matter sufficient to estop the petitioner from maintaining this proceeding, or from showing that he has an interest in the estate of Catherine M. Garcelon; and, second, that no trial of the issues of fact tendered by the petition had been had, and that petitioner had been denied a trial of such issues by a jury. The court below, therefore, properly assumed that these were the only grounds upon which the petitioner opposed the motion, and it is too late to suggest here for the first time that he was entitled to make proof of other facts showing his right to contest the will of deceased, and which would have been sufficient to avoid the estoppel which the trial court held resulted from the compromise agreement.

2. The main question arising upon this appeal relates to the construction and effect of the compromise agreement set out in the answers. That agreement seems to have been prepared with great care, and there is no ambiguity in any of its provisions. By its terms the appellant and his brother waived their right as heirs of Dr. Merritt to contest the will left by him, or to claim any portion of the estate bequeathed and devised by him to their aunt, other than the portion thereof which she gave and relinquished to them by that agreement; and in consideration of the property thus secured to them they further agree "that they, nor either of them, nor their respective heirs, shall or will at any time hereafter assert any right, title, or interest, as heirs or heirs at law of the said Catherine M. Garcelon to the property, real and personal, derived by her under the said last will and testament of the said Samuel Merritt;" and, doubtless for the purpose of making the foregoing agreement upon their part more effectual, the appellant and his brother, in the deed executed by them for the purpose of carrying out the compromise agreement, and which is to be construed as a part of such agreement, covenanted "to and with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns," that they would not "in any manner, or to any extent, question, dispute, or contest any disposition of the property above mentioned or referred to, or any part thereof,

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and all claims, now and in the future against [his ancestor] and his estate, living or dead, and that he has no further claim, in any shape, manner, or form, against [his ancestor] or heirs or any one else bearing the name," it was held that the words of the receipt referred to the heir's interest in the ancestor's estate, and bound him and creditors claiming through or under him from making any claim upon the estate after the ancestor's decease. Liginger v. Field, 78 Wis. 367.

See also Kershaw v. Kershaw, 102 Ill. 307, *supra*, VI.

IX. *Not enforced.*

In Stokesberry v. Reynolds, 57 Ind. 425, a father advanced money to his son upon a verbal understanding that it should be in full of his interest in his father's estate, and it was held in an action by such son for partition of the real estate of his father, that such advancement made by his father should be treated simply as an advancement, and not as a release of his expectant interest in such real estate.

In the above case there was a clear intention shown to reduce the agreement into writing, but whether the court refused relief upon the ground that the agreement should have been reduced into writing pursuant to statute is not shown by the opinion.

So, in Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, the interest in expectation or hoped-for inheritance of four daughters from their father's estate was released by their several husbands by virtue of instruments in writing executed by them respectively to the father, whereby each acknowledged the receipt of the advancement and agreed not to set up any further claim against the father's estate as one of his heirs after his decease; and the case presented the question of the power of the husband to release the wife's bare possibility or expectation of inheritance from her ancestor. The court held that such an assignment or release only transferred the husband's right, and passed nothing to the assignee in case the husband did not survive the wife, or unless the reversionary chose in action was reduced to possession during the coverture.

In the above case it was contended that, although the release executed by the husband was wholly valid at law, yet a court of equity would regard it and give effect to it as a contract to release when the interest became vested, but the court stated that the contract in question could not be enforced, as the deceased in his lifetime made the advance to his daughters, and took the receipt of the husband of each, whereby the husband acknowledged the same "'to be in full of all claims he could have against the estate of said [deceased] after his death, as one of his heirs,' and stipulating for himself and his heirs, 'not to set up any further claim,'" the advancement being a voluntary act done without mutuality either of consideration or of obligation, and for the reason that the contract, being an executory one made for the purpose of controlling the estate of a decedent after his decease, had no binding effect.

Where, in the proceedings for the distribution of the estate of an intestate, there was some evidence of an agreement in writing under seal, which was afterwards lost, entered into between the deceased and one of his sons, by which the latter was to have a farm at a certain valuation, and was to keep the father as long as he lived for a named consideration, the balance to be divided among the other heirs, and after the father's death such son was to pay to the other heirs certain amounts, retaining a certain sum as his own share, when a deed was to be made by the father's personal representatives to him, it was held that the question of release or

or of any property which may be acquired therefrom or thereby which the said Catherine M. Garcelon may have made or may hereafter make by either deed or by her last will and testament." There is not the slightest contention that the parties to this agreement were not fully competent to contract in relation to their property rights, and the agreement itself recites that it was entered into "after full examination into the facts, and full and deliberate consideration of the premises;" and there is nothing upon its face to suggest that the differences thereby compromised were not settled upon fair and equitable terms, nor was there any offer to prove extrinsic facts for the purpose of impeaching the agreement in this or any other respect. The questions for decision, therefore, are whether such an agreement, based upon a full and adequate consideration, and entered into with deliberation by parties in every way competent to contract, is valid, and, if valid, is the petitioner thereby estopped from maintaining this proceeding to revoke the probate of the alleged will of his aunt? The agreement, as we have seen, in addition to his promise not to contest the will of his uncle, Dr. Merritt, contains two distinct covenants upon the part of the petitioner: First, that he would not thereafter, as an heir at law of his aunt, Mrs. Garcelon, assert any right to the property derived by her under the will of his said uncle; and, second, that he would never in any manner question or dispute any disposition which she might make of that property, by deed or will. The first of these covenants is in substance and effect an agreement upon the part of the petitioner to relinquish, as heir presumptive, his expectancy in that portion of the estate of his aunt to which the agreement related. It is claimed by the petitioner that such an agreement is void under §§ 700 and 1045 of the Civil Code of this state, the first of which provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and the latter section declaring that "a mere possibility, not coupled with an interest, cannot be transferred."

These sections simply state the well-settled and well-understood rule of the common law upon the subject to which they relate. At common law, a mere possibility, such as the expectancy of an heir, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule was different and agreements for the sale or release of expectancies, if fairly made, and for an adequate consideration, were enforced upon the death of the ancestor; and in our opinion it was not the intention of the legislature, in enacting the sections of the Code just referred to, to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts. This construction of these sections is in harmony with § 5 of the same Code, which declares that the provisions of that Code, "so far as they are substantially the same as existing statutes of the common law, must be construed as continuations thereof, and not as new enactments;" and also follows the presumption that the legislature, in the enactment of

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advancement could be raised on distribution of the fund raised by the sale under partition proceedings. Summerville's Estate, 129 Pa. 631.

In Buck v. Kittle, 49 Vt. 288, the plaintiffs claimed as children and heirs at law of a deceased daughter of the intestate, and the facts showed that while the intestate and the deceased daughter were both alive, the daughter and her husband executed to the intestate an instrument not under seal purporting, in consideration of a deed then executed to her and her husband by the intestate, to release the claim of herself and her heirs to her share of the intestate's estate. It was held that, the plaintiffs taking directly from the intestate as the representatives of their mother, the writing had no effect as an accord and satisfaction, for the reason that the mother at the time of its execution had a mere expectancy, and that such an instrument not being under seal would have no effect as a covenant which would bind the daughter and her children; and, further, that such instrument was inoperative as an agreement under Vt. Gen. Stat. chap. 56, §§ 16, 17, and that it was therefore not an advancement in full of the expectancy, and the plaintiffs were therefore allowed their distributive share in the estate.

X. *English authorities.*

a. *General rule.*

Agreements between father and children are not to receive encouragement, especially where founded on the father's mistake; and it is a rule in equity to relieve against such agreements as are founded on mistakes. Morris v. Burroughs, 1 Atk. 398.

Transactions between a father and child are to be viewed with a reasonable degree of jealousy, and not in the light of reversionary bargains. Tweddell v. Tweddell, 1 Turn. & R. 1.

By the custom of London the orphanage part must go in equal shares, and if the father turns the money into any other shape which he thinks may take it out of the custom, the court will relieve the children. Heron v. Heron, 2 Atk. 160.

If a father merely for the sake of maintenance, and not for advancement in marriage or trade, obliges his son to release his right to the orphanage share, such release is absolutely void. *Ibid.*

The custom of London admits of no bar to relief against agreements between expectant heirs and their ancestors, on the ground of mistake, for nothing but an actual advancement of a child as such will bar his claim. But in equity, if a daughter who has a portion given by her father on marriage agrees to take it in satisfaction of any demand she may afterwards have on his estate, such agreement amounts to a bar. Morris v. Burroughs, *supra.*

A father's preferring a child in marriage, or advancing money to set his son up in trade, may amount to a bar of his customary share; but in all these instances there must be a valuable consideration moving from him and an actual benefit accruing to the child. Morris v. Burroughs, *supra.*

b. *Agreements enforced.*

A daughter, by agreeing to take a portion given to her by her father upon marriage, in satisfaction of any future demand upon his estate, bars her rights therein upon her father's decease. Morris v. Burroughs, 1 Atk. 399.

So, in Ives v. Medcalfe, 1 Atk. 63, husband and wife covenanted in articles executed prior to marriage, in consideration of a given sum (the wife's portion) to release all the right that might accrue to them out of her father's personal estate by the custom of London, and the husband was held bound by his covenant; the court stating that though the wife was under age yet he might release

statutes, does not intend to overturn long-established principles of law unless such intention is made to clearly appear, either by express declaration or by necessary implication. Mr. Story, in § 1040c (vol. 2) of his work on Equity Jurisprudence, states the equitable rule upon the subject of such agreements as the one before us as follows: "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such a case, if made bona fide for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract." And see also, as sustaining the same proposition, Pom. Eq. Jur. 2d ed. §§ 168, 953; *Bacon* v. *Bonham*, 33 N. J. Eq. 614. In accordance with this principle, it has been held in many cases in which the question has arisen that an heir may release to the ancestor his expected share in the ancestor's estate. Thus in *Havens* v. *Thompson*, 26 N. J. Eq. 383, it was held that a son, by such release to his father, estopped himself from claiming as heir any portion of the father's estate. In that case it appeared that the father gave to the son the sum of $600, upon the condition that it should be accepted in full satisfaction of his interest in the father's estate, the son executing a receipt stating that the money was received "in full in lieu of dowry." The chancellor construed the receipt in view of the facts surrounding its execution as a release, and said: "I regard this instrument as an agreement, by which Benjamin, in consideration of the money paid to him by his father, agreed with the latter that he would make no claim to a share of his father's estate, should the latter die intestate, but therefrom would be debarred by that instrument, made upon what was a satisfactory compensating consideration. Such an agreement may be made between a father and his child, in regard to the interest of the latter in the estate of the former, and effect will be given to it in equity, according to the intention of the parties." And the rule thus declared was afterwards approved in *Brands* v. *De Witt*, 44 N. J. Eq. 545. In *Bishop* v. *Davenport*, 58 Ill. 105, it was shown that the father in his lifetime gave to certain of his children property, and took from them an instrument in writing in which they acknowledged that such property was received by them as their full share of his estate. The father died intestate, and the court, in passing upon the question, held that the transaction was not an advancement, and that the instrument signed by the children operated as a re-

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it as it was a matter that accrued to him in right of his wife, and his release would bind her.

So, in Lockyer v. Savage, 2 Strange, 947, action was brought by the assignees of a commission in bankruptcy, to have an account of the personal estate which the bankrupt's wife's father died possessed of, he being a freeman of the city of London. It was insisted on behalf of the defendants that by articles between the bankrupt and his daughter previous to her marriage, she had, for valuable consideration advanced by the father in his lifetime, released her right to any further share of the personal estate, the consideration money being settled for the use of the bankrupt for life, but in case of his failure the trustees were to apply it to the separate maintenance of the wife and children. It was held that a child of full age might for the consideration of a present advance bar herself of the customary share, and that it was stronger in the case of a child who had a right than in the case of an intended wife; and, further, that the provision for her maintenance in case the husband failed was good against creditors, it not being a provision out of the bankrupt state, but the settlement of her own portion.

Where the plaintiff was entitled, upon the death of his father, then advanced in years, to a certain sum to be raised by a charge upon an estate which had been purchased by the defendant, and a few weeks before the plaintiff attained his majority his father suggested that the defendant should purchase the plaintiff's reversionary interest, the plaintiff being at the time without funds and desiring an advance to enable him to pursue his medical studies; and it was agreed that the defendant should purchase at a given price payable in annual instalments, with interest on the unpaid amounts, the costs to be paid by the plaintiff; and a deed was prepared by the defendant's attorney and executed by the plaintiff about three weeks after he became of age, he employing no attorney or adviser other than his father, who died three months afterwards, having been in impaired health at the time of the sale, though there was no evidence that the defendant knew such to be the case, but if the state of the father's health at the time had been taken into account the price paid would have been inadequate,—upon a bill filed to declare the deed fraudulent and void, it was held that in the absence of fraud, and having regard to the circumstances, the transaction could not be impeached; although there was a dissenting opinion to the effect that although there was no evidence of fraud the plaintiff ought to have had an independent adviser and was therefore entitled to relief in equity. O'Rorke v. Bolingbroke, L. R. 2 App. Cas. 814, 26 Week. Rep. 239.

c. *When not enforced.*

In Heron v. Heron, 2 Atk. 160, a father, a freeman of the city of London, took advantage of his son's necessities, and in consideration of a bond for securing the son an annuity of £50 prevailed upon him to release the share he had in the orphanage part, and also prevailed on another of his sons to give him a release of his share of the orphanage part in consideration of an annuity in the same note, but there were not the same proofs of his being forced into the release, and the father had at times advanced him £300 or £400. It was held, the plaintiff being turned out of doors, left destitute and void of maintenance, that such release extorted from him could not be supported, and Lord Hardwicke also inclined to the opinion that the other release was equally void.

And in Morris v. Burroughs, 1 Atk. 399, a father having five children entered into an agreement with them that he would come to the city of London and take up his freedom there, provided they would release any right or demand they might be entitled to in respect of his personal estate by virtue of a custom of that city. An agreement was drawn up and executed by the father and three of the children, who were of age. Upon a bill subsequently brought by the plaintiff and his wife, one of the daughters who was of age at the time of the agreement, for her customary share of her father's estate, he having in the meantime taken his freedom, it was held that equity would not interpose in voluntary agreements in the absence of fraud, and that the agreement could not operate as a release for want of an interest in the children upon which it might operate, they neither having the *jus in rem* nor the *jus ad rem*, the whole being in the father during his lifetime. E. W.

lease by them of their expectancies in their father's estate, and should be upheld as such. So, also, in *Kershaw* v. *Kershaw*, 102 Ill. 307, a son accepted from his father a deed, the deed reciting that "said land is deeded as an advancement to said John W. Kershaw out of the estate of said Joseph Kershaw, and the deed is accepted by said John as his full and entire share of his father's estate." The court in that case held that the acceptance of the deed bound the son to the same extent as if he had signed it, and that the conveyance did not constitute an advancement, but operated as "an executed contract whereby an heir released his expectancy in his father's estate in consideration of a present grant of real estate." And it was further there decided that the son was estopped from making any further claim as heir at law to any portion of his father's estate. In *Crum* v. *Sawyer*, 132 Ill. 443, the court, in a well-considered opinion, held that a husband might for an adequate consideration enter into a valid contract with his wife releasing all his interest as her heir in her lands and personal estate, saying: "There can be no question then that the complainant's contingent interest or expectancy, as the heir of his wife, in her real and personal estate, was a proper subject of contract, and the contract in question having been made upon a valuable consideration, by parties capable of contracting with each other, and, so far as the evidence shows, with entire fairness, it should, as to such contingent interest or expectancy, be enforced according to its terms." And in *Power's Appeal*, 63 Pa. 443, it was decided that a father might make a contract with his child which would bar the latter as his heir at law, and that when property had been received by the son from the father, the son giving a receipt reciting that the same was received in full of his share as heir at law, he was thereby estopped, upon the death of the father, from claiming any further part of his estate. Without multiplying authorities upon this point,—and many others might be cited to the same effect,—it is sufficient to say that we are entirely satisfied with the rule declared in the foregoing cases, and hold that it is competent for an heir, under the limitations stated in that rule, to relinquish to his ancestor all interest in the estate of the latter which might otherwise in the future vest in him as such heir. In *Crum* v. *Sawyer*, 132 Ill. 462, it was held that such a relinquishment would inure to the benefit of the other heirs, whether mentioned or not, and in all the cases we have cited the release so made to the ancestor was enforced in behalf of other heirs. In this case, however, it is claimed by the petitioner that the pleadings admit that he and his brother are the only heirs of Mrs. Garcelon; and it is thence argued—First, that if in fact she died intestate, her property must, under the statutes of this state, be distributed to them, notwithstanding they may by the compromise agreement have relinquished to her their rights as such heirs; and second, that the defendants are strangers, in no way in privity with that agreement, and therefore are not entitled to claim the benefits of its provisions. In the view we take of this case, it is not necessary to determine what force, if any, there might be in the first of these contentions, if Mrs. Garcelon had in fact died intestate, and the question arose upon the distribution of her estate as that of an intestate. It is admitted that Mrs. Garcelon executed, apparently in due form of law, a document which upon its face purports to be her will, and which, if valid, disposed of all her estate consisting of all the property referred to in the compromise agreement of which she died possessed, and this document has been duly admitted to probate as her last will and testament. So long as this judgment stands it cannot be said that the deceased died intestate, and, unless the petitioner shall succeed in annulling the said judgment of probate, the question as to what would have been his rights as her heir at law if she had died intestate can never arise. The real question is, Does the petitioner have the right to maintain this proceeding in the face of his agreement that he would not contest any will of his aunt? The court below held that he could not, and this was one of the grounds upon which the court based its judgment dismissing the present proceeding.

3. This conclusion of the learned judge of that court was doubtless based upon a consideration of that part of the compromise agreement in which the petitioner covenanted with Mrs. Garcelon, "her heirs, devisees, legatees, executors, and administrators," that he would "never in any manner or to any extent question, dispute, or contest any disposition of the property" mentioned in that agreement "which she may have made, or may hereafter make, by either deed or by her last will and testament." If this covenant is valid, and is sufficiently broad to apply to and include a will, the validity of which is challenged, as is this, upon the grounds of incompetency of the maker, or because of its alleged execution under duress or undue influence, it is clear that the defendants, as executors of the disputed will, are in such privity with the alleged testator that they have the right, as against the petitioner, to invoke the benefit of this covenant not to contest (*Dakin* v. *Dakin*, 97 Mich. 289), and it would follow that the court below was correct in its ruling upon this point.

This particular covenant was evidently inserted by the parties for the purpose of supplementing the other part of the compromise agreement in which the petitioner relinquished to his aunt his expectancy as her presumptive heir at law, and was intended by him as a complete relinquishment or release of all right to contest, upon such grounds as are set forth in the petition filed in this proceeding, any will apparently executed in due form and, in fact, signed by his aunt, and which right of contest might otherwise, as a matter of possibility, come to him in the future as such heir at law. To place any other construction upon the agreement would deprive it of all practical meaning and effect. The agreement not to contest was made in view of the fact that, under the law, an heir is given the right to contest the validity of the document actually intended by the ancestor as his last will and testament, some of the grounds upon which such a contest is permitted by the statute often involving doubtful questions of law and fact; the latter, perhaps, depending for their deci-

sion upon the conflicting evidence of witnesses, and also upon the verdict of a jury which may be more or less influenced by sympathy or caprice, and the covenant of the petitioner was that he would not bring such questions concerning any will made by his aunt into dispute or litigation. Such being its true construction, we are brought to the consideration of the question, Is such an agreement upon the part of an heir binding upon him? The covenant not to sue for a breach, or for the enforcement of an existing obligation, operates as a release of such obligation; and unless void as against public policy (a point to be hereafter noticed), this covenant not to contest the will of Mrs. Garcelon should be given effect as a release by the petitioner of his right to make such contest. It is true that at common law a mere possibility was not the subject of release, and that a release was held to operate only upon a present interest. (*Pierce* v. *Parker*, 4 Met. 80; *Reed* v. *Tarbell*, Id. 93). A covenant made by one person not to sue another for or in respect to any matter arising out of future contracts between them, or by reason of any future tort, would, of course, be utterly void, as the parties to such contract could not have in view any particular subject-matter, or have any conception of the amount which might be involved in the causes of action upon which the covenant was to operate. But in this case the subject-matter of the covenant was in the mind of the contracting parties, and was in its nature no more fleeting and unsubstantial than the assignment of an expectancy, and the same principle upon which courts of equity uphold such assignments will sustain the proposition that a release by a presumptive heir of his contingent right to contest the will of his ancestor may also be enforced when fairly obtained, and based upon an adequate consideration. The two contracts stand upon the same basis; both relate to possibilities, and both concern the same subject-matter—the expectancy of the heir—the purpose of the latter agreement being to take away from the heir any right to assert any claim to such expectancy, in the face of a will bequeathing or devising it to another, and both are equally entitled to enforcement.

4. It is argued, however, in behalf of petitioner, that such an agreement is void because against public policy, and in support of this contention the case of *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 451, 22 L. ed. 368, is cited. In that case it was held that an agreement by an insurance company in its contract of insurance not to litigate in the Federal courts any claim arising upon the contract was void; and in *Nute* v. *Hamilton Mut. Ins. Co.* 6 Gray, 174, a similar question was decided in the same way, and the reasons for such a conclusion were very fully and carefully stated by Chief Justice Shaw in a clear and comprehensive opinion, but there is no analogy between those cases and the one before us, the reasons upon which the decisions in those cases rest are not at all applicable to a covenant not to contest a will such as we are now considering.

5. The petitioner further contends that it is against the policy of the law that the will of an insane person, or a will executed under the influence of fraud or duress, should be established as a valid will, and that this particular covenant is void, because it attempts to bind the petitioner not to show such facts, and thereby attempts to prevent him from establishing the invalidity of the will in controversy.

In passing upon this question, we start with the proposition laid down by Sir G. Jessell, M. R., in his opinion in the case of *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." The sole object which the parties had in mind in entering into the covenant now under consideration was to secure to Mrs. Garcelon the right to make such disposition of her property as she might desire, free from the contingency that her right so to do, or the fact that in so disposing of it she acted freely or voluntarily, might after her death be disputed by the petitioner or his brother; and, as before stated, the agreement was made in contemplation of the fact that controversies concerning the validity of wills or deeds frequently involve doubtful questions of fact, and that, by reason of false testimony or the weakness of juries, their final decision may not always be in accordance with the actual justice and truth of the case; and we see no reason why persons whose rights of property would be affected by the decision of such questions may not in advance, for an adequate consideration, waive their right to engage in such litigation. Such a contract is one that concerns the parties alone, and does not appear to us to be against public policy. There never has been any doubt that parties actually engaged in contesting a will upon any of the grounds upon which such contests are permitted may compromise all matters in difference arising out of such contest, and allow the disputed will to be established, and such agreements, when fairly made, are always enforced. It is difficult to understand why such a compromise agreement is any less against public policy than an agreement made by an heir apparent or heir presumptive with his ancestors, not to contest a future will of the latter. In addition to this, we think the principle upon which the case of *Cooke* v. *Turner*, 14 Sim. 493, was decided, is sufficient to sustain the validity of this covenant, so far as relates to the question of public policy. The question in that case arose upon a condition in a will to the effect that, if a devisee should dispute the will, or the competency of the testator to make it, the devise thereby given to her should be revoked. It was argued in that case that such a condition was void as against public policy because having a tendency to set up the wills of insane persons by restraining heirs named therein as devisees from contesting such wills; but the court in answer to this argument said: "There appears to be no more reason why a person may not be restrained by a

condition from disputing sanity, than from disputing any other doubtful question, whether of fact or of law, on which the title to a devise or grant may depend." And the court then, after calling attention to certain conditions which if found in a will would be declared void as against public policy, such as conditions in restraint of marriage or of lawful trade, proceeded to say: "But, in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they may think expedient as to raising or not raising questions of law or of fact among themselves, the sole result of which is to give the enjoyment of the property to one claimant rather than to another." This reasoning is applicable to the case at bar, for it must be admitted that that which is valid by way of condition, whether in a will or deed, would also be valid as a covenant contained in a contract. See also, as sustaining the decision in *Cooke* v. *Turner*, just cited, *Bradford* v. *Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; 2 Jarman, Wills, *902; 2 Redf. Wills, 679.

We have given to the earnest and able argument of the attorneys of the petitioner careful consideration, and, while we have not noticed in detail all the points urged by them in support of this appeal, the views above set forth are really conclusive of every question discussed by them. Our conclusion upon the whole case is that the compromise agreement is valid, and that the petitioner is thereby estopped from maintaining this proceeding; and it follows therefrom that the superior court did not err in refusing petitioner's demand for the trial of the issues relating to the sanity of the testator, or her freedom from undue influence. If the petitioner was not entitled to litigate these matters, the orderly course of procedure required that the court should dismiss his petition, as it did. The respondents have moved to dismiss the appeal, but, in view of our conclusion upon the merits, it is not necessary to discuss the grounds of such motion. We think the motion should be denied. Motion to dismiss appeal denied, and *judgment affirmed.*

We concur: **Fitzgerald, J.**; **McFarland, J.**

Hearing in banc denied.

MASSACHUSETTS SUPREME JUDICIAL COURT

William E. BROWN
v.
JARVIS ENGINEERING COMPANY.

(.....Mass.....)

A contractor building a brick and mortar foundation for a printing press is not liable to a driver of a van containing rolls of paper, for an injury to him caused by negligence of employees attempting to aid in unloading the van, for which their own work was necessarily suspended, with a suspension of their wages for the time lost, when they attempted to assist without any request of the driver, even if they may have been directed to do so by their foreman.

(May 20, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for personal injuries which were alleged to have been caused by the negligence of defendant's servant, which resulted in a verdict for plaintiff. *Sustained.*

The facts are stated in the opinion.

Messrs. **Stephen H. Tyng** and **George F. Piper** for defendant.

Messrs. **Sherman L. Whipple** and **George A. Saltmarsh,** for plaintiff:

The negligent workman was at the time of the accident under the direction and control of the defendant's foreman and representative and in the performance of the specific orders which he had given.

In doing what he did was the negligent workman acting for himself and his own personal interest, or was he acting for his employer and under his employer's direction?

Bowler v. *O'Connell*, 162 Mass. 319, 27 L. R. A. 173.

Lathrop, J., delivered the opinion of the court:

This is an action of tort for personal injuries. The defendant had a contract with the Advertiser Company to construct a brick and mortar foundation for a printing press in the basement of the Advertiser Building. It sent three or four of its workmen there to do the work, in charge of and under the direction of one Healey. While the men were at work, the plaintiff, a driver of a van containing rolls of paper, backed up his van to the rear entrance of the building to deliver the paper to the Advertiser Company. It was necessary that the defendant's work should be suspended while the paper was being unloaded and rolled into the basement. One of the defendant's men, without the knowledge or request of the plaintiff, got upon the dray for the purpose of assisting in unloading it, and carelessly set in motion a roll of paper, which rolled from the dray, and struck and injured the plaintiff. There was evidence tending to show that Healey ordered his men to go out and assist in unloading the van so that the defendant's work might be suspended as short a time as possible. Healey testified that he gave no such order, and had no knowledge that any of his men were assisting in unloading the

NOTE.—As to the liability of an employer for the negligence of his employee injuring third persons to whom he sustains no contractual relation, see Ritchie v. Waller (Conn.) 27 L. R. A. 161.

van. It further appeared that Healey's duties were to superintend the construction of the foundation for the printing press, and that the three or four men with him were under his direction, and in the employ of the defendant, and that these men were tenders or helpers in carrying brick or mortar. They were paid by the hour, and when their work was suspended for a time they received no pay from the defendant. They did not receive any pay for the time the work was suspended during the unloading of the dray, which consumed about one hour's time. The defendant requested two rulings: First, that the action could not be maintained; second, that the foreman of the defendant had no authority to bind the defendant by ordering his men to help unload the rolls of paper from the dray driven by the plaintiff, and, if he did so order any of his men, that the defendant would not be responsible for their acts while engaged in helping unload the van. Both of these instructions the presiding judge refused to give, and instructed the jury that, if the foreman, for the purpose of carrying forward the work which he was sent to do, and for the benefit and advantage of the defendant, ordered his men to assist in unloading the dray, and one of them did so assist, the defendant would be responsible for any injury he may have suffered by the careless act of the workmen who assisted in unloading the van. The jury returned a verdict for the plaintiff, and the case comes before us on the defendant's exceptions to the refusal of the judge to give the rulings requested and to the ruling given.

The question of law presented by these exceptions is whether the evidence would warrant a verdict for the plaintiff, and this depends upon whether the foreman and workman acted within the scope of their employment. We are of opinion that on the evidence a verdict for the plaintiff would not be warranted. The defendant employed these men to construct a foundation in the basement, and did not employ them to unload vans, or to do any other act, although such act might in some way expedite the business of the master. The act of the defendant's servants was not a necessary or natural or proper result of anything that the servants were employed to do. If they had volunteered, at the request of the plaintiff, to assist him in unloading the van, the defendant would not have been liable. *Potter* v. *Faulkner*, 1 Best & S. 800. Here the act of unloading was without the knowledge or request of the plaintiff, and was, therefore, an act for which the defendant is not responsible. *Bowler* v. *O'Connell*, 162 Mass. 319, 27 L. R. A. 173; *Harding* v. *Boston*, 163 Mass. 14; *Driscoll* v. *Scanlon* (Mass.) 43 N. E. 100; *Lyons* v. *Martin*, 8 Ad. & El. 512; *Mitchell* v. *Crasweller*, 13 C. B. 237; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; *Lord Bolingbroke* v. *Swindon New Town Local Bd. of Health*, L. R. 9 C. P. 575; *Stevens* v. *Woodward*, L. R. 6 Q. B. Div. 318; *Rayner* v. *Mitchell*, L. R. 2 C. P. Div. 357; *M'Kenzie* v. *M'Leod*, 10 Bing. 385. Even if the act of Healey in directing the men to unload the van was for the purpose of carrying forward the work, and for the benefit of the defendant, yet, as this act was not within the scope of his employment, the defendant is not responsible. In the construction of a building it frequently happens that one set of workmen has to wait until another set of workmen gets through, but it has never been supposed that this would authorize the foreman of a gang of painters to direct his men to assist carpenters or plasterers, or to attempt to do their work, although the doing of it might, in a sense, be said to facilitate the carrying forward of the work of painting. Men are employed because they are supposed to be skillful in their particular trades, and when they are set to do a work within their trade they carry no implied authority from their master to engage in any other trade. In *Limpus* v. *London General Omnibus Co.* 1 Hurlst. & C. 526, it was said by Blackburn, J.: "It is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses." In the opinion of a majority of the court, the entry must be, *exceptions sustained.*

32 L. R. A.

See also 37 L. R. A. 642.

COMMONWEALTH of Massachusetts
v.
James A. MURPHY, *Appt.*

(.....Mass.....)

1. **The constitutional right to keep and bear arms** for the common defense is not violated by Stat. 1893, chap. 367, § 124, prohibiting unauthorized bodies of men to associate together as a military organization, or drill and parade with arms in cities and towns.
2. **A statute exempting certain independent military bodies** or organizations from the operation of a provision against parading with firearms is not unconstitutional class legislation, as it grants a special privilege only which does not interfere with any constitutional rights of others.
3. **Ordinary breech-loading Springfield rifles** which have been altered so that they cannot discharge a missile by means of gunpowder or any other explosive, which fact is not obvious to the ordinary observer, are "firearms" within the meaning of Stat. 1893, chap. 367, § 124, prohibiting unauthorized bodies of men to parade with firearms.

(May 22, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Suffolk County convicting him of violating the statute against parading with an unauthorized body of men with firearms. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Thomas J. Gargan, P. M. Keating,** and **S. C. Brackett,** for appellant:

The statute is in contravention of the Constitution of Massachusetts.

NOTE.—As to the constitutional right to carry weapons, see State v. Workmen (W. Va.) 14 L. R. A. 600, and *note.*

The 17th article of the Declaration of Rights, Constitution of Massachusetts, part 1, declares: "The people have a right to keep and bear arms for the common defense."

2 Story, Const. §§ 1895–97; *Bliss* v. *Com.* 2 Litt. (Ky.) 90, 13 Am. Dec. 251.

The right to "bear" arms in itself is the right to use them as the weapons of soldiers, and the word has been so defined.

English v. *State*, 35 Tex. 473, 14 Am. Rep. 375; Bishop, Crim. L. § 124.

A diminution of the liberty to bear arms is an impairment of the right.

Bliss v. *Com. supra.*

A statute which under the pretense of regulating amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional.

State v. *Reid*, 1 Ala. 612, 35 Am Dec. 44; *State* v. *Wilforth*, 74 Mo. 528, 41 Am. Rep. 330; *Wilson* v. *State*, 33 Ark. 557, 34 Am. Rep. 52; *Haile* v. *State*, 38 Ark. 566, 42 Am. Rep. 3.

The citizen has at all times the right to keep and bear the arms of modern warfare, and to bear them in such manner as they are capable of being used, without annoyance and hurt to others, in order that he may be trained and efficient in their use.

Andrews v. *State*, 3 Heisk. 165, 8 Am. Rep. 8.

There has been a general doubt whether the terms of this constitutional provision were not infringed by the regulations of the legislature, as is shown by the limitations placed upon the right where state constitutions have been revised or amended.

Compare Mo. Const. 1867, art. 1, § 8, with Const. 1875, art. 2 § 17. Compare Tenn. Const. 1834, art. 1, § 26, with Const. 1870, art. 1, § 26.

If it should be held that the legislature has a right to limit the bearing of arms to the active militia, it has no power to single out certain organizations and give them peculiar rights which it denies to others.

This would be an infringement of the general principles, the very spirit, of the Constitution, which aims at equality of all men before the law.

Cooley, Const. Lim. chap. 11,485.

Defendant cannot be convicted under this statute, for the reason that the statute only applies to assembling for drill or parade with "firearms," and the weapon carried by the defendant was not a "firearm."

Criminal statutes must be construed strictly.

Com. v. *Loring*, 8 Pick. 370; *Cleaveland* v. *Norton*, 6 Cush. 380.

The weapon was incapable of being fired, and could not by any means explode a charge or expel a missile.

It was not a firearm.

A weapon does not come within the prohibition when it has ceased to be capable of use as a firearm and may not reasonably be used and carried as such a weapon.

Evins v. *State*, 46 Ala. 88; *Atwood* v. *State*, 53 Ala. 508.

Defendant had a right to go to the jury on the question whether or not the arm which he carried was a firearm.

Com. v *Betton*, 5 Cush. 427; *Morton* v. *Fairbanks*, 11 Pick. 368; *Porter* v. *Blood*, 5 Pick. 54.

Mr. **John D. McLaughlin,** for appellee:

It is especially important that the duties of citizens under this statute should be determined by some unvarying standard of conduct.

It will be conceded that this weapon before it was bored and the firing-pin filed was a firearm. The fact that it is temporarily or even permanently disabled, while still retaining the general characteristics and appearance of a rifle, does not render it less a firearm in the ordinary and usual sense of the term.

Williams v. *State*, 61 Ga. 417, 34 Am. Rep. 102; *Atwood* v. *State*, 53 Ala. 508.

Article 2 of the Amendments to the Constitution of the United States does not prohibit the legislation in question, and is a limitation only upon the power of Congress and the national government, and not upon that of the states.

Presser v. *Illinois*, 116 U. S. 252, 29 L. ed. 615; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

It is not in violation of the Declaration of Rights.

Presser v. *Illinois, supra; Dunne* v. *People*, 94 Ill. 120, 34 Am. Rep. 213.

Statutes forbidding the carrying of concealed weapons are constitutional.

Andrews v. *State*, 3 Heisk. 165, 8 Am. Rep. 8; *Aymette* v. *State*, 2 Humph. 158; *Wright* v. *Com.* 77 Pa. 470.

There is nothing in the Constitution which forbids the legislature arming and equipping bodies of men, other than the militia, or permitting such bodies to arm and equip themselves.

Opinion of the Justices, 14 Gray, 614.

The right to parade with arms is one that cannot be possessed by all. It is a right which it is important that some bodies or associations other than the militia should possess. The state, therefore, may properly select and point out such associations as seem to it worthy of such privilege.

Mason v. *Harper's Ferry Bridge Co.* 17 W. Va. 396; *Tipton County* v. *Rogers Locomotive & Mach. Works*, 103 U. S. 523, 26 L. ed. 340; Cooley, Const. Lim. 6th ed. 486.

Allen, J., delivered the opinion of the court:

The defendant is complained of for belonging to and parading with a certain unauthorized body of men with arms, which said body of men had associated themselves together as a company and organization for drill and parade with firearms, in violation of Stat. 1893, chap. 367, § 124. He contends that this statute is in contravention of the 17th article of the Declaration of Rights, which declares that "the people have a right to keep and bear arms for the common defense." This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms, so as to forbid such unau-

thorized drills and parades. *Presser* v. *Illinois*, 116 U.S. 252, 264, 265, 29 L. ed. 615, 619; *Dunne* v. *People*, 94 Ill. 120, 34 Am. Rep. 213. The protection of a similar constitutional provision has often been sought by persons charged with carrying concealed weapons, and it has been almost universally held that the legislature may regulate and limit the mode of carrying arms. *Andrews* v. *State*, 3 Heisk, 165, 8 Am. Rep. 8; *Aymette* v. *State*, 2 Humph. 154; *Wilson* v. *State*, 33 Ark. 557, 34 Am. Rep. 52; *Haile* v. *State*, 38 Ark. 564, 42 Am. Rep. 3; *English* v. *State*, 35 Tex. 473, 14 Am. Rep. 374; *State* v. *Reid*, 1 Ala. 612, 35 Am. Dec. 44; *State* v. *Wilforth*, 74 Mo. 528, 41 Am. Rep. 330; *State* v. *Mitchell*, 3 Blackf. 229; Bishop, Statutory Crimes, § 793. The early decision to the contrary, of *Bliss* v. *Com.* 2 Litt. (Ky.) 90, 13 Am. Dec. 251, has not been generally approved.

The defendant further contends that this statute, which mentions certain military bodies as exempt from its operation, is class legislation, which grants exclusive privileges to certain classes of citizens which are denied to the body of the people. It is not contended that the troops of the United States or the regularly organized militia of the commonwealth should be forbidden to drill and parade; but the argument is that the legislature has no power to single out other independent organizations, and give to them peculiar rights which it denies to others. But, in regulating drills and public parades, it is for the legislature to determine how far to go. No independent military company has a constitutional right to parade with arms in our cities and towns, and the granting of this privilege to certain enumerated organizations does not carry with it the same privilege to all others. It is within the power of the legislature to determine, in reference to such independent organizations, which of them may, and which of them may not, associate together and organize for drill and parade with firearms. No decision has been cited to us which intimates the contrary. The granting to certain persons of special privileges of this kind, which do not interfere with the rights of others, is not open to objection on constitutional grounds.

It appeared in evidence that the defendant, with ten or twelve other men, formed one company in the parade, and that all the men in this company carried ordinary breech-loading Springfield rifles, which had been altered and bored in the barrel near the breech, and the firing pins had been filed down, so as to make them immovable; and in this condition they could not discharge a missile by means of gunpowder or any other explosive. The defendant contends that these weapons were not "firearms" within the meaning of the statute. The purpose for which these alterations were made is not disclosed. They would not be obvious to the ordinary observer, while the rifles were carried in the parade. So far as appearance went, it was a parade with firearms which were efficient for use. To the public eye, it was a parade in direct violation of the statute. The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still exist in the parade in which the defendant took part. To hold that such a weapon is not a "firearm," within the meaning of the statute, would be to give too narrow and strict a construction to its words. It was originally a firearm which was effective for use. The fact that it was disabled for use did not change its name. It was for the court to determine whether the statute included the weapon which was produced and exhibited at the trial, and his instruction to the jury that it was a "firearm," within the meaning of the statute, was right. *Williams* v. *State*, 61 Ga. 417, 34 Am. Rep. 102; *Atwood* v. *State*, 53 Ala. 508; Bishop, Statutory Crimes, § 791.

Verdict of guilty to stand.

John S. WAY
v.
ABINGTON MUTUAL FIRE INSURANCE COMPANY.

(.....Mass.....)

Damage to insured property by the burning of soot in a chimney accidentally ignited by the burning of waste paper in a stove is within the terms of a policy against all loss or damage by fire,—especially where there was an accidental obstruction of the flue contributing to the damage.

(May 19, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover for a loss alleged to have been covered by defendant's policy of fire insurance. *Overruled.*

Plaintiff operated a tobacco factory. His foreman emptied into the stove in one of the rooms the contents of a waste basket, intending to have the contents consumed. He subsequently closed the drafts of the stove and locked up the room and left. An hour afterwards the chimney was discovered to be on fire, and when the door was opened the rooms were found to be filled with a dense smoke which caused the damage for which this action was brought. An examination of the chimney disclosed that the soot in it had become ignited, and the heat caused accumulated soot and particles of mortar to fall down and choke the flue, which threw the smoke into the rooms.

Further facts appear in the opinion.

Mr. **L. S. Dabney,** for defendant:

The ignition of the soot in the chimney was not the intended or probable result of the fire in the stove.

Where fire is employed as an agent, either for the ordinary purposes of heating a building, for the purposes of manufacture, or as an

NOTE.—On the question what losses are covered by insurance against fire, see also as to explosions, *note* to Heuer v. Northwestern Nat. Ins. Co. (Ill.) 19 L. R. A. 594; and also as to the proximate cause of loss when a fire causes a short circuit and starts a powerful current of electricity, see Lynn Gas & E. Co. v. Meriden F. Ins. Co. (Mass.) 20 L. R. A. 297.

instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed, as from the effects of smoke or heat evolved thereby or escaping therefrom from any cause, whether intentional or accidental

1 Wood, Ins. § 103, p. 236; 2 Marshall, Ins. 3d ed., 790; *Austin* v. *Drew*, 4 Campb. 360, 6 Taunt. 436; *American Towing Co.* v. *German F. Ins. Co.* 74 Md. 25; *Millaudon* v. *New Orleans Ins. Co.* 4 La. Ann. 15; *Scripture* v. *Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 Am. Dec. 111.

Messrs. **Alfred Hemenway** and **William H. Preble,** for appellee:

The contract will be given a liberal construction in favor of the object to be accomplished, and it is presumably the intention of the insurance that in case of loss protection shall be given to the full extent which a fair interpretation will permit.

May, Ins. §§ 174, 402, and cases.

An insurer is liable for damage caused by smoke as well as by ignition or the actual contact of the fire itself.

Scripture v. *Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 Am. Dec. 111.

So long as fire is the proximate cause of the loss or damage, it is covered by such a policy. So, insurance companies are held liable for damage caused by the use of water in reasonable attempts to extinguish the fire.

Lewis v. *Springfield F. & M. Ins. Co.* 10 Gray, 159; *Geisek* v. *Crescent Mut. Ins. Co.* 19 La. Ann. 297; *Whitehurst* v. *Fayetteville Mut. Ins. Co.* 6 Jones, L. 352.

And for damage, either by theft or otherwise, to goods during their removal for safety.

White v. *Republic Ins. Co.* 57 Me. 91, 2 Am. Rep. 22; *Witherell* v. *Maine Ins. Co.* 49 Me. 200; *Case* v. *Hartford F. Ins. Co.* 13 Ill. 676.

And for damage caused by explosion, when it is traceable to the fire as its cause.

Scripture v. *Lowell Mut. F. Ins. Co. supra;* 18 Alb. L. J. 426; *Renshaw* v. *Firemen's Ins. Co.* 33 Mo. App. 394.

And by the intentional blowing up of a building to prevent the spread of fire.

City F. Ins. Co. v. *Corlies,* 21 Wend. 371; *New York & B. Despatch Exp. Co.* v. *Traders' & M. Ins. Co.* 152 Mass. 377, 42 Am. Rep. 440; *Lynn Gas & E. Co.* v. *Meriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297; *Brady* v. *Northwestern Ins. Co.* 11 Mich. 425; *Elmentrout* v. *Girard F. & M. Ins. Co.* (Minn.) 30 L. R. A. 346.

Where the damage is caused by or consequent upon ignition outside of the proper place for the fire, where it flows from any other process of combustion, the liability of the insurer for such damage has never been questioned.

American Towing Co. v. *German F. Ins. Co.* 74 Md. 25; Bunyon, Fire Ins. 3d ed. 35, 36.

Knowlton, J., delivered the opinion of the court:

It is conceded by the defendant that it is liable for damage caused by smoke, to the same extent as if the damage had been caused directly by the fire which produced the smoke. The question before us is whether the fire in the chimney was within the contract of insurance made by the defendant. The policy purports to cover all loss or damage by fire, but the defendant contends that in all such contracts there is an implied exception of such fires as this, from which the plaintiff suffered loss. The facts are not in dispute, and if defendant's witness had been permitted to testify as an expert, or if the jury had used their common experience and common knowledge to find the facts as the defendant's counsel, in his opening, contended that they should be found, there would have been no substantial conflict between the statement of the auditor and the facts relied upon by the defendant. A chimney is not intended to be used as a place in which to kindle fires, or to have fires for use or enjoyment in connection with the occupation of a building. It is intended to carry off the products of combustion. One of the products of combustion, in a stove or fire place connected with a chimney, is soot, which will accumulate more or less in the chimney, and will sometimes take fire from the flame in the stove or fireplace. Chimneys are constructed with a view to guard against accidents when such fires occur. Occasional fires in a chimney, from the ignition of soot, are to be expected. Such fires are not desired. They are not maintained for any useful purpose. In a sense, they are accidental; for they are not lighted intentionally, but they start, from time to time, without human agency, when a large quantity of soot has accumulated, and the circumstances chance to be favorable to ignition from the fire which is maintained in the place intended for it.

The defendant's counsel contends that the policy was not intended to apply to a fire which is lighted and maintained for the ordinary purposes for which fires are used in buildings, and which is confined within the place that is fitted for such fires. He argues that if a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or scorch valuable furniture left too near it, or injure property by its smoke, which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it, the insurance company would not be liable. See *Austin* v. *Drew,* 4 Campb. 360, Holt, N. P. 126, 6 Taunt. 436; *American Towing Co.* v. *German F. Ins. Co.* 74 Md. 25; *Scripture* v. *Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 Am. Dec. 111. We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney, incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire, with-

out human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally, as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire; and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance. It is doubtless true that in former years, in some parts of the country, straw and other combustible materials have sometimes been put in chimneys, and set on fire, to burn out the soot. But neither at the trial of this case before the jury, nor in the argument before us, was there any suggestion that such a practice prevails, or has ever prevailed, in Boston, or that this chimney was constructed with a view to kindling fires in it for such a purpose. What our decision would be if damage was done by smoke from a fire in a chimney, intentionally kindled to burn out the soot, it is unnecessary now to determine. It is also to be noted that there was an accidental obstruction of the flue, by the falling of the plaster lining of the chimney, which, in some aspects of the case, might be deemed an important fact in favor of the plaintiff's claim.

Exceptions overruled.

PRINCE *et al.*
v.
CROCKER *et al.*

(.....Mass.....)

1. **Judicial notice may be taken** of a vote of a city at a special election, accepting a statute.
2. **A vote by a city to accept a statute** for the construction of a subway under its streets is virtually a vote to raise or to pay money, within the meaning of Pub. Stat. chap. 27, § 129, so as to give taxpayers a standing to contest the legality of the use of the public money for such purpose.
3. **The consent of the city council is not necessary** to authorize the legislature to impose a debt upon a city and to take away the control of its streets to some extent from the city officers by constructing a subway under the streets,—especially when the statute is accepted by a majority of the voters of the city.
4. **The building of a subway under the streets of a city** for the carriage of such passengers as pay the regular fare on a street railway to which it will be leased is for public use and within the constitutional power of the legislature to order or sanction taxation for it.
5. **The unconstitutionality of a statute** omitting to provide for compensation for property taken or injured is not a ground of objection to any person except those whose property is affected by it.
6. **The combined action of the legislature in passing a statute, and of the inhabitants of a city in accepting it,** is a sufficient answer to an objection that the statute authorizes the use of public grounds without compensation, in the construction of a subway for transportation of passengers.
7. **Consent by the inhabitants of a city to a particular use of public grounds** may constitute a waiver of the provisions of a statute prohibiting such use even if that constitutes a contract between the state and the city.
8. **A statutory limitation on municipal indebtedness** may be changed by the legislature by providing for additional indebtedness for a specified purpose.
9. **Judicial notice is taken** of the situation of the streets and squares and public grounds of Boston in determining the construction of a statute as to authorizing an entry upon the Public Garden in building a subway under Stat. 1894, chap. 548.
10. **The right to enter upon the Public Garden** in Boston so far as is necessary to make a suitable connection between surface tracks and the subway authorized by Stat. 1894, chap. 548, is implied from the right given to make such connection on or near Boylston street, together with other provisions of the statute.
11. **The right to extend a subway upon the Public Garden** in Boston under Stat. 1894, chap. 548, to that extent modifies Pub. Stat. chap. 54, § 13, restricting highways, street railways, etc., on public commons or parks.

(June 15, 1896.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench after sustaining a demurrer to a bill filed to restrain defendants from proceeding to construct a subway under the streets of Boston. *Dismissed.*

The facts are stated in the opinion.

Messrs. **F. A. Brooks** and **John D. Bryant** for complainants.

Mr. **Solomon Lincoln** for the Boston Transit Commission.

Allen, J., delivered the opinion of the court:

The general complaint of the plaintiffs, as stated in their bill, is that, if the transit commissioners are permitted to proceed in the execution of the enterprise committed to them by Stat. 1894, chap. 548, they will involve the city of Boston in an indebtedness or liability of many millions of dollars beyond the limit of indebtedness prescribed by the laws of the commonwealth, and will do this without the authority of the city council or the consent of the taxpaying citizens; and also that this statute would have the effect to deprive the city of many rights and privileges belonging to its inhabitants, and especially that it would infringe rights which relate to the control of the streets and highways of the city by the aldermen and street commissioners; all in violation of the right of the inhabitants of the city to govern themselves.

It is provided by § 40 of the statute that

NOTE.—The above case is believed to be entirely a case of first impression. Other cases about so-called subways have related to mere conduits for electric wires. One of these is the recent Missouri case of State, St. Louis U. S. Co., v. Murphy, which condemns an ordinance permitting the use of streets for an electrical subway of a private corporation. But this case is yet pending on rehearing.

the transit commission shall not "take any land or commence the construction of any subway or tunnel until this act shall be accepted by a majority of the voters of said city voting at some special election called by the mayor," etc. In the printed copy of the subway legislation furnished to us by mutual consent of counsel it is stated that this act was accepted at a special election held July 24, 1894. There is no averment in the bill that no such vote of acceptance had been passed, and, though the briefs on both sides say little or nothing on this point, yet it is implied in the briefs furnished by one of the counsel for the plaintiffs (Mr. Bryant) that there had been such an acceptance, and it is then contended that the people at the polls are not the tribunal to determine what debts shall be incurred by or in behalf of the city, because, by a law which stands unrepealed, that question is to be determined by both branches of the city government, and a two-thirds vote of each branch is required to authorize the incurring of a debt by the city. As the fact of the acceptance of the statute has significance in certain aspects of the questions presented, we will state at the outset that, in the absence of any averment to the contrary, we assume that such a vote of acceptance was duly passed. This is a fact of which the court should take judicial notice. *Andrews* v. *Knox County Supers.* 70 Ill. 65; *State* v. *Swift*, 69 Ind. 505; *Rauch* v. *Com.* 78 Pa. 490. Moreover, it is very doubtful, to say the least, whether the plaintiffs, as taxpaying inhabitants, have any standing to maintain the bill in their own names, except upon the assumption that the vote to accept the statute is virtually a vote to raise or to pay money, within the meaning of Pub. Stat. chap. 27, § 129. In this commonwealth, contrary to what has been held in some other jurisdictions, a suit like the present has been considered not to fall within the general jurisdiction of a court of equity. *Baldwin* v. *Wilbraham*, 140 Mass. 459; *Steele* v. *Municipal Signal Co.* 160 Mass. 36; *Carlton* v. *Salem*, 103 Mass. 141. By Pub. Stat. chap. 27, § 129, when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power, it may be restrained by this court upon the suit or petition of not less than ten taxable inhabitants. The case of *Frost* v. *Belmont*, 6 Allen, 152, was brought under Stat. 1847, chap. 37, which was like Pub. Stat. chap. 27, § 129. The case of *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39, was also brought under the similar provision found in Gen. Stat. chap. 18, § 79. No point was there made that under the statute the petitioners had no right to be heard.

It is contended, however, by the present defendants that the plaintiffs have no standing to maintain this bill, but in favor of affording a remedy against a use of public money which is supposed to be illegal we think a somewhat liberal construction should be given, and that the vote to accept the statute is sufficient to give the plaintiffs a standing in court under Pub. Stat. chap. 27, § 129.

The two principal grounds upon which the plaintiffs contend that Stat. 1894, chap. 548, as a whole, is invalid, are that it imposes a heavy debt upon the city, and to a certain extent takes away from the city the control of its streets. The plaintiffs deny the power of the legislature to do either of these things without the authority of the city council, or the consent of the taxpaying citizens of the city. It has, however, been established by a great weight of usage and authority that the legislature may impose such a duty and burden upon towns and cities without their own consent. We do not deem it necessary to go into an extended discussion of this subject, or to consider what objects may be so special or local in their character as not to come within the general rule. As to roads of all kinds and bridges and sewers the doctrine is well established in this commonwealth and elsewhere that the legislature may prescribe what shall be done, and requires cities and towns to bear the expense to such an extent and in such proportions as it may determine. The powers which had been given to cities and towns by the legislature by special or by general laws are in no sense a contract, and do not become vested rights as against the legislature. *Coolidge* v. *Brookline*, 114 Mass. 592, 596, 597; *Agawam* v. *Hampden County*, 130 Mass. 528, 530; *Re Kingman*, 153 Mass. 566, 573, 576, 12 L. R. A. 417; *People* v. *Morris*, 13 Wend. 325; *Sloan* v. *State*, 8 Blackf. 361; *People, McLean*, v. *Flagg*, 46 N. Y. 401; *Philadelphia* v. *Field*, 58 Pa. 320; *Pumphrey* v. *Baltimore*, 47 Md. 145, 28 Am. Rep. 446; Dill. Mun. Corp. 4th ed. §§ 54, 73, 74, 831, and other cases there cited. If this power were otherwise doubtful, in the present case the statute under consideration is not peremptory and absolute, but it remained inoperative until accepted by a majority of the voters of the city. The plaintiff's contend that the statute is to become operative without the authority of the city council or the consent of the taxpaying citizens; but, if a consent were necessary, we know of no authority or legal reason for requiring any other consent than that of qualified voters. In *Merrick* v. *Amherst*, 12 Allen, 500, 506, the court, while intimating that no consent at all was necessary, said: "To guard against all danger of mistake, and to obtain the highest evidence from those most interested that the imposition of the tax was not unequal or disproportionate to the expected benefits, the legislature required that it should not be laid on the inhabitants of the town, unless two thirds of the voters, at a meeting to be called for the purpose, should consent to its imposition." The instances where legislatures have provided that towns or cities or counties might or should bear the whole or a portion of the expense of local improvements in case the qualified voters should assent, and not otherwise, are numberless. In our own statutes, from early times, such legislation has been common. In the Public Statutes now in force many instances are found enacting that cities and towns may by vote accept the provisions of certain statutes, and thereupon shall be subject to certain duties and burdens. There have been many special laws to the same effect. It cannot be necessary to cite more than a few illustrative instances: Pub. Stat. chap. 27, §§ 10–13, 27, 29, 44, 65, 69, 74; Id. chap. 28, §§ 8, 22, 23; Id. chap. 35, § 4; Id.

chap. 45, §§ 44, 52; Id. chap. 50, §§ 20, 22, 25; Id. chap. 51, § 10; Id. chap. 80, §§ 8–13. By the 2d Amendment to the Constitution, city governments cannot be established except with the consent and on the application of a majority of the inhabitants of the town present and voting thereon at a meeting. All of the cities of the commonwealth have been incorporated under this amendment. *Larcom* v. *Olin*, 160 Mass. 102, 104, 108. When the legislature imposes such a condition in order to bind a city or town or county to assume a particular burden, it must be complied with; but an assent by vote will give full effect to the statute, and the city, town, or county will thereupon become bound. *Hampshire County* v. *Franklin County*, 16 Mass. 76, 87, 90; *Stone* v. *Charlestown*, 114 Mass. 214; *Central Bridge Corp.* v. *Lowell*, 15 Gray, 106, 116; *St. Joseph Twp.* v. *Rogers*, 83 U. S. 16 Wall. 644, 662, 663, 21 L. ed. 328, 337, 338; *Knox County Comrs.* v. *Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 208; Dill. Mun. Corp. §§ 519, 526, 544, 551–553, and cases there cited. It is not material that the work is not put in charge of the street commissioners of the city. The legislature might provide for doing the work at the expense of the city, but through other agents than those regularly appointed by the city; it might impose liability on the city, incur the expense, and require payment by the city. The acceptance of the act by the city precludes objection on this score, even if such objection would otherwise have been open.

The foregoing considerations apply to the bridge over Charles river, provided for in § 30, as well as to the subway itself.

It is further contended that taxation can only be for a public use; that the term "public use," in reference to taxation, has a more restricted meaning than when applied to the taking of land by eminent domain; that the subway will not be a highway or open and free to be used by the public for driving or walking; that, when finished, the statute authorizes the transit commission virtually to grant a lease of it to any street-railway company for fifty years; and that the use of the subway which is contemplated is not a public use. That the legislature can authorize a city or town to tax its inhabitants only for public purposes is well settled and familiar. *Opinion of the Justices*, 155 Mass. 598, 601, and cases there cited. But railroads are always held to be built for public use, whether the right to take land or the right to grant pecuniary aid to them is considered. The legislature of this commonwealth has granted aid to railroad corporations from its own treasury. See instances cited in *Re Kingman*, 153 Mass. 570, 12 L. R. A. 417. It has also in a number of instances authorized cities and towns to furnish such aid by subscribing to stock or otherwise. For illustrations, see Stat. 1852, chap. 156; Stat. 1855, chaps. 394, 395; Stat. 1860, chaps. 34, 184; Stat. 1861, chap. 98; Stat. 1862, chaps. 56, 78; Stat. 1863, chaps. 96, 104, 105; Stat. 1864, chaps. 11, 242, 245, 246, 249, 260. Finally such municipal aid was authorized by general laws. Stat. 1870, chap. 325, § 3; Stat. 1874, chap. 372, § 35; Pub. Stat. chap. 112, § 46. The constitutionality of such legislation has not been brought into direct controversy before this court, but indirectly it has been recognized. *Kittredge* v. *North Brookfield*, 138 Mass. 286; *Com.* v. *Williamstown*, 156 Mass. 70. And elsewhere it has been established by such a weight of judicial authority that we regard it as settled. *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678, 694–696, 21 L. ed. 382, 388; *Chicago, B. & Q. R. Co.* v. *Otoe County*, 83 U. S. 16 Wall. 667, 21 L. ed. 375; *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 666, 22 L. ed. 227; Dill. Mun. Corp. 4th ed. §§ 153–158, 508. The building of the subway for the carriage of such passengers as pay the regular fare is therefore for a public use, and it is within the constitutional power of the legislature to order or sanction taxation for it.

The plaintiffs also contended that the statute is in violation of the 14th Amendment to the Constitution of the United States. This objection is not dwelt upon in argument, and it is enough to say that we think it is unfounded.

The plaintiffs further contended that the statute is unconstitutional because it omits to provide for compensation for property taken or injured, and especially for taking part of the Common and Public Garden. But the plaintiffs cannot be heard to object to the constitutionality of the statute on grounds which only affect others than themselves. *Hingham & Q. B. & Turnp. Corp.* v. *Norfolk County*, 6 Allen, 353; *Davis* v. *Hampshire County Comrs.* 153 Mass. 218, 228, 11 L. R. A. 750. So far as other private owners are concerned, the plaintiffs do not represent them, and have no standing to be heard in their behalf.

In respect to the matter of providing compensation, the stress of the argument of the plaintiffs rests on the contention that there is no provision for compensation for so much of the Common and Public Garden as may be taken. It is urged that these were dedicated to the use and enjoyment of the inhabitants of the town long before the city charter was granted, and that they are held by the city in trust to secure and promote such use; that the city, as trustee for these purposes, is entitled to compensation if any part of either is taken; and that the fact that the city is the party to pay, as well as to receive, does not affect this argument, because the city acts in two different capacities. If we assume that the plaintiffs are entitled to be heard on this branch of the argument, it is well settled that the land already appropriated to one public use may be taken by authority or direction of the legislature for another public use. *Old Colony R. Co.* v. *Framingham Water Co.* 153 Mass. 561, 13 L. R. A. 332. We do not need to go into any nice consideration of the precise capacity, interest, or duty of the city on caring for the Common and Public Garden, because both the legislature and the city have consented to such new use of both as may be included within the terms of the statute. If the right to their use is in the inhabitants of the city, their vote accepting the act binds them. If it is in the public at large, as distinguished from the inhabitants of the city, the interests of the public are under the protection of the legislature. The plaintiffs in their capacity of taxpaying citizens of Boston, or as voters, or as a constituted part of the public at large, can assert no right to the continued use of the Common or

of the Public Garden as public parks, or to have compensation paid for the surrender of such use, against the combined action of the legislature in passing the statute and of the inhabitants of the city in accepting it. *Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; Dill. Mun. Corp. 4th ed. §§ 598, 650–651*a*, notes, and cases there cited. Under these circumstances we need not pursue the questions relating to the title to and interest of the public in public parks,—questions somewhat discussed in *Abbott* v. *Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, and *Atty. Gen.* v. *Abbott*, 154 Mass. 323, 13 L. R. A. 251.

It is also contended by the plaintiffs that if Stat. 1894, chap. 548, bears such a construction as to allow the transit commission to enter the Public Garden with the subway the statute is unconstitutional, because it impairs the obligation of a contract between the commonwealth and the city. This supposed contract is found in Stat. 1859, chap. 210, § 3, which provided that the commissioners on the Back Bay should fill up and complete at the expense of the commonwealth so much of Arlington street as remained to be completed, and the strip of land easterly of said street which had theretofore been released by the commonwealth to the city; and, further, that "no building shall hereafter be erected between Arlington and Charles streets, except such as are expedient for horticultural purposes." It is argued that this is a contract that the commonwealth would not erect a building there, and that the subway as constructed is a building, and, if it is authorized by Stat. 1894, chap. 548, then that the statute is a violation of said contract. The short answer to this argument is that the inhabitants of the city have accepted Stat. 1894, chap. 548, and so have consented to whatever is contained therein. Contracts may be waived by the parties to them. If this was a contract, the city was a party to it, and might waive it.

The plaintiffs also contend that the statute is invalid because work to be done under it will increase the debt of the city much beyond the limit of municipal indebtedness fixed by Stat. 1885, chap. 178, § 2. But the same authority which fixed that limit may change it, and § 17, which requires the treasurer of the city to issue bonds, also provides that this debt shall not be included in determining the limit of indebtedness. Similar exceptions have been very numerous in the legislation of the last ten years. See Blue Book for 1895, p. 805. There is no averment in the bill that the limit of indebtedness as thus extended will be exceeded by the issue of the bonds provided for by Stat. 1894, chap. 548.

It is also argued by the plaintiffs that the statute does not authorize any entry upon the Public Garden; that, at any rate it does not authorize the erection of a building thereon; and that the subway, as constructed there, is a building, which is in violation of Pub. Stat. chap. 54, §§ 16, 17. In determining whether an entry upon the public garden is authorized, the court will take notice of the situation of the streets and squares and public grounds. The Boylston street mall upon the southerly side of the common extends westerly along the line of Boylston street from Tremont street to Charles street, which last named street separates the Common from the Public Garden; and Park Square is a place open for travel south of Boylston street, and bounding thereon, and is in part opposite to the southerly end of Charles street, where it joins Boylston street at right angles. Columbus avenue opens into Park Square from the southwest. Stat. 1894, chap. 548, § 25, authorizes the transit commission to construct a subway or subways of sufficient size for four railway tracks, with approaches, entrances, sidings, stations, and connections therefor, and for the running of railway cars thereon through and under Tremont street and the adjoining mall of Boston Common, etc. Section 27 authorizes the commission also to "construct subways to be used for the same purposes as said other subways, but which may be made of sufficient width for two tracks only, as follows: From Tremont street through and under Boylston street and the adjoining mall of Boston Common, or other public or private lands adjoining said street, to a point on or near Boylston street where a suitable connection with surface tracks may be made; from Boylston street through and under Park Square and Columbus avenue or other lands adjoining said square and avenue, to a point on or near Columbus avenue where a suitable connection with surface tracks may be made; and from Tremont street through and under Park street," etc. Section 29 provides that "said commission may locate and construct said subways, tunnels, approaches, tracks, sidings, stations, entrances, and connections where it deems best within the limits aforesaid, . . . but shall not permanently occupy above the surface of the ground for any purpose any part of said Common, except so much of the Tremont and Boylston street malls as may be necessary for stairways to stations and coverings therefor." Section 35 provides that "said commission may, on or before the completion of such subways and tunnels, grant locations for tracks . . . shall order all surface tracks to be removed . . . from Boylston street between Park Square and Tremont street." By Stat. 1895, chap. 440, § 3, it is provided that "no portion of the Common with the exception of the malls on Boylston and Tremont streets shall be permanently occupied above the surface of the ground for any of the purposes of the subway, except so far as necessary for the suitable ventilation thereof, and no portion of said malls shall be permanently occupied above the surface of the ground except so far as necessary for suitable ventilation, and for shelter and other accommodations at the station entrances and exits." Having reference to the locality, it thus appears that it was probably contemplated that the subway should remain below the surface of the ground in Park Square, and on the Common at the corner of Boylston and Charles streets; that is, that in going west from Tremont street it should be underground till after leaving the Common, and that it should be built through and under Boylston street and the adjoining mall of Boston Common, or other public or private lands adjoining said street, to a point on or near Boylston street where a suitable connection with surface tracks might be made. Since a connection

with surface tracks is to be made on or near Boylston street, and since no such connection can be made east of Charles street without getting above ground, a right is implied to emerge from underground west of Charles street, and to continue the subway for that purpose as far as is necessary in order to make a suitable connection with surface tracks, but no further; and, so far as is necessary for that purpose, to enter upon the Public Garden, that being public ground adjoining Boylston street. The plaintiffs do not aver that the present construction of the subway extends further upon the Public Garden than is necessary in order to emerge from underground immediately west of Charles street, and to make a suitable connection with surface tracks at a point as near as is practicable. If the fact is so, it should have been averred. It was stated in the argument for the plaintiffs that it had been agreed by counsel that the bill should not be treated as averring an intention to go further west on the Public Garden than the subway is now built, and the defendants had disclaimed any intention of doing so.

It is further argued for the plaintiffs that the subway as constructed on the Public Garden is a building, and that it is in violation of the provision of Pub. Stat. chap. 54, § 16, that "no building exceeding 600 square feet in area upon the ground shall be erected in or upon a common or park dedicated to the use of the public without leave of the general court." The manner of the construction of the subway is set forth, and it is averred that it is a building; but it is not averred in the bill, nor was it suggested in the arguments, that the subway as built is unnecessary or unsuitable or unreasonable in its form or structure, if a subway was to be built at all. The permission of the legislature to build a subway such as is adapted for the uses and purposes described in § 25 of the Statutes of 1894 by implication authorizes such a structure as is necessary and reasonable for those purposes, and, in the absence of any averment to the contrary, we must assume the present structure to be within this implied authority, and therefore, if the subway is a building, the leave of the general court which is required by Pub. Stat. chap. 54, § 16, is given by the giving of authority to enter with the subway upon the Public Garden for a short distance west of Charles street.

The suggestion is also made that the building of the subway in the Public Garden is in violation of Pub. Stat. chap. 54, § 13, providing that "no highway, townway, street, turnpike, canal railroad, or street railway shall be laid out or constructed over a common or park dedicated to the use of the public, or appropriated to such use without interruption for the period of twenty years . . . unless with the consent of the inhabitants of the city or town, after public notice, given in the manner provided in cases of the location and alteration of highways." But the legislature might, and by Stat. 1894, chap. 548, did, authorize the subway to extend upon the Public Garden as above explained; and in § 40 it was provided that the transit commission should not begin work until the act should be accepted by a majority of the voters of the city. This legislation was a substitute, so far as the subway on the Common and Public Garden is concerned, for Pub. Stat. chap. 54, § 13, and the acceptance of the statute furnished all the consent on the part of the inhabitants that is necessary.

According to the terms of the report, the entry must be, *bill dismissed.*

Field, Ch. J.:

I concur with the opinion of the court, except that I think it was not the intention of Stat. 1894, chap. 548, and of Stat. 1895, chap. 440, that any part of the subways should be constructed in the Public Garden. The use to be made of Boston Common in the construction of the subways is very carefully provided for in § 29 of the Statute of 1894, and in § 3 of the Statute of 1895, but not a word is said concerning the Public Garden in either statute. Considering the very careful provisions made in the statutes concerning the use of the Common for subways, it is improbable that the legislature would not have made equally careful provisions concerning the use of the Garden if it had supposed that the commissioners could use the Garden for the purposes of the subways, or could construct a subway in or under it. I think that the intention of the legislature was that the connection of the subway with the surface tracks of the railway on Boylston street should be made at or near the corner of the Common bounded by Charles and Boylston streets, and that the incline of the subway for these tracks should begin there. By § 25 of the Statute of 1894 the principal subway was to begin at "a point or points within 1,000 feet of the junction of Tremont street and Shawmut avenue," and was to continue "through and under Tremont street and the adjoining mall of Boston Common or other public or private lands adjoining or near said street" to Scollay's Square, etc. By § 27, Id., subways to be connected with the principal subway might be constructed for the use of the cars which run along Columbus avenue through Park Square and along Boylston street. At the time of the passage of these statutes, at the junction of Charles and Boylston streets and Park Square the surface tracks of the railways were connected with one another. No provision was made by the statutes whereby the surface tracks on Charles street should be connected with the subways, but provision was made whereby the surface tracks on Columbus avenue and on Boylston street might be so connected. The provision for the Boylston street tracks is that a subway may be constructed "from Tremont street through and under Boylston street and the adjoining mall of Boston Common or other public or private lands adjoining said street to a point on or near Boylston street where a suitable connection with surface tracks may be made." The provision for the Columbus avenue tracks is that a subway may be constructed "from Boylston street through and under Park Square and Columbus avenue or other lands adjoining said square and avenue to a point on or near Columbus avenue where a suitable connection with surface tracks may be made." The subsidiary subways must unite with the principal subway at or near the corner of

Boylston and Tremont streets. The Columbus avenue subway, if one is built, must unite with the subway in Boylston street or the adjoining mall of Boston Common at or near the junction of Park Square and Boylston street. I see no authority in the statutes for carrying the subway in Boylston street or the adjoining mall of Boston Common beyond the junction of Park Square and Boylston street, or beyond the limits of the adjoining mall on the Common.

The report of the presiding justice states that "on the admission of the plaintiffs that they did not rely on the allegations in the bill as to extending the subway from opposite Church street to Arlington street, in view of the statement which was made by the respondents that there was no intention on their part to do so, I sustained the demurrer," etc. The work actually done by the commissioners in the Public Garden perhaps indicated an intention on their part, not of reaching the surface tracks on Boylston street by the nearest practicable approach to the subway as it was built under Charles street, but of deflecting the surface tracks on Boylston street at its junction with Arlington street to the southwesterly side of the Garden, and of laying tracks over the surface of the Garden until they reached the incline of the subway in the Garden. But such intention, if it ever existed, it seems has been abandoned. The opinion of the court justifies the construction of the subway in the Public Garden on the ground that it was necessary in order to comply with the provisions of § 29 of the Statutes of 1894, and § 3 of the Statutes of 1895, to the effect that no part "above the surface" of the Common should be occupied by railway tracks, or for any other purpose than for suitable ventilation, for shelter and stairways to stations, and for coverings therefor, and not on the ground that authority was given by the statutes to the commissioners to use the Garden in any such manner as they saw fit for the purpose of constructing the subways. Without laying much stress upon the employment of the word "tunnel," in the statutes, as distinguished from "subway," the use of an incline beneath the surface of the ground for tracks to reach a subway or tunnel is not, I think, an occupation "above the surface," within the meaning of the provisions of the statutes which have been cited. An incline is a necessary part of the subway, and is to be included within the limits of the subway. The phrase, "other public or private lands adjoining said street," found in § 27 of the Statutes of 1894, is found in other sections of the statute, and cannot be held to extend the termini of the subways as fixed by other provisions of the statutes. The phrase means that within the authorized termini the commissioners may construct the subways in the directions indicated through the land, whether the land be public or private. I do not dissent from the result reached by the court, because the subway had been substantially constructed in the Public Garden without any objection, so far as appears, on the part either of the commonwealth or of the city of Boston; and I should not feel justified, under such circumstances, in attempting to undo the work there done because I differed in opinion with the commissioners upon the construction to be given to the statutes, unless the construction acted on by them seemed to me impossible; but my opinion is that the statutes were not intended to authorize such a use as they have made of the Public Garden.

PALMER SAVINGS BANK
v.
INSURANCE COMPANY OF NORTH AMERICA.

(.....Mass.....)

1. **A mortgagee is entitled to recover in his own name** to the extent of his interest on a policy of insurance payable to him as his interest may appear, where the mortgagor is by the mortgage required to insure the property for the mortgagee's benefit.
2. **The interest of a mortgagee in a policy payable to him as his interest may appear,** does not extend to a subsequent mortgage executed by the wife of the insured who had in the meantime obtained a conveyance of the property and in which the husband is not named in the granting clause, although he joins in the instrument to release any marital rights he may have.

(May 23, 1896.)

REPORT by the Superior Court for Hampden County for the opinion of the Supreme Judicial Court of an action brought to recover the amount alleged to be due on a policy of fire insurance. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. **Stephen S. Taft,** for plaintiff:

The right of the mortgagee to recover depends upon the condition of affairs and the situation of the parties at the time of the loss, and not at the time of the issuing of the policy.

Harrington v. *Fitchburg Mut. F. Ins. Co.* 124 Mass. 126.

The mortgagee can maintain the suit in his own name.

Foote v. *Hartford F. Ins. Co.* 119 Mass. 259; *Harrington* v. *Pittsburg Mut. F. Ins. Co. supra*; *Haley* v. *Manufacturers' F. & M. Ins. Co.* 120 Mass. 292; *City Five Cents Sav. Bank* v. *Pennsylvania F. Ins. Co.* 122 Mass. 165; *Wheeler* v. *Watertown F. Ins. Co.* 131 Mass. 1.

Messrs. **Robinson & Robinson,** for defendant:

The plaintiff has no right to recover in his own name and in the form of its action. There was no privity of contract between these parties. No consideration moved from the plaintiff to the defendant. The contract was between the assured and the defendant.

Mellen v. *Whipple*, 1 Gray, 317; *Exchange Bank* v. *Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Rogers* v. *Union Stone Co.* 130 Mass. 581, 39 Am. Rep. 478; *Locke* v. *Homer*, 131 Mass 107, 41 Am. Rep. 199; *Aigen* v. *Boston & M. Railroad*, 132 Mass. 423; *Morrill* v. *Lane*, 136 Mass. 93; *Saunders* v. *Saunders*, 154 Mass. 337; *Borden* v. *Boardman*, 157 Mass. 410.

NOTE.—For right of a mortgagee to the benefit of insurance taken in the mortgagor's name, see *note* to Chipman v. Carroll (Kan.) 25 L. R. A. 305.

See also 38 L. R. A. 397; 39 L. R. A. 148.

If the debt to the mortgagee were less than the amount of insurance, then the defendant is not to be subjected to two suits.

Or if there were two or more independent mortgagees, certainly each of them as well as the assured should not have the right to separate actions.

2 Wood, Fire Ins. 1124; *Hartford F. Ins. Co.* v. *Davenport*, 37 Mich. 609.

If above the mortgage claim there was a surplus of insurance money the mortgagee might recover in the name of the assured his whole claim, while the assured might not have any right to such surplus.

City Five Cents Sav. Bank v. *Pennsylvania F. Ins. Co.* 122 Mass. 165.

The promise was to pay Calkins.

Pierce v. *Charter Oak L. Ins. Co.* 138 Mass. 161.

Plaintiff can recover only in the name of the assured.

Flynn v. *North American L. Ins. Co.* 115 Mass. 449; *Rindge* v. *New England Mut. Aid Soc.* 146 Mass. 289; *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 381; *Flynn* v. *Massachusetts Ben. Asso.* 152 Mass. 289; *Saunders* v. *Saunders*, 154 Mass. 337; *Nims* v. *Ford*, 159 Mass. 575; *McCarthy* v. *Metropolitan L. Ins. Co.* 162 Mass. 254.

The office of the habendum is to fix the nature and extent of the title conveyed; it may define, enlarge, or diminish the estate granted.

Pratt v. *Sanger*, 4 Gray, 84; 2 Washb. Real Prop. 2d ed. 688.

If James W. owned the property, then the plaintiff had no valid interest in it so far as the second mortgage is concerned, and can only recover at most on the first note.

In case Lucia E. became the owner then the defendant was not made liable for the second note collaterally and contingently to the plaintiff because the defendant had no notice or knowledge that any transfer of title to the mortgaged property had been made or attempted or that the said mortgage by Lucia E. had been made and the defendant did not consent thereto.

At most the plaintiff could have against the defendant under the policy and under the direction written on the policy at the date of the policy only security for the mortgage debt then, that is, at the date of the policy existing.

City Five Cents Sav. Bank v. *Pennsylvania F. Ins. Co. supra.*

If it be held that the title shifted to Lucia E. without the defendant's consent, while it did not invalidate the plaintiff's claim against the defendant as to the first note, it did invalidate any claim in excess of that.

Kyte v. *Commercial Union Assur. Co.* 144 Mass. 43; *Oakes* v. *Manufacturers' F. & M. Ins. Co.* 131 Mass. 164; *Brown* v. *Cotton & W. Mfrs. Mut. Ins. Co.* 156 Mass. 587.

Field, Ch. J., delivered the opinion of the court:

This is an action on a policy of fire insurance issued on March 12, 1890, by the defendant to James W. Calkins for $400, and made payable in case of loss to the plaintiff "mortgagee as its interest may appear." At the time when the policy was issued, James W. Calkins owned the real estate, and the barn on it, which was insured; and the plaintiff, the Palmer Savings Bank, held a mortgage on the property, given by James W. Calkins to the plaintiff to secure his note, payable on demand, for $200. Subsequently James W. Calkins made and delivered a deed of the premises to Inez B. Burleigh, who made and delivered a deed thereof to Lucia E. Calkins, the wife of James W. Calkins. The peculiarity of these deeds will be noticed hereafter. They were each subject to the mortgage which has been mentioned. Afterwards Lucia E. Calkins, for $400 received of the plaintiff, gave a note therefor, payable on demand, signed by herself and her husband and two other persons, and secured it by a power of sale mortgage on the property described in the deed to her as aforesaid, and on other property. In this mortgage her name alone appears in the granting clause, but in the proviso her husband's name appears, in the following manner: "And, for the consideration aforesaid, I, James W. Calkins, husband of the said Lucia E. Calkins, do hereby release unto the said grantee and its successors and assigns all right of or to, both curtesy and other rights, in the aforegranted premises, and in the proceeds thereof, in case of sale hereunder, and agree to join in any deed of confirmation or any sale or foreclosure made or affected as aforesaid." The *in testimonium* clause is as follows: "In witness whereof, we, the said Lucia E. Calkins and James W. Calkins, have hereunto set our hands and seals this 23d day of May, in the year of our Lord 1892;" and both signed and sealed the deed. At the time of the fire there was due on the first mortgage $200 and some interest, and on the second mortgage $400 and some interest, but after the fire the amount due on the second mortgage was somewhat reduced by partial payments. The amount due on both mortgages at the time of the trial was about $548, which is more than the amount of the insurance. The policy was a Massachusetts standard policy, under Stat. 1887, chap. 214, § 60, and it was not under seal. The loss was total, and was more than the amount of the insurance.

At the conclusion of the trial the defendant asked the court to rule as follows: "(1) The plaintiff has no right of recovery in his own name, and in the form of the plaintiff's action. (2) If the defendant is liable at all to the plaintiff, no greater amount can be found against it than the principal of the first note signed by James W. Calkins, and the interest thereon. (3) The plaintiff cannot recover of this defendant in this action any sum in excess of the amount due on the said first note of James W. Calkins." These rulings the court refused to give, and, trying the case without a jury, found for the plaintiff in the sum of $432,—being the whole amount of the insurance, with interest,—and the presiding justice reported the case to this court. The report concludes as follows: "If the plaintiff is not entitled to recover at all in this action, judgment shall be entered for the defendant. If the plaintiff is entitled to recover of the defendant only the amount of the note of James W. Calkins, and interest thereon, there shall be judgment for the sum of $200 dollars, and the interest accrued thereon. If the plaintiff shall be entitled to recover the whole amount of said policy in this action,

then the judgment of the superior court, as stated above, shall be affirmed."

The policy, being in the Massachusetts standard form, contained, among others, the following provision: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agent, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." Stat. 1887, chap. 214, § 60. If the policy became void as to James W. Calkins, by his conveyance of the premises, it still remained in force, for the benefit of the mortgagee, so far as its interest appears. *City Five Cents Sav. Bank* v. *Pennsylvania F. Ins. Co.* 122 Mass. 165; *Harrington* v. *Fitchburg Mut. F. Ins. Co.* 124 Mass. 126; *Eliot Five Cents Sav. Bank* v. *Commercial Union Assur. Co.* 142 Mass. 142. The practice in this commonwealth has been, in a case of this kind, for the mortgagee to sue in his own name. Cases cited *supra; Barrett* v. *Union Mut. F. Ins. Co.* 7 Cush. 175; *Foote* v. *Hartford F. Ins. Co.* 119 Mass. 259; *Franklin Sav. Inst.* v. *Central Mut. F. Ins. Co.* Id. 240; *Wheeler* v. *Watertown F. Ins. Co.* 131 Mass. 1; *Fogg* v. *Middlesex Mut. F. Ins. Co.* 10 Cush. 337; *Hale* v. *Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 28; *Macomber* v. *Cambridge Mut. F. Ins. Co.* 8 Cush. 133; *Smith* v. *Union Ins. Co.* 120 Mass. 90; *Fitchburg Sav. Bank* v. *Amazon Ins. Co.* 125 Mass. 431; *Eliot Five Cents Sav. Bank* v. *Commercial Union Assur. Co. supra.* But it is said that in none of the foregoing cases was the right of the plaintiff to sue denied, although in some of them an opinion was expressed that the mortgagee could sue in his own name. It has also been held that the mortgagor can sue in his own name, with the assent of the mortgagee. *Jackson* v. *Farmers' Mut. F. Ins. Co.* 5 Gray, 52; *Turner* v. *Quincy Mut. F. Ins. Co.* 109 Mass. 568; *Kyte* v. *Commercial Union Assur. Co.* 144 Mass. 43. In *Jackson* v. *Farmers' Mut. F. Ins. Co.* it was held that, if the assent of the mortgagee was given before suit brought, the plaintiff, who was the mortgagor, would be entitled to recover costs, otherwise not. It is argued that these decisions permitting a mortgagee to sue in his own name are inconsistent with the decisions in *Mellen* v. *Whipple,* 1 Gray, 317; *Exchange Bank* v. *Rice,* 107 Mass. 37, and other similar cases; with our decisions on life insurance policies, of which *Wright* v. *Vermont L. Ins. Co.* 164 Mass. 302, is an example; and with the decisions on benefit certificates, such as *Rindge* v. *New England Mut. Aid Soc.* 146 Mass. 286. It is the practice of the courts of the states of this country generally, although not universally, in such a case as the present, to permit the mortgagee to sue in his own name. In some of these states, it is true, a person for whose benefit a contract is made, although not a party to it, is permitted to sue upon it; in some states a joint action by the mortgagor and mortgagee is permitted, where the mortgage debt does not exhaust the insurance; in some a distinction is taken between a case where the loss is payable to a mortgagee without any limitation, and one where the loss is payable to a mortgagee according to his interest; and in some the mortgagor and mortgagee each can sue according to his interest. See *Motley* v. *Manufacturers' Ins. Co.* 29 Me. 337, 50 Am. Dec. 591; *Chamberlain* v. *New Hampshire F. Ins. Co.* 55 N. H. 249; *Meriden Sav. Bank* v. *Home Mut. F. Ins. Co.* 50 Conn. 396; *Winne* v. *Niagara F. Ins. Co.* 91 N. Y. 185; *Cone* v. *Niagara F. Ins. Co.* 60 N. Y. 619; *Martin* v. *Franklin F. Ins. Co.* 38 N. J. L. 140, 20 Am. Rep. 372; *State Ins. Co.* v. *Maackens,* Id. 564; *Coates* v. *Pennsylvania F. Ins. Co.* 58 Md. 172, 42 Am. Rep. 327; *Tilley* v. *Connecticut F. Ins. Co.* 86 Va. 811; *Bartlett* v. *Iowa State Ins. Co.* 77 Iowa, 86; *Hammel* v. *London Queen Ins. Co.* 50 Wis. 240; *Williamson* v. *Michigan F. & M. Ins. Co.* 86 Wis. 393; *Westchester F. Ins. Co.* v. *Coverdale,* 48 Kan. 446; *Graves* v. *American Live-Stock Ins. Co.* 46 Minn 130; *Maxcy* v. *New Hampshire F. Ins. Co.* 54 Minn. 272; *Ermentrout* v. *American F. Ins. Co.* 60 Minn. 418; *Travelers' Ins. Co.* v. *California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769; *Fire Ins. Cos.* v. *Felrath,* 77 Ala. 194; *Hartford F. Ins. Co.* v. *Davenport,* 37 Mich. 609; *Minnock* v. *Eureka F. & M. Ins. Co.* 90 Mich. 236; *Mitchell* v. *City of London Assur. Co.* 15 Ont. App. Rep. 262. In mortgages in this commonwealth it is customary for the mortgagor to covenant that he will keep the mortgage property insured for a certain amount, for the benefit of the mortgagee, in such form and in such insurance companies as the mortgagee shall approve. Although this does not expressly appear in the report, and we have not been furnished with full copies of the mortgages, we assume that they contained the usual provisions on the subject. A mortgagor and a mortgagee have each an insurable interest in the property. Each can insure for his own benefit,—the mortgagor for the full value of the property, and the mortgagee for the full value of his interest in the property,—and neither can avail himself in any way of the money recovered from insurance by the other unless there is some contract making it so available. But a form of insurance like that in the case at bar has become common, whereby a part or the whole of the insurance on the mortgagor's property is made payable to the mortgagee, and the money paid by the insurance company to the mortgagee operates, in whole or in part, as payment of the mortgage debt, and the mortgagor, after the mortgage debt is paid, is entitled to the remainder of the money due from the insurance company, if there is any. At first the policy usually was issued to the mortgagor in the common form, and was then assigned by him to the mortgagee, to the extent of his interest, and the insurance company assented to the assignment. Afterwards the provisions for the benefit of the mortgagee were inserted in the body of the policy. But such policies, unless there were stipulations to the contrary, were avoided, as against the mortgagee, by any act of the mortgagor which avoided the policy as to him. To make such policies a better security to the mortgagee, it has been provided in the Massachusetts standard policy that no act or default of any person other than the mortgagee or his agent, or those claiming under him, shall defeat such mortgagee's right to recover in case of loss; and the policy contains various other provisions with reference to the mortgagee which make the contract with him,

or for his benefit, somewhat different from that with the mortgagor. When a mortgagor, under an obligation (expressed in the mortgage) to insure the property to a certain amount for the benefit of the mortgagee, in satisfaction of this obligation, procures insurance on the property, and makes the loss payable to the mortgagee to the extent of his interest, the mortgagor in fact acts both for himself and for the mortgagee. The mortgagee is not an entire stranger to the consideration, because the mortgagor, in effecting the insurance, has only performed a duty which he was under towards the mortgagee, and for the performance of which he was paid by the loan which was secured by the mortgage. In practice such policies are delivered to and retained by the mortgagee. The effect of such a policy is the same as if the mortgagor had taken out the insurance in his own name, and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment, and had promised the mortgagee that no act or default of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. Under such an assignment, assented to by the company, the mortgagor, in the event of a loss, could maintain an action in his own name to recover to the extent of his interest. In *Fogg* v. *Middlesex Mut. F. Ins. Co.* 10 Cush. 337, 346, the court says: "But there is another species of assignment, or transfer, it may be called, in the nature of an assignment of a chose in action; it is this: 'In case of loss, pay the amount to A B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. *Mowry* v. *Todd*, 12 Mass. 281." If the interest assigned equals or exceeds the amount of the insurance, it would be the common case of an assignment, and the promise of the debtor to pay the debt when it became payable to the assignee. A difficulty has been found by some courts when the assignment is of but a part of the debt, and in such a case, where there is a code regulating practice, the mortgagor and mortgagee sometimes have been permitted or required to join as plaintiffs in the action; but, as their interests are several, it is, to say the least, doubtful whether, at common law, they could be permitted to sue jointly. While there are objections against splitting a debt without the consent of the debtor, these objections never have prevailed where the debtor has consented to it. An assignment of a part of a debt is valid against the debtor, if he assents to it, and the assignee can sue for the part assigned, in his own name, if the debtor has promised to pay it. We think that the policy in the present case is in effect a policy for the benefit of the mortgagee as well as of the mortgagor, in which the insurance company has entered into a direct contract with the mortgagee, which is somewhat different from a contract with the mortgagor, and has promised the mortgagee to pay the loss to it, to the extent of its interest; and it differs materially from a policy for the benefit of B when there is no promise to pay B, and from a policy where B has no interest unless A chooses to give him an interest after he has procured the policy. The plaintiff had an interest from the beginning in the property insured, and in the policy, and the policy was issued to protect that interest from loss by fire. Calkins could not have canceled the policy without the consent of the plaintiff, and could not have adjusted the loss, so as to bind the plaintiff, without its consent. *Harrington* v. *Fitchburg Mut. F. Ins. Co. ubi supra.* While, in this commonwealth, the rule is held strictly that no one can sue or be sued on a simple contract who is not a party to it, either disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move form the promisee to the promisor, in the ordinary sense of those words. In a novation no consideration moves from the promisee directly to the promisor. An assignee of a non-negotiable debt must sue in the name of the assignor unless the debtor has promised to pay it to the assignee, but if there is such a promise the assignee can sue in his own name, although no consideration for this promise moves directly from the promisee to the promisor. We think the rule in this commonwealth, in cases like the present, is that where the mortgage has been paid before the loss the mortgagor, in his own name, recovers the whole loss, to the extent of the insurance; that where the mortgage debt exceeds the loss the mortgagee can recover the whole in his own name; that where the loss exceeds the mortgage debt the mortgagor and mortgagee each can sue for his share, unless by the terms of the policy the whole loss is payable to the mortgagee, although it may exceed his interest, in which case perhaps the mortgagee may be taken as assignee of the whole; and that in any case the mortgagor may sue for the whole loss, if the mortgagee consents, although the separate rights of each must be preserved at the trial, as it often happens that there are defenses against the mortgagor which are not available against the mortgagee. The plaintiff therefore is entitled to recover in his own name.

The remaining question is, How much shall the plaintiff recover? It is manifest that the property has been alienated by James W. Calkins, if his deed to Inez B. Burleigh conveyed anything. That deed purports to grant the land to Inez B. Burleigh, but in the granting clause there is no mention of heirs or assigns. The habendum of the deed is in the usual form, except that it is "to the said J. W. Calkins, the grantor, and his heirs and assigns, to their own use and behoof, forever." The deed is executed by Calkins and his wife who signs in token of her release of dower and homestead in the premises. The deed of Inez B. Burleigh to Lucia E. Calkins is similar, and there is a similar mistake in the habendum. These deeds were without consideration, and the principal purpose was to convey the premises from James W. Calkins to his wife. If the habendum be rejected in the deed of Calkins to Burleigh, as inconsistent with the grant, then the deed conveyed the property to the grantee for her life, and this is true of the deed from Burleigh to Mrs. Calkins. It is possible, too, that the deeds might be reformed in equity

so as to effect what was undoubtedly the intent of the parties, but that we cannot now consider. If there was an alienation of the property by Calkins, in fee, or for the life of any person, without the assent of the company, we understand that this avoids the policy as to him. But whether these deeds are void, or conveyed an interest for life, is not, we think, within the lines of the policy, and was not within the contemplation of the parties to the policy. It is a mortgage given by Mrs. Calkins on what was considered her property, with full covenants by her, and the husband is not named in the granting clause. It is plainly intended as a mortgage of the land and building of the wife, in which the husband joins to release any rights he may have as husband. Whatever its effect upon his rights may be, the policy was not intended to cover such a mortgage. Whether, if the title had remained in James W. Calkins, and he had made a second mortgage to the plaintiff after the policy was issued, the policy could be held to cover that, it is unnecessary to decide. This mortgage was intended to be a mortgage upon the land and building of the wife, and, at the time the mortgage was given, James W. Calkins could not insure as owner of the land and building of his wife.

The result is that *the plaintiff is entitled to have judgment* entered for the sum of $200 and interest. So ordered.

George H. BARRUS
v.
Adelard PHANEUF.

(.....Mass.....)

1. There is sufficient consideration for a promise to pay an expert witness a reasonable compensation in addition to the statutory fees when he is engaged in advance of the trial to testify as an expert.

2. An expert witness does not waive his right to the extra compensation which he is entitled to by contract by subsequently receiving statutory fees as a witness from the party who has engaged him and by testifying without making any claim for extra compensation, even if he is not in fact asked any questions which call for his opinion as an expert.

(May 21, 1896.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Suffolk County made during the trial of an action to recover compensation for services as a witness which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr. **R. W. Shea** for defendant.

Mr. **Herbert L. Baker,** for plaintiff:

The request to rule that the action could not be maintained and to direct the jury to enter a verdict for the defendant is in effect asking for a nonsuit, and the refusal to grant it is not open to exceptions.

Cox v. *Cook*, 14 Allen, 166; *Wentworth* v. *Leonard*, 4 Cush. 414; *Priest* v. *Wheeler*, 101 Mass. 479.

Allen, J., delivered the opinion of the court:

The jury must have found, upon the evidence, that the defendant engaged the plaintiff to go into court at a future day and testify for him as an expert in regard to a matter which the plaintiff had examined as a civil engineer. From the dates given it would seem that this engagement was six weeks before the trial. The plaintiff agreed to do this, and talked over the matter, and went into court and testified, and during the progress of the trial advised the defendant's attorney in regard to the questions to be asked of himself and of the other witnesses. At some time after he had so agreed to appear and testify the plaintiff was regularly summoned by the defendant as a witness, and was paid the statutory fees, and made no objection thereto, and made no claim for extra compensation, and it would seem that, during his testimony, he was not, in fact, asked any questions which called for his opinion as an expert.

The defendant contends that, if there was an express promise to pay the plaintiff extra compensation, such promise was without consideration, and that the plaintiff did no more than he was legally required to do under his subpœna. In this commonwealth, every justice of the peace may issue summonses for witnesses in civil cases. Stat. 1885, chap. 141. This is usually done by the party's attorney, if he is a justice of the peace, or by a justice upon the mere request of a party or of his attorney, without any consideration of the materiality of the evidence or of other circumstances. No doubt, here, as in England, the court might interpose to prevent this privilege from being used oppressively. *Raymond* v. *Tapson*, L. R. 22 Ch. Div. 430. But usually no question arises unless a witness fails to attend, in which case the court may issue a warrant to bring him in. Pub. Stat. chap. 169, § 6. The issuing of this warrant is a matter of discretion, and before issuing it the court usually must be satisfied that the testimony is material, and that the failure to attend is without reasonable excuse. We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts, and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. *Re Roelker*, 1 Sprague, 276, Fed. Cas. No. 11,995; *Webb* v. *Page*, 1 Car. & K. 23; *Parkinson* v. *Atkinson*, 31 L. J. C. P. 199. Whart. Ev. §§ 380–383. Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court would re-

NOTE.—The question of the compensation of expert witnesses is the subject of a *note* to Flinn v. Prairie County (Ark.) 27 L. R. A. 669.

quire of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have when his turn should come. *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Flinn* v. *Prairie County*, 60 Ark. 204, 27 L. R. A. 669. If a party is content to rest upon his legal rights, and to summon the expert whose testimony he wishes to have, and to pay the statutory fees, without any previous engagement or understanding with him, and to take his chance of being able to get an attachment to bring the witness into court in case he should fail to appear, and if he thus succeeds in getting the testimony which he wishes, and afterwards refuses to pay any special compensation, the question might be directly presented whether the witness would be entitled to recover anything on a *quantum meruit*. That question does not arise here. The questions here are whether there was any sufficient consideration for an express or implied promise to pay, and whether there was sufficient evidence of an engagement by him to testify as an expert, upon request, which might imply a promise by the defendant to pay him as an expert.

Several cases have arisen in different courts, where a professional witness has taken the stand without objection, and afterwards has declined to give professional opinions without special compensation, and has been required by the court to answer. Such decisions do not strictly apply to the case before us, because in all such cases the court has judicially determined that the purposes of justice require the testimony of the witness. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Wright* v. *People*, 112 Ill. 540; *State* v. *Teipner*, 36 Minn. 535. In Indiana, however, the court has refused to require such a witness to answer under such circumstances. *Buchman* v. *State*, 59 Ind. 1, 26 Am. Rep. 75; *Dills* v. *State*, Id. 15. In Connecticut, in respect to an ordinary witness, not an expert, the court held that, ordinarily, an agreement to pay extra fees will not be sustained, but that it might be valid where the witness assumed a duty which the law would not impose on him, and the court added: "If a witness agrees with a party that he will attend and testify without being summoned, and he is not summoned and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced, for the proceeding or service is not in pursuance with the statute." *Dodge* v. *Stiles*, 26 Conn. 463, 466, 467. A casual intimation that, ordinarily, a witness can recover only the fees allowed by law, is also found in *Pool* v. *Boston*, 5 Cush. 219, 221. In the present case, we are of opinion that, upon the facts in evidence, there was sufficient consideration to support a promise to pay a reasonable compensation, in addition to the statutory fees, and that the jury was warranted in finding a promise to that effect or a mutual understanding that the plaintiff was to be so paid. If such promise was made, or such understanding existed, the plaintiff's right to recover would not be taken away or lost by his omission to claim or demand extra compensation, or to notify the defendant that he should make such claim, or by his acceptance of the statutory fee without objection, or by the omission of the defendant at the trial to put any question to him as an expert witness, and the consequent omission of the plaintiff to testify as an expert. All these were merely matters for the consideration of the jury in determining whether any such promise was made, or such understanding existed.

Exceptions overruled.

Sarah HUGHES

v.

Isaac GROSS *et al.*

(.....Mass.....)

1. **A contract of employment by partners** is not dissolved by the death of one of the partners, where the business goes on without a break and both parties seem to assume that the contract is not ended.
2. **A contract signed in the name of a firm** is not such a memorandum under the statute of frauds as will make the oral acceptance thereof by a subsequent member of the firm binding upon him, where the contract comes within the statute.
3. **A letter answering reasons for dissatisfaction** given in a notice to terminate employment may be admitted against the employer to throw light on his reply and subsequent conduct, where it is not offered as evidence of admissions by him.
4. **An agreement in a contract of employment** that refusal to go on a second year can be justified only by "written notice . . . of any cause of dissatisfaction on or before Jan. 1," plainly means "any existing cause" or "any cause relied on" and on such notice a cause not alleged therein, if it existed before January 1, may be relied upon.

(May 19, 1896.)

EXCEPTIONS by defendants to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for breach of contract which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Mr. **E. N. Hill** for defendants.

Messrs. **John Woodbury** and **John M. Merriam** for plaintiff.

Holmes, J., delivered the opinion of the court:

This is an action of contract for refusing to employ the plaintiff a second year. The plaintiff had a verdict, and the case is here on exceptions. The original contract was in writing, and was made with two partners, Gross and Strauss, for one year from April 25, 1892, with a conditional right of renewal on the side of the plaintiff for one year more. On November 1, 1892, during the first year of the plaintiff's employment, Strauss died, and the business was carried on by Gross. The first question raised by the exceptions is whether Strauss's death ended the contract. At the end of December the plaintiff received a notice from Gross that she would not be employed beyond the first year, stating causes of dissatisfaction. There was an answer from the

NOTE.—As to the effect of the death of a person to terminate a contract, see *note* to Drummond v. Crane (Mass.) 23 L. R. A. 707; also *note* to Parker v. Macomber (R. I.) 16 L. R. A. 858.

plaintiff, and a reply by Gross. Exceptions were taken to the admission of the plaintiff's letter in evidence, and to the exclusion of evidence of other causes of dissatisfaction besides those mentioned in the notice. On February 1, 1893, the defendant Sommers became a partner in the business with Gross, the new firm taking the assets and assuming the liabilities of the old one. Thereafter the plaintiff was paid out of the funds of the new firm, and, according to the plaintiff's testimony, was referred to Sommers for further discussion of her relations with the firm, and had several interviews with him, in which he wanted to terminate the contract. Another exception is to the refusal to direct a verdict for Sommers.

We are of opinion that it could not be ruled, as matter of law, that the contract of service was dissolved by the death of a partner. We have no occasion to criticise the decisions in some of our states and in England and Scotland, where an opposite result was reached by a majority of the judges with reference to different kinds of business from the present, except to remark that the argument put forward in Scotland and elsewhere, that the only contracting party was the firm, and that the firm had ceased to exist, does not agree with the common law. *Tasker* v. *Shepherd*, 6 Hurlst. & N. 575; *Hoey* v. *MacEwan*, 5 Ct. Sess. Cas. 3d series, 814, 815; *Griggs* v. *Swift*, 82 Ga. 392, 5 L. R. A. 405; *Greenburg* v. *Early*, 30 Abb. N. C. 300, 303. The common law does not know the firm as an entity. *Hallowell* v. *Blackstone Nat. Bank*, 154 Mass. 359, 363, 13 L. R. A. 315. A contract with a firm is a contract with the members who compose it. A joint contract to employ the plaintiff is not ended necessarily by the death of one of the contractors (*Martin* v. *Hunt*, 1 Allen, 418), and there is no universal necessity that death should have a greater effect when the joint contractors are partners (*Fereira* v. *Sayres*, 5 Watts & S. 210, 40 Am. Dec. 496). If the death naturally would put an end to the business, as it so frequently does, very possibly it might end the employment. We have no need to consider what would be the result if in fact no further business was done, except to wind up the affairs of the firm, as was the case in *Griggs* v. *Swift*, *supra*. But this business went on without a break, and both parties seemed to have assumed that the plaintiff's contract was not ended by the death of Strauss.

But the foregoing suggestions are not enough to lay a foundation for the liability of Sommers, even assuming that there was evidence warranting the inference that he was content to be bound unless Gross escaped, and that he made an oral contract on the terms of the written agreement. The declaration is on the written instrument, and the refusal to direct a verdict for Sommers must be taken as made either with reference to the pleadings, in which case Sommers must be shown to be a party to the instrument, or else on the evidence, irrespective of the pleadings, in which case, unless he is to be taken to have signed the writing, the statute of frauds would be a defense under our decisions. *Hill* v. *Hooper*, 1 Gray, 131; *Freeman* v. *Foss*, 145 Mass. 361. It appears to us that this difficulty cannot be answered, except by attributing an oversubtle meaning to the firm signature and to the acts of the new partners. We cannot read "Gross and Strauss" as not only meaning all those who then were members of the firm, but also as purporting to name in advance all persons who might become members pending the contract. It follows that a verdict for Sommers should have been directed. But there seems to be no reason why the superior court, if it sees fit, should not allow the plaintiff to discontinue as against Sommers, and to take a judgment against the other defendant, Gross. *Ridley* v. *Knox*, 138 Mass. 83, 86; *Fifty Associates* v. *Howland*, 5 Cush 214.

The plaintiff's letter, answering the reasons for dissatisfaction given in the notice that she would not be employed beyond the year, was admitted only for what light it might throw on the defendants' reply and subsequent conduct, not as evidence of admissions by the defendants, as in *Sturtevant* v. *Wallack*, 141 Mass. 119. The defendants' reply excluded any admission. Limited, as it was limited, the evidence was not improper, and can have done no harm, although not very instructive.

We assume that the plaintiff might have been discharged for any just cause during her employment. But the refusal to embark upon a second year was placed by the contract upon a special ground, and was restricted more than the implied right to discharge for cause.

The refusal to go on a second year could be justified only by "written notice . . . of any cause of dissatisfaction on or before January 1, 1893." "Any cause" plainly means "any existing cause," or "any cause relied on." The defendants therefore could not be allowed to prove other causes. The exceptions do not show that they offered to prove other causes arising after January 1, 1893, as distinct from other causes coexisting with those alleged in their notice. But we are not prepared to say that the contract would allow a refusal to begin the second year, for causes arising between January 1, and April 21, 1893.

Exceptions sustained.

NEW HAMPSHIRE SUPREME COURT.

AMOSKEAG MANUFACTURING COMPANY
v.
Town of CONCORD.

(66 N. H. 562.)

The value of a water power created by a dam in a river which forms the boundary between towns is to be apportioned to the lands under it in the different towns for the purpose of taxation, although the water power is used entirely for the operation of a mill in one of the towns.

(July 31, 1891.)

NOTE.—For cases somewhat similar to the present case in respect to the taxation of a water power or water mains, see Paris v. Norway Water Co. (Me.) 21 L. R. A. 525.

PETITION by the Amoskeag Manufacturing Company to the Supreme Court in Merrimack County for relief from taxes which had been assessed against it for the town of Concord. *Relief granted.*

An opinion was originally handed down in this case reaching a result somewhat different from that now reached. That opinion, together with a statement of facts and an abstract of the arguments of counsel, will be found in 29 L. R. A. 57.

Mr. **D. Cross** for petitioner.

Mr. **H. G. Sargent** for defendant.

Allen, J., delivered the opinion of the court:

"Real estate must be taxed in the town where it is situated. Gen. Laws, chap. 53, § 2; Id. chap. 54, § 11. 'The words "land," "lands," or "real estate," shall include lands, tenements, hereditaments, and all rights thereto and interests therein.' Gen. Laws, chap. 1, § 20. . . . Water power or rights in a reservoir of water are an interest in the land upon and by which they are created, and, by the express terms of the statute, must be taxed in the town where the land of which they are a part is situated. Although they may be so far severed from that land and annexed to land situated in another town as to pass without special mention in a conveyance of the latter, their geographical location is not thereby changed." *Winnipiseogee Lake Cotton & W. Mfg. Co.* v. *Gilford,* 64 N. H. 337, 348. In that case the plaintiffs (citing *Boston Mfg. Co.* v. *Newton,* 22 Pick. 22, and other authorities) seem to have contended that New Hampshire water power, when used with mills situated in Massachusetts, becomes annexed to those mills, and is taxable in Massachusetts (with the mills to which it is incident), and not in New Hampshire. The decision established the opposite view, and left no open question in this case. In *Bellows Falls Canal Co.* v. *Rockingham,* 37 Vt. 622, there was no question of taxability in different towns.

The dam and the bed and banks of the river at Garvin's Falls are a basin from which water may be drawn to turn a wheel in Concord or in Bow, or to equalize the stream in Massachusetts by equalizing it in New Hampshire. The capacity of the basin to furnish water for such uses is evidence of its salable and taxable value. Its value may largely depend on the quantity and head of water constantly flowing through it. The pond is as high in Concord as in Bow, and if the referees did not regard the canal in Bow as a part of the water power, it does not appear, except from their estimate of values, that any of the elements of which the water power is composed are unequally divided by the thread of the river which is the municipal boundary. As a site for a canal and mill, the western side may be more valuable than the eastern. Aside from the canal and the referee's appraisal, the facts specifically found by them do not show that, in capacity to furnish power, the Concord portion of the basin is less valuable than the other, or is worth less than $12,000 (the amount at which they appraised it). There is no apparent error of law or fact in their report. If A, owning a farm in Bow and an adjoining farm in Dunbarton, sells to B the Dunbarton farm, and a perpetual right to carry to it, in acqueduct pipes or otherwise, the water flowing from a spring on the Bow farm, the easement thus created in Bow land, and, in some legal sense and for some legal purposes of title, annexed to Dunbarton land, is in Bow, and is taxable in Bow to its owner. If each farm, without the benefit or burden of the easement, would be worth $2,000, and if the easement is worth $100, and the creation of it by deed and the annexation of it to the Dunbarton farm make that farm (with the easement) worth $2,100, and takes $100 from the value of the whole title of the Bow farm, the Dunbarton farm is taxable to B, in Dunbarton at $2,000, the easement is taxable to him in Bow at $100, and the rest of the Bow farm is taxable to A, at $1,900 After the conveyance of the interest in the Bow farm from A to B, giving B a right to carry the water to the Dunbarton farm, and after he exercises that right, there is as much water-producing real estate in Bow as there was before. Whether the water is carried in buckets or in a canal, Bow is the town to which it is taken from the spring, and diverted from its natural course. B has no easement in his own land. His right to carry the water from the common boundary of the farms across his land in Dunbarton to his house and barn is not an interest in Bow land. The easement begins at the spring, and ends at the boundary of the Bow farm. No alteration in the value of the fountain, or in the place of its taxation, results from the mere division of the title of the Bow farm, or from the use of the water in Dunbarton. If the easement were terminated by a reconveyance, an increased demand for the water in adjoining towns might increase the value of the spring and of the Bow land of which the spring is a part. If a town line ran through the middle of the spring, and all the water was used on one side of the line, the land in each town, including its capacity to furnish water as well as its capacity to produce crops, would be taxable on its own side of the line. The statute of taxation applies the same geographical test to springs and mill ponds. When, for some purposes, in contemplation of law, a right of way, a right to take water from a spring, and a right to fill a natural or artificial pond, or raise the water in it above the natural level, and to draw water from it (or from the east or west half of it), are severed from the town in which they exist, and in which they must be exercised, and annexed to land in another town, a change in the place of taxation fixed by statute is not one of the purposes of the common-law severance and annexation.

On the question of the place of taxation, the plaintiff's right to sell the Bow part of their basin at Garvin's Falls, and with it an easement in the Concord part of the same basin, is as immaterial as a sale creating such an easement, and making such a division of the title of the Concord part; and by electing to use the Concord part of their water power in Concord or in Bow, they cannot determine in which town the power-producing capacity of their Concord land shall be taxed. In other words, they cannot, by any disposition of title or use of water, alter the statutory provision that real estate, including land and all rights thereto and interests therein, shall be taxed in the town in which it is situated. The Concord part of

the basin cannot be a power-producing reservoir in Bow. Whether used or not, the plaintiffs' water power is an element of their salable and taxable land. The value of the Bow bank of the river may be diminished by destroying the canal. The value of the Concord bank may be increased by building a mill and digging a canal upon it. After such changes of value, and after a disuse of the water power or a transfer of its use from the Bow to the Concord bank, the Bow part of the dam, the Bow bank, the Bow portion of the bed of the river, including their capacity for valuable use as a part of the basin, and the water power furnished by that part, being in Bow, would be taxable in that town as land.

Judgment on the report.

Blodgett, Carpenter, and **Chase,** JJ., did not sit; the others concurred.

MISSISSIPPI SUPREME COURT.

Albert TUCKER, *Appt.*,
v.
Ada TUCKER.

(.....Miss.....)

1. To show the motive of the defendant in an action for alienating the affections of his son from the latter's wife, conversations after the offense charged against him may be admitted.

2. Evidence that a woman was arrested in a house of ill fame is not admissible to impeach her testimony.

3. To permit a witness on re-examination to go into an extended account of alleged machinations of a party against whom she testifies to entrap her into a house of ill fame and have her arrested is error, when the court has refused to permit cross-examination as to the fact of such arrest.

4. A parent is not liable for advising a son to separate from his wife if moved by proper parental motives for his son's welfare and happiness instead of by malice.

(May 4, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action to recover damages for the alienation by defendant of the affections of plaintiff's husband from her and inducing him to leave her. *Reversed.*

The facts are stated in the opinion.

Messrs. **Allen & Robins** and **Sykes & Bristow** for appellant.

Messrs. **Blair & Anderson** for appellee.

Woods, J., delivered the opinion of the court:

The action of the court below is complained of by the appellant in twenty-one assignments of error. We notice such only as are necessary to the determination of this appeal.

The sixth, seventh, eighth, and ninth assignments may be disposed of together, and briefly. The conversations had between appellant and appellee, which it is alleged were improperly permitted to go to the jury, because not given notice of in the bill of particulars, occurred long after Norman Tucker had deserted the appellee, and were inadmissible as evidence showing or tending to show the substantive offense charged in the declaration. That offense, if ever committed, was long past, and the subsequent conversations of appellant, if offered in evidence to show the independent fact of desertion by reason of appellant's wrongful persuasion and inducement thereto, were competent, in this aspect, only if they were in the nature of confessions. That they were not of the character of confessions is plain, and looked at as they are by complaining counsel, they were incompetent. But, looked at as evidence showing or tending to show the motive of appellant in his supposed wrongful action, they were competent; for, as counsel for appellant ably and correctly argue throughout their exhaustive brief, the motive of appellant was a question of the first importance. If these conversations are given their fair and legitimate construction, they should be found to be helpful to the defense; for, in one of them, the appellant, father of appellee's husband, expressed to appellee the opinion that it would be best for appellee and her husband to remain apart. But, however a jury may regard this, we think they were competent as tending to show motive in appellant.

The tenth, eleventh, twelfth, and thirteenth assignments may be properly considered together. It was sought to show, by Imogene Hyatt, that she had, some time before the trial of the cause, been arrested, with a male companion, in a house of ill fame in Indianapolis, in the state of Indiana. This the court refused to permit to be done by appellant's counsel on their cross-examination of the witness, but, on re-examination, allowed the witness to make an extensive statement as to circumstances offered to show, and tending to show, that on that occasion, by the machinations of appellant and others nearly related to him, she was entrapped into that dishonorable position. After this re-examination, appellant's counsel proposed to cross-examine the witness on this new evidence, and their request was twice refused. That the course pursued by the court was unfair to the

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NOTE.—The above case is especially important in respect to the right to advise one's own son to separate from his wife. A somewhat similar decision as to advice to a wife is made in Tasker v. Stanley (Mass.) 10 L. R. A. 468.

The right in general to maintain an action for alienation of the husband's affections is sustained in Bennett v. Bennett (N. Y.) 6 L. R. A. 553, and *note;* Foot v. Card (Conn.) 6 L. R. A. 829; Warren v. Warren (Mich.) 14 L. R. A. 545; Haynes v. Nowlin (Ind.) 14 L. R. A. 787; Clow v. Chapman (Mo.) 26 L. R. A. 412; Hodgkinson v. Hodgkinson (Neb.) 27 L. R. A. 120; Price v. Price (Iowa) 29 L. R. A. 150; while the contrary is held in Duffies v. Duffies (Wis.) 8 L. R. A. 420; Doe v. Roe (Me.) 8 L. R. A. 833; and that a wife cannot maintain an action against another woman which is simply an action in the nature of crim. con. is held in Kroessin v. Keller (Minn.) 27 L. R. A. 685.

See also 40 L. R. A. 549; 43 L. R. A. 114.

appellant is manifest, and that it was essentially prejudicial to appellant is too clear for disputation. The witness was permitted to make quite a full statement of facts as to her being arrested in a house of prostitution, and as to her having been entrapped therein by the appellant's agency, as the necessary implication was; and then the door to all further inquiry on this line was closed, thus leaving the appellant to the mercy of the jury, branded by the witness as one who had wickedly had her entrapped into the horrible situation indicated, and whose mouth, as well as that of his accusatory witness, was absolutely shut to any defense he might have been able to make to this damning evidence against him. Now, the character of a witness for truth may not be impeached by showing her to be of probably unchaste character, and the evidence as to Mrs. Hyatt's having been arrested in the brothel was, in the first instance, properly excluded; but the court should have continued to exclude it. And assuredly, in common fairness, it should not have been permitted to be used by appellee to her heart's content, and any attempt to examine into it have been denied appellant. The effect of this action of the court was, we repeat, necessarily and immensely prejudicial to appellant.

Before proceeding, now, to consider the mistake of law which runs through the instructions generally, we desire to call attention to the ambiguity of the language of appellee's first charge. By it the jury were told that they were "the exclusive judges of the evidence, its weight and effect, and of the credibility of the witnesses." For appellant it is earnestly contended that, by this charge, the jury were told that they were judges of the weight of the evidence and of its legal effect; in other words, that they were made judges of the law as well as of the facts. Of course, the answer of appellee's counsel is that this is not the natural or reasonable interpretation of the charge, and that, by the use of the word "effect," the jury were intended to be informed, and, in fact, were only informed, that they were the judges of the weight of the evidence, and of its value as showing what facts might be said to be fairly established by it. That able and accomplished and upright counsel differ so widely as to the meaning of the language makes it at least not amiss to suggest the obviation of this objection by other and unambiguous language on another trial.

A few general observations on the law applicable to the conduct of a parent in counseling and advising a married child, in cases of this character, will suffice to show the erroneous view which prevailed in the trial below, without considering *seriatim* the charges given and refused, or modified by the court. In every suit of this character, the principal inquiry is, From what motive did the father act? Was it malicious, or was it inspired by a proper parental regard for the welfare and happiness of his child? The instinct and conscience unite to impose upon every parent the duty of watching over, caring for, and counseling and advising the child at every period of life, upon marriage and after marriage, whenever the necessities of the child's situation require or justify such action on the parent's part. The reciprocal obligations of parent and child last through life, and the duty of discharging these divinely implanted obligations is not and cannot be destroyed by the child's marriage. Multiplied instances will occur to the mind in which a failure of the father to speak and to act would be regarded with horror. A daughter who has recklessly contracted an undesirable marriage with a man utterly unworthy to be the husband of a virtuous woman, against the wish and over the vigorous protest of the father, and who has, by such illstarred union, been brought to wretchedness and humiliation and want of the ordinary comforts of life, may surely be advised, counseled, and cared for in the parental home, even against the will and expressed wish of the unfaithful husband. The question always must be, Was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice and in his action he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have twelve men pass upon the integrity of his intentions. The third, fourth, and seventh instructions given for the appellee ignore this rule of law, and put the father upon the footing of a stranger who intervenes between husband and wife, and they are therefore erroneous. For the same reason the first, ninth, eleventh, and twelfth instructions asked by appellant should have been given as asked, and without the modifications made by the court.

Cases of this character do not abound, and the present appeal presents the question of a father's liability for the first time in our courts. The learned court and able counsel for appellee misconceived the liability of the parent, and held him to the rigid accountability imposed upon strangers who invade the domestic circle and separate husband and wife. See *Hutcheson* v. *Peck*, 5 Johns. 196; *White* v. *Ross*, 47 Mich. 173; *Burnett* v. *Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Payne* v. *Williams*, 4 Baxt. 583.

Reversed and remanded.

Whitfield, J., specially concurring:

I concur in the result reached, and write only to save myself from committal to the proposition, announced in the opinion in chief, that the fact that a woman is a common prostitute may not be shown to impeach her veracity. In *Smith* v. *State*, 58 Miss. 867, it is stated that the earlier rule in this state was that this could not be shown, and that these cases were overruled in *Head's Case*, 44 Miss. 731, and *Head's Case* was on that point overruled by *Smith's Case*. There is a partial collection of the authorities in *Smith's Case*. The English rule supports *Head's Case*, as do many of our state supreme courts. 2 Taylor, Ev. § 1471, and note 3; 3 Rice, Ev. p. 367; *Real* v. *People*, 42 N. Y. 280. I do not now express any opinion on the point, reserving such expression for a case presenting the question for decision.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Cornelius HADDEN, Exr., etc., of James H. Dandy, Deceased, *et al.*, *Appts.*,
v.
METHODIST SOCIETY OF IRELAND *et al.*, *Respts.*

(51 N. J. Eq. 154.)

* **A bequest made, without limitation** as to its use, directly to an unincorporated, but regularly organized and well-established, charitable association, is valid.

(April 14, 1893.)

APPEAL by complainant from a decree of the Chancery Court in favor of the legatees under the will of James H. Dandy, deceased, in a proceeding to obtain construction of certain provisions in such will. *Affirmed.*

The facts are stated in the Vice Chancellor's opinion, which was as follows:

Pitney, V. C.:

The object of the bill is to obtain the direction of the court in the final execution of the will of James H. Dandy, deceased. The clause of the will upon which the executor is in doubt is as follows: "Third. All the rest and residue of my property, both real and personal, I give and devise to my executor, hereinafter named, in trust, nevertheless, to pay all the interest, income, and profits thereof to my wife during the term of her natural life, and upon her death to pay and dispose of said principal sums as follows, *viz.:* To my niece Sarah D. Huff the sum of $1,500; to my niece Charlotte Bush the sum of $1,000; to John Davis, of the town of Belturbet, Caven county, Ireland, the sum of $50 per year for and during the term of his natural life, my executor being hereby directed to retain in his hands and invest a principal sum sufficient to yield said income, and upon the death of the said John Davis the said principal sum is to be paid to the Wesleyan Methodist Society of Belturbet, Caven county, Ireland. All the remainder of the property is to be paid to the Wesleyan Methodist Society of Ireland." The question is whether the bequest to the Wesleyan Methodist Society of Belturbet and to the Wesleyan Society of Ireland are good.

Two several answers were filed by leave of the court, one by three gentlemen "on behalf of the Society of People called Methodists of Belturbet, Caven county, Ireland, which society is commonly known as the 'Methodist Society of Belturbet,'" and "was formerly known as the 'Wesleyan Methodist Society of Belturbet;'" and another by two gentlemen "on behalf of the Society of People called Methodists in Ireland, commonly known as the 'Methodist Society of Ireland,' and was for-

* Headnote by PITNEY, V. C.

NOTE.—*Validity of gift to unincorporated charity.*

Owing largely to conflicting opinions as to the extent and origin of the power of courts of equity over charitable trusts, the different courts have reached quite diverse conclusions upon this question. There seems to be no conclusive rulings among the early English decisions, and the modern law upon the subject has been largely constructed by modern courts.

Early decisions.

In Pawlet v. Clark, 13 U. S. 9 Cranch, 292, 3 L. ed. 735, there is a quotation from the Year Books (11 Hen. IV. 84*b*), that if a grant be made to a church of such a place it shall be a fee in the parson and his successors. And in like manner if the gift be of chattels to parishioners who are no corporation, it is good and the church wardens shall take them in succession, for the gift is to the use of the church.

In Porter's Case, 1 Coke, 25, it seems to have been taken for granted that unincorporated associations were capable of being *cestuis que trust* in a charitable use.

In Adams' and Lambert's Case, 4 Coke, 104, colleges are mentioned as existing without incorporation, although it was necessary to sustain them by gifts.

In Burbank v. Whitney, 24 Pick. 146, it is said that prior to the statute Elizabeth it would seem that donations to charitable uses were good, although they were to be distributed by a society or body of men who were not incorporated, and that there can be no doubt that such bequests are good and valid under the statute of Elizabeth if not good without the aid of that statute.

In Burr v. Smith, 7 Vt. 241, it was said unincorporated associations could receive bequests to charitable uses prior to 23 Hen. VIII. chap. 10.

In Zane's Case (Magill v. Brown, Brightly (Pa.) 350, *note*), cited, *inter alia*, in 7 Vt. 241, Baldwin, J., says: The common law required no charter to enable a body of men to receive donations of chattel property by their name as a body, but that a charter was necessary to enable them to receive title to real estate in fee. Any opinion to the contrary arises in not discriminating between the right of holding an estate of inheritance with and without proper words to convey it, and between the effect of a deed which transmits from ancestor to heir, or a charter which passes it from predecessor to successor. They are capable of taking the fee by proper words of grant to themselves and their heirs, or to another in trust for their use. To decide that a charter was necessary to enable a religious society to enjoy the sites and buildings for worship, for charity, for education and sepulture, and funds for the maintenance and support of the poor, would be a declaration that the rights of conscience and worship would be made dependent upon the discretion of the legislature.

In the latter case a very large number of early cases were reviewed, and the conclusion was reached by following what was apparently involved in the cases and not passed upon, rather than by finding and following conclusive decisions.

Right to take real estate or permanent fund.

The objections at common law to a voluntary association's taking title to real estate or to a permanent fund are so nearly insurmountable that there is very great uniformity in the rulings that in the absence of some trust device a conveyance to such association of such property is void.

In *Re* Ticknor's Estate, 13 Mich. 44, the court states that it has been settled that a devise of land to an unincorporated society is not valid, and also that such society cannot take and manage a permanent fund.

See also 38 L. R. A. 669.

merly known as the 'Wesleyan Methodist Society of Ireland.'" By these answers, whose allegations are not put in issue, it appears that the great John Wesley, the founder of Methodism in Christian religious worship, and of the Christian sect called "Methodist," about the middle of the last century founded in various parts of Great Britain and Ireland a number of religious societies, with preachers and chapels and houses of worship, all under the governmental control of an assembly of all the preachers, called a "conference." Such a conference was established in Ireland under the provisions of a deed executed by Wesley himself, and the organization under it has continued until the present time. The various societies whose preachers composed the conference acquired real property, which was vested in local trustees, and was transmitted from generation to generation, so that, although never legally incorporated, they had still, by means of the machinery of trustees, maintained and enjoyed perpetual succession both in their organization and in the title to their property. The aggregate of these several local societies was known as the "Society of People called Methodists." After the death of Wesley several secessions from the original society took place in Ireland, and, for distinction's sake, a practice arose of calling the original society founded by Wesley himself the "Wesleyan Methodist Society." In 1816–1818 a division occurred in the original or Wesleyan Methodist Society of Ireland, and a new society was formed, composed, of course, of numerous local societies, which adopted the name of the "Primitive Wesleyan Methodist Society of Ireland." It thus happened that from 1818 to 1878 there existed in Ireland two general societies, composed of numerous local societies, called respectively "The Wesleyan Methodist Society of Ireland" and "The Primitive Wesleyan Society of Ireland." In 1871 the British Parliament passed an act (34 & 35 Vict. chap. 40) entitled "An Act to Alter and Regulate the Proceedings and Powers of the Primitive Wesleyan Methodist Society of Ireland, and for Other Purposes." This act is cited as the "Primitive Wesleyan Society of Ireland Act." This act recognizes the organization, discipline, and creed of the society by annexing it as a schedule to the act, and by referring to it in its body. It declares that all property held in trust for it shall continue to be held upon the trusts upon which it was then held until such trusts shall be changed by conference; that the design, discipline, laws, rules, etc., then prevailing shall continue until altered by vote of conference, and shall govern all members, and be capable of being enforced in the temporal courts in relation to property; that the society might by vote of conference unite or co-operate with any church or religious body or association in Ireland, and might appoint standing "trustees to hold real and personal property for the society, or for any district, circuit, or station thereof," and fill vacancies from time to time, each appointment of a trustee to be enrolled in the Irish chancery; and that all property once vested in said trustees shall con-

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An unincorporated association cannot take real estate under a will, but it may take the use of real estate devised to trustees for its benefit. Stone v. Griffin, 3 Vt. 400.

A conveyance to an unincorporated association is void at law for want of a grantee capable of taking. Kirk v. King, 3 Pa. 436.

A devise to an unincorporated charitable association is void. White v. Howard, 46 N. Y. 144; Brewster v. McCall, 15 Conn. 274; Cobb v. Denton, 6 Baxt. 235; Green v. Allen, 5 Humph. 170.

A devise to a yearly meeting of Quakers and to their successors, which is not a corporation, is void. Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58.

As a general rule a bequest or devise to an unincorporated association is void, and it is only by virtue of that peculiar jurisdiction exercised by courts of equity in regard to charitable uses that such bequests have ever been sustained. State, Methodist Episcopal Church, v. Warren, 28 Md. 338.

A bequest in trust of a fund to educate youths for the ministry, to a religious association which is unincorporated, cannot be taken by the association as such, nor by the individuals composing it. Philadelphia Bapt. Asso. v. Hart, 17 U. S. 4 Wheat. 1, 4 L. ed. 499; Gallego v. Atty. Gen. 3 Leigh, 450, 24 Am. Dec. 650; Brooke v. Shacklett, 13 Gratt. 301; Seaburn v. Seaburn, 15 Gratt. 423; Bible Soc. v. Pendleton, 7 W. Va. 79; Carskadon v. Torreyson, 17 W. Va. 43.

A bequest of money to an unincorporated charitable institution to be held in trust in perpetuity for the education of indigent youths is void since there is no trustee capable of acting. M'Cord v. Ochiltree, 8 Blackf. 15.

But in Pennsylvania religious societies are recognized as having an associate or quasi-corporate existence in law with power to hold land and build appropriate houses thereon. Phipps v. Jones, 20 Pa. 260, 59 Am. Dec. 708; Brown v. Lutheran Church, 23 Pa. 499; Thomas v. Ellmaker, 1 Pars. Sel. Eq. Cas. 98; Yard's Appeal, 64 Pa. 95.

And it has been held that an unincorporated charity which is in fact merely a department of the work of a municipal corporation may be the subject of a valid devise which may be taken and administered by the municipality. Vance's Succession, 39 La. Ann. 371.

So it has been held that if a grant is to an existing church the parson will immediately become seised of the freehold as a sole corporation capable of transmitting the inheritance to his successors. Pawlet v. Clark, 13 U. S. 9 Cranch, 292, 3 L. ed. 735.

And in Beatty v. Kurtz, 27 U. S. 2 Pet. 566, 7 L. ed. 521, the court says that in Pawlet v. Clark the court considered cases of an appropriation or dedication of property to public or religious uses as an exception to the general rule requiring a particular grantee.

But although the conveyance is void at law courts of equity have been solicitous to preserve the charity, and many of them have gone to such lengths in doing so that the inability of the association to take at law has been of very little moment.

It is very generally held that the association may be *cestui que trust*. Guilfoil v. Arthur, 158 Ill. 600; Vandervolgen v. Yates, 3 Barb. Ch. 242; Mannix v. Purcell, 46 Ohio St. 102, 2 L. R. A. 753; Methodist Church v. Remington, 1 Watts, 218, 26 Am. Dec. 61.

An unincorporated aggregate body cannot be *cestui que use* under the statute of uses, because it has no capacity to take. Earle v. Wood, 8 Cush. 430; Dickson v. Montgomery, 1 Swan, 248.

Although it has been held that a conveyance to trustees for the benefit of an unincorporated church is valid. Terrett v. Taylor, 13 U. S. 9 Cranch, 43, 3 L. ed. 650.

A deed in trust for an unincorporated charity may be given effect. Earle v. Wood, *supra*; King v. Parker, 9 Cush. 71.

tinue to be held by such trustees upon such trusts as conference may decide. It does not appear that any trustees were appointed by the Primitive Society under this act. Afterwards, in 1878, the two societies above named united in one society, in pursuance of the provisions of this act. One of the terms of the union was that the distinctive terms "Wesleyan" and "Primitive Wesleyan," by which they had previously been known, be dropped, and the term "Methodist" alone be used. At the date of the will there was no society in Ireland bearing either of the distinctive names used by the testator in his will.

The testator was, before coming to this country, a resident of Belturbet, and a member of the Primitive Methodist Society of Ireland. There was at that time at Belturbet both a "Primitive Methodist Society," forming part of the Newtown-Butler circuit of the Primitive Wesleyan Society of Ireland, and also a "Wesleyan Methodist Society," which formed a part of the Clone circuit of the Wesleyan Methodist Society of Ireland. At the union above mentioned these societies were also united, and became known as the "Belturbet Circuit." The testator was connected with the Primitive Wesleyan Society of Belturbet. His will was made in this country in 1882. In 1876 the conference of the Wesleyan Society appointed trustees to hold property in trust for the society and its component societies in the manner provided in the act of Parliament above set forth. Under what authority this was done does not appear, as the act above referred to did not apply to such society, and my attention was not called to any act which does. The trustees so appointed executed a declaration of trust, which has been enrolled in the Irish chancery, and have continued to act to the present time. A part of the constitution of the local societies or circuits is that there shall be "stewards," who look after the temporal affairs of the society, and receive and disburse its moneys. Of the three defendants who have answered on behalf of the Belturbet Society one is the superintendent minister of that circuit, and the other two are the stewards thereof.

I think there can be no doubt that the two societies named by the testator in his will are respectively the local Methodist Society of Belturbet and the general Methodist Society of Ireland. The addition by the testator of the word "Wesleyan" does not, in my judgment, throw the least doubt on his meaning. The previous existence there of two societies of one faith, and, in the main, of one discipline, with one of which he was connected, and their subsequent union into one society, of which union he was probably aware, seems to leave no room for doubt. The case, as to this part of it, is far within the range of authoritative decisions, too numerous and familiar to require citation.

It seems to be settled by what I conceive to be the weight of authority, and in accord with reason, that a voluntary unincorporated association may be a legatee of a legacy like this. It is to be observed—First, that there is here no

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A deed in trust for the benefit of an unincorporated charity is valid. Alden v. St. Peter's Parish, 158 Ill. 631.

A devise to trustees of land for the use of a masonic lodge is valid. Cruse v. Axtell, 50 Ind. 49.

In Cahill v. Bigger, 8 B. Mon. 211, a conveyance of land to the deacons of an unincorporated church in trust for the church was upheld.

An unincorporated religious society cannot hold real property in the name which it assumes, nor can the directors and their successors in office appointed by the society hold it. But there may be a conveyance to an individual and his heirs in trust for the society, which will be valid. Goesele v. Bimeler, 5 McLean, 223.

A bequest to trustees for the benefit of an unincorporated association is valid. Tappan v. Deblois, 45 Me. 130.

A devise in trust for a well-organized charity is valid. Barnum v. Baltimore, 62 Md. 297, 50 Am. Rep. 219.

A bequest to an incorporated church in trust for an unincorporated Sunday school connected therewith is valid. Eutaw Place Bapt. Ch. v. Shively, 67 Md. 495.

A devise in trust for a definitely described charity is valid if made to a trustee capable of taking it. Halsey v. Protestant Episcopal Church Convention, 75 Md. 275.

A bequest in trust for the persons who at the time constitute a voluntary association is not void for uncertainty, but is available for the individuals then composing such association, and not to their successors. Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99; Jackson v. Phillips, 14 Allen, 591.

But an earlier case held that a devise to be expended for the use of schools among the inhabitants in the northwest parish in the town of Boxford, confining it to inhabitants of such town while the parish contains inhabitants of another town, so that the beneficiaries are not a corporation, is not valid. Barker v. Wood, 9 Mass. 419.

It being settled that the association may be beneficiary, and equity having power to effectuate charitable trusts, the question arises, How far will equity create and administer a trust in case of a simple gift to the association? Upon this question courts differ. The difference is founded in part upon whether or not the statute of Elizabeth has been adopted. But it also involves the further question as to the power of equity over trusts.

Under the statute of Elizabeth a charity may be given effect although the grantee is not incorporated. Missouri Historical Soc. v. Academy of Science, 94 Mo. 459.

Where the statute 43 Elizabeth is in force it is no objection that no person capable of taking is named as trustee. The devise will be upheld and executed although it is to an unincorporated association. Washburn v. Sewall, 9 Met. 280; Dexter v. Gardner, 7 Allen, 243.

A devise to an unincorporated charity will be regarded as a devise in trust under the statute of Elizabeth, and will be executed in favor of the society. Bartlett v. Nye, 4 Met. 379.

A voluntary association will not be permitted to take a permanent fund established for a particular purpose, but the court will create of it a proper and permanent trust. Wellbeloved v. Jones, 1 Sim. & Stu. 40, 1 L. J. Ch. 11.

In M'Girr v. Aaron, 1 Penr. & W. 49, 21 Am. Dec. 361, in which there was a devise for the benefit of an unincorporated church, the court says a gift to a charity should not fail for the want of a trustee.

Although the grantee is unincorporated a court of equity will not allow the gift on that account to fail, but will see to its effectuation. Schmidt v. Hess, 60 Mo. 595.

A bequest to trustees for the benefit of a Sunday

devise of real estate, requiring a person, natural or artificial, capable of holding the title; and, second, that there is no perpetual continuing trust, which can be administered only by such a person. The gift is of money, and is absolute and unlimited by any trust except such as is implied by its being given to a religious society. There is no limitation of the gift to the use of the annual income, nor to any particular purpose, such as is often found in such testamentary dispositions. In order to carry out the intention of the testator, we have only to see to it that the gift reaches the proper officer of the association. What shall afterwards become of it does not concern the court, as, so far as appears, it did not the testator. He appears to have been satisfied to give the money to the association without any direction as to how it was to be used, relying, as he might well do, upon the general and established character of the society. That an unincorporated association of this character is competent to receive a direct and unlimited gift of money was admitted to be settled law by Sir John Leach in *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40. There the bequest was to the officers of an unincorporated theological seminary, in trust to use the income and interest in certain specified charities. The suit was brought by the officers of the school against the executors, without bringing in the attorney general. It was held that the attorney general must be brought in, because the King, as *parens patriæ*, superintends the administration of all charities, and acts by the attorney general," and that a proper trust must be established, etc. Sir John Leach, however, adds these words: "It has been held not to be necessary that the attorney general should be a party where a legacy is given to the treasurer, or other officer of some established charitable institution, to become a part of the general funds of that institution; and this exception is reasonable; for the attorney general can have no interference with the distribution of their general funds." And Mr. Boyle in his treatise on Charities (p. 217), states this as the law in England. And this principle seems to have been acted upon without question in *Johnstone* v. *Earl Harrowby*, 29 L. J. Ch. 145, 1 De G. F. & J. 183, where I infer the bequests were to unincorporated societies. And Mr. Perry, in his treatise on Trusts, (§ 730), cites other English as well as American cases in support of the same rule. The case of *Evangelical Asso.'s Appeal*, 35 Pa. 316, was so much like the present as to be indistinguishable, and the subject there received full consideration by Justice Strong, who reviewed the authorities, and whose language and judgment apply here. The same rule is supported by the judgment of Mr. Justice Baldwin in *Magill* v. *Brown*, reported in Brightly (Pa.) 347, note, and *Blenon's Estate*, Brightly (Pa.) 339. To the same effect are the earlier cases in New York. *Potter* v. *Chapin*, 6 Paige, 639, where Chancellor Walworth (p. 649) says that the contrary decision of *Philadelphia Baptist Asso.* v. *Hart*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499, is generally admitted to be wrong;

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school which is an unincorporated society is valid. Conklin v. Davis, 63 Conn. 377.

While a devise to an unincorporated association is void at law equity will protect and perpetuate the charity, the legal title remaining in abeyance or vesting in the heirs of the testator as trustees for the persons beneficially interested. American Bible Soc. v. Wetmore, 17 Conn. 181.

If an unincorporated religious society takes possession of property donated to its use, and upon the faith of the donation builds a church thereon with the consent of the donor, a court of equity might compel him to convey to trustees in perpetuity for the use of the church, or execute a declaration of trust that he and his heirs should hold the property for its use. Beatty v. Kurtz, 27 U. S. 2 Pet. 566, 7 L. ed. 521.

There are some courts which do not concur in these rulings, and which hold that if the trust is not made perfect by the creator the court cannot render any assistance. Those cases will be found under the next subdivision of this note.

Personal property.

In case of personal property the objections to the association taking it are not so strong, and conveyances of such property for use at the discretion of the association are quite generally upheld in accordance with the ruling in HADDEN V. METHODIST SOCIETY OF IRELAND.

If there is a bequest to a society the individuals composing it who may be identified by evidence take as natural persons in the same manner as if each had been particularly named; and if it be upon a lawful trust they will be compelled to execute it. Atty. Gen. v. Jolly, 1 Rich. Eq. 99; Gibson v. M'Call, 1 Rich. L. 174.

A charitable bequest to an unincorporated religious society is valid. Evangelical Asso.'s Appeal, 35 Pa. 316.

A gift to a charitable association without specifying any particular use to which it is to be applied is a charitable gift. Woolford's Appeal, 126 Pa. 47.

In Witman v. Lex, 17 Serg. & R. 88, 17 Am. Dec. 644, it is said that in Pennsylvania donations to unincorporated bodies were uniformly upheld.

An absolute bequest to an unincorporated society is good. Parker v. Cowell, 16 N. H. 149.

A bequest of money generally, and not upon permanent uses to an unincorporated association capable of clear identification, is valid. *Re* Ticknor's Estate, 13 Mich. 44.

A legacy to an unincorporated association with a direction that it shall go to the treasurer thereof for the time being is valid. Tucker v. Seaman's Aid. Soc. 7 Met. 188.

A bequest to a voluntary unincorporated association is valid. Carter v. Belfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299.

And this was the view which was at first adopted in New York.

In an early case the chancellor said: "Although some doubt was thrown upon the question of charitable donations, for the benefit of a community or body not incorporated so as to be capable of taking and conveying the legal title to property, by Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1, 4 L. ed. 499, I believe it is generally admitted that the decision in that case was wrong. And it may now be considered as an established principle of American law that the court of chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, . . . where the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor. . . . A devise or conveyance of real estate . . . may perhaps form an exception to the general principle." Potter v. Chapin, 6 Paige, 639.

A voluntary unincorporated society may take a

Wright v. *Methodist Episcopal Church*, Hoffm. Ch. 202, at pages 239, 265; *King* v. *Woodhull*, 3 Edw. Ch. 79; *Hornbeck* v. *American Bible Soc.* 2 Sandf. Ch. 133; *Banks* v. *Phelan*, 4 Barb. 80. In that case there was a bequest of $3,000 "to the Roman Catholic Church of Petersburg, in the state of Virginia;" an unincorporated religious society. The learned Judge, in his opinion (p. 89), of this bequest says: "It appears, however, that this is an unincorporated institution, and it is contended that for that reason the legacy is void. The legality of bequests for pious and charitable uses, though for the benefit of unincorporated associations, is so well established in this state that it is barely necessary to refer to the authorities." He then cites some of the authorities above cited, and proceeds: "In this case, however, the will does not create a trust. It gives the legacy directly to the objects of the bounty of the testatrix," and he held the bequest good. The later New York cases lean the other way. In *Owens* v. *Missionary Soc.* 14 N. Y. 380, 67 Am. Dec. 160, an unlimited bequest to an unincorporated association was held void because the general objects of the association were not charitable, and on that ground it was distinguished from the cases just cited. In *Sherwood* v. *American Bible Soc.* 1 Keyes, 561, a bequest as follows: "I give and bequeath unto the Arcot Mission of the Reformed Dutch Church the sum of $3,000, to be used for the education of the heathen boy on whose account I have heretofore advanced money,"—was held void because the association was unincorporated, and therefore unable to act as a trustee of a special, continuing trust, as that was held to be. The opinion makes no mention of the cases earlier than *Owens* v. *Missionary Soc.*, which it cites as holding the general proposition that a voluntary association cannot be a legatee. *White* v. *Howard*, 46 N. Y. 144, was a case of a devise of lands, and may well stand on that ground. Numerous other cases in accord with those first above cited are found in Mr. Randolph's learned note on the subject. 1 Jarman, Wills (Rand. & T. ed.) pp. 410–412. A review of these leads me to the conclusion first above stated, that a direct gift of money without limitation as to its future use, to an unincorporated charitable association, is good.

But if it were necessary to the validity of the bequests here in question to hold that the legatee should have corporate capacity, I should be inclined to hold that the act of Parliament before referred to was sufficient for that purpose. It expressly provides the machinery by which the society may acquire and hold for its purposes real and personal property, and it impliedly, at least, authorizes such acquisition and holding, and subjects it to the purposes of the society as declared by its governing body. The same act authorizes the grantee of this power to unite with any other church, religious body, or association in Ireland, but says nothing of the effect of such union upon the exercise of the power thus granted. I conclude that the effect would not be to destroy the power, but rather that it would be perpetuated in the association to re-

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legacy. Wright v. Methodist Episcopal Church, Hoffm. Ch. 239. This case contains a very full and valuable examination of the jurisdiction of chancery to enforce charitable trusts.

Bequests for charitable purposes to unincorporated societies are sustained where the object is competent and is designated or may be clearly ascertained. Hornbeck v. American Bible Soc. 2 Sandf. Ch. 133.

A bequest to an unincorporated religious association for the use of its poor ministers is not within the statute against perpetuities. Shotwell v. Mott, 2 Sandf. Ch. 46.

A bequest to a religious society as such is valid as a gift for pious and charitable uses, although the society is not incorporated. Banks v. Phelan, 4 Barb. 80.

Such a bequest is void as there is no trustee competent to take the fund, since a society is composed of fluctuating and unascertained persons, and the beneficiaries are the entire community within the influence of the society. Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Ruth v. Oberbrunner, 40 Wis. 238.

But it was subsequently held that a bequest to a voluntary association is invalid. Owens v. Missionary Soc. of M. E. Ch. 14 N. Y. 380, 67 Am. Dec. 160. The reason given was that, the purpose of the gift not being stated, there was no way of ascertaining the object to which it should be devoted. But it is said that it is not intended to deny the power of courts of equity to enforce the execution of trusts created for charitable purposes in cases where the fund is given to trustees competent to take, and where the use is so far defined as to be capable of being specifically executed by authority of law.

A voluntary unincorporated association is not legally competent to receive a donation, even for a purpose denominated charitable. Sherwood v. American Bible Soc. 1 Keyes, 561, 4 Abb. App. Dec. 227.

So that the generally recognized rule in that state now is that a bequest to an unincorporated association or society is void. First Presby. Soc. v. Bowen, 21 Hun, 389; McKeon v. Kearney, 57 How. Pr. 349; Betts v. Betts, 4 Abb. N. C. 403; Leonard v. Davenport, 58 How. Pr. 384. But in a recent case in the surrogate's court it was held that an unincorporated association was competent to take a bequest for a pious use. Carpenter v. Historical Soc. 1 Dem. 607. And in De Witt v. Chandler, 11 Abb. Pr. 471, a bequest to an unincorporated society is upheld without a direct discussion upon the question under the act authorizing the suit for the benefit of associations consisting of seven or more members.

So other states have followed the same rule.

A bequest to an unincorporated association is not valid for want of capacity in the legatees to take and enjoy what is given. Holland v. Peck, 2 Ired. Eq. 255.

A bequest directly to an unincorporated association is void. Rhodes v. Rhodes, 88 Tenn. 637.

A gift to an unincorporated association to be put into the hands of a trustee to be selected by it is void. Daniel v. Fain, 5 Lea, 319; Reeves v. Reeves, Id. 644.

A bequest to an unincorporated society is void. White v. Hale, 2 Coldw. 77.

A bequest to a voluntary unincorporated association is void because it is incapable of taking title to property and there is no *cestui que trust* who can enforce its execution in equity. Church Extension of M. E. Ch. v. Smith, 56 Md. 362; Rizer v. Perry, 58 Md. 113.

By the laws of Maryland a bequest to an unincorporated society of a fund to be applied by it to a certain purpose is void. Meade v. Beale, Taney, 339.

sult from the union. The result would be that the trustees previously appointed by the Wesleyan Methodist Society would, by the union, acquire the rights and be subjected to the duties and restrictions prescribed in the act.

The character and objects of the legatees are beyond question. It is a matter of history and general knowledge, of which the court takes notice without proof, that the societies formed by Wesley in the British Isles and in this country were, and still continue to be, societies engaged in promoting the Christian religion, and therefore charitable. Money given to any such society is presumably given to charity, and the gift will be upheld. I will advise that the gifts are valid; that the fund set apart for the annuity of $50 may be paid to the "stewards," for the time being, of the Belturbet circuit, and the residue to be paid to the permanent trustees of the general society or conference for Ireland. Such payment may be made under the supervision of a special master, and upon such vouchers as he may approve; and upon his report a decree may be made discharging the executor. Costs of both parties with a reasonable counsel fee to be fixed, will be paid out of the fund.

Messrs. **Benjamin A. Vail** and **Clarence D. Ward,** for appellants:

This court will not administer a foreign charity.

Taylor v. *Bryn Mawr College*, 34 N. J. Eq. 104.

A bequest to benevolent, religious, or charitable institutions is void as it embraces by force of the term "benevolent" objects which are not in a legal sense charities.

Thomson v. *Norris*, 20 N. J. Eq. 490.

The residuary estate should be distributed among the next of kin, because, (1) there is no definite beneficiary; (2) there is no competent trustee; (3) there is no bequest to charitable uses and the court cannot appoint a trustee.

1 Jarman, Wills (Rand. & T. ed.) p. 403.

Mr. **Thomas J. Kennedy,** for respondents:

Bequests to religious societies without limitation are charitable.

Earle v. *Wood*, 8 Cush. 430; *Dexter* v. *Gardner*, 7 Allen, 243; *Evangelical Asso.'s Appeal*, 35 Pa. 316; *Gibson* v. *M'Call*, 1 Rich. L. 174; *Atty. Gen.* v. *Jolly*, 1 Rich. Eq. 99; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36, Affirmed 31 N. J. Eq. 671; Perry, Tr. 701; *Thomson* v. *Norris*, 20 N. J. Eq. 489; *Cory Universalist Soc.* v. *Beatty*, 28 N. J. Eq. 570; Hamilton, Charities in Ireland, pp. 5, 21.

Charitable gifts are favored by the law.

Roper, Legacies, 1180, 1181; Boyle, Charities, 222; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36; *Hadley* v. *Hopkins Academy*, 14 Pick. 253; *Chapin* v. *School Dist. No. 2*, 35 N. H. 445.

A mere misnomer or misdescription of the devisee or legatee intended is immaterial if such devisee or legatee can be clearly identified.

Perry, Tr. § 730; Story, Eq. Jur. § 1170; Jarman, Wills (Rand. & T. ed.) 411, note; *McBride* v. *Elmer*, 6 N. J. Eq. 107; *Van Wagenen* v. *Baldwin*, 7 N. J. Eq. 211; *New York Annual Conference Minister's M. A. Soc.* v. *Clarkson*, 8 N. J. Eq. 541; *Smith* v. *First Presby. Church*, 26 N. J. Eq. 132; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36, Affirmed 31 N. J. Eq. 671; *Bradshaw* v. *Thompson*, 2 Younge & C. Ch. Cas. 295; *Bunting* v. *Marriott*, 19 Beav. 163; *M'Girr* v. *Aaron*, 1 Penr. & W. 49, 21 Am. Dec. 361; *Domestic & F. Missionary Soc.'s Appeal*, 30 Pa. 435; *Makeown* v. *Ardaugh*, 10 Ir. Eq. Rep. 445; *United States* v. *Drummond*, 33 Beav. 449.

A devise or bequest for the benefit of a voluntary, unincorporated religious or other charitable society is good.

Gibson v. *M'Call*, and *Atty. Gen.* v. *Jolly*, *supra;* Perry, Tr. § 730; Story, Eq. Jur. § 1169; *Earle* v. *Wood*, and *Dexter* v. *Gardner*, *supra; Pickering* v. *Shotwell*, 10 Pa. 23; *Evangelical Asso.'s Appeal*, 35 Pa. 316; *Yard's Appeal*, 64 Pa. 95; *Zeisweiss* v. *James*, 63 Pa. 465, 3 Am. Rep. 558; *Johnstone* v. *Earl Har-*

A bequest to the trustees of an unincorporated religious association is void. Mong v. Roush, 29 W. Va. 119; Wilmoth v. Wilmoth, 34 W. Va. 426.

Equity has in some cases upheld bequests of personalty.

A bequest to an unincorporated charity in a strict legal view cannot be supported, but it may be such a charity as chancery will uphold and protect. King v. Woodhull, 3 Edw. Ch. 79.

A court will sustain a legacy to an unincorporated society and appoint a trustee to carry into effect the general purpose of the testator. Winslow v. Cummings, 3 Cush. 365.

A charitable bequest to an unincorporated association may be enforced by virtue of the statute of Elizabeth even if it could not be made effectual without that statute. Preachers' Aid Soc. v. Rich, 45 Me. 552; Swasey v. American Bible Soc. 57 Me. 523.

In case of a charitable gift to an unincorporated association the court will lay hold of the fund and carry into effect the charitable intention of the testator by appointing a trustee if necessary. Beall v. Fox, 4 Ga. 404.

Association as trustee.

If the appointed trustees are unorganized as well as unincorporated they cannot act. Grimes v. Harmon, 35 Ind. 246, 9 Am. Rep. 690.

But a power of selection of the beneficiaries may be vested in an unincorporated religious society. Pickering v. Shotwell, 10 Pa. 23; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558; Domestic & F. Missionary Soc.'s Appeal, 30 Pa. 434.

Statutes.

The association may be given power by statute to hold property, and if it is given such power a devise to it may be valid. Heiskell v. Chickasaw Lodge, No 8, 87 Tenn. 685, 4 L. R. A. 699.

Under the Tennessee statute an unincorporated church society may take title of a lot upon which to build a church. Reeves v. Reeves, 5 Lea, 644.

Under the Massachusetts statute a deed of land to an organized and acting, though unincorporated, religious society vests a valid title in the grantee as a body, and does not create a tenancy in common among the individuals who compose the society. Hamblett v. Bennett, 6 Allen, 140.

A voluntary association may, under the Vermont laws, receive and hold a legacy. Smith v. Nelson, 18 Vt. 546.

As to the effect of subsequent incorporation, see *note* to Longheed v. Dykeman's Baptist Church and Soc. (N. Y.) 14 L. R. A. 410. H. P. F

rowby, 1 De G. F. & J. 183; *Preachers' Aid Soc.* v. *Rich*, 45 Me. 552.

And this is so even when there is no charitable use specified.

American Bible Soc. v. *Wetmore*, 17 Conn. 181; *Evangelical Asso.'s Appeal*, *Yard's Appeal*, and *Johnstone* v. *Earl Harrowby*, *supra*; *Burr* v. *Smith*, 7 Vt. 241, 29 Am. Dec. 154.

Equity will not suffer a trust, charitable or otherwise, to fail for want of a trustee.

Jarman, Wills (Rand. & T. ed.) note B, p. 414; *Williams* v. *Pearson*, 38 Ala. 299; *Pickering* v. *Shotwell*, *supra*; *Atty. Gen.* v. *Jolly*, 1 Rich. Eq. 99; *McBride* v. *Elmer*, 26 N. J. Eq. 107; *Chapin* v. *School Dist. No. 2*, 35 N. H. 445.

A legacy given to an established charitable institution to become part of its general or ordinary funds will be paid directly to such an institution.

Boyle, Charities, 217; *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 43; *Johnstone* v. *Earl Harrowby*, *Evangelical Asso.'s Appeal*, and *Burr* v. *Smith*, *supra*.

Per Curiam:

Decree affirmed as to both appeals, for the reasons given in the court of chancery.

For affirmance: **Beasley**, Ch. J., **Abbett, Depue, Dixon, Lippincott, Magie, Reed, Van Syckel, Bogert, Brown, Clement, Krueger, Smith**—13.

For reversal: None.

MISSISSIPPI SUPREME COURT.

Z. T. DORRAH, Admr., etc., of Frances A. Jeffries, Deceased, *Appt.*,

v.

J. H. HILL *et al.*

(------Miss.------)

1. **An agent is guilty of a fraud which may be repudiated** by his principal, when without the latter's knowledge he loans his money to his own debtor, receiving a large part of the proceeds in payment of a deed of trust held by him.

2. **One whose money is loaned by an agent on a deed of trust** which is invalid because not signed by the grantor's wife, and the proceeds of which are in large part received by the agent in discharge of a valid deed of trust which he held for purchase money, may, by reason of the agent's adverse personal interest in the matter, which was not known to the lender but was known to the borrower, have the valid deed of trust restored and be subrogated to its security.

(*Whitfield, J., dissents.*)

(April 15, 1896.)

APPEAL by plaintiff from a decree of the Chancery Court for Noxubee County refusing to subrogate plaintiff to the security of a deed of trust which had been given to secure the purchase price on certain real estate to pay which the money of plaintiff's intestate had been used. *Reversed.*

The facts are stated in the opinion.

Mr. **J. E. Rives,** for appellant:

A mere change in the form of indebtedness will not discharge a lien unless the parties clearly intend to extinguish it.

Cansler v. *Sallis*, 54 Miss. 446.

At the time Patty made this loan to Hill his own security was valid although the trust deed was not signed by Mrs. Hill (the debt being for the purchase money). Owing to the relation of the parties, Patty, being the agent of Mrs. Jeffries, having the exclusive lending of her money and taking security therefor, could not, under such circumstances, take an invalid security for her in any transaction in which he was personally interested where he would be deriving any benefit. Hill, knowing this relation and knowing that the real purpose in this new trust deed was to allow Patty to use that much of Mrs. Jeffries' money, was equally bound with Patty, and so far as the property was concerned it should in equity remain in the same way it was when this illegal transaction took place.

Pom. Eq. Jur. §§ 1211, 1212, and cases therein cited.

Messrs. **Orr & Dinsmore** for appellee.

Cooper, Ch. J., delivered the opinion of the court:

The appellant, as administrator of the estate of Mrs. Frances A. Jeffries, exhibited his bill against the appellees, asking to be subrogated to the security of a certain deed of trust executed by the appellee Hill, on the 18th day of January, 1889, to secure the payment of a debt of $450 and interest thereon, in such deed described, to one R. C. Patty. On final hearing this relief was denied, and the complainant appeals.

The facts, chronologically stated, are as follows: In the year 1885 Patty sold to Hill a small tract of land at the price of $450, for which he accepted the notes of Hill, payable at stated future times. On the 18th of January, 1889, Hill, not having paid any part of the purchase price of said land, executed a deed of trust to Patty to secure the same. On the same day Patty, acting as the agent of one Mrs. Gaston, loaned to Hill the sum of $264, and received from him to secure its payment a deed of trust on certain personal property. On the 1st day of January, 1890, Patty had in his hands as the agent of Mrs. Jeffries, a sum of money which she had intrusted to him to lend, or otherwise invest, for her account.

NOTE.—As to subrogation to rights under a mortgage which has been paid, see Wilton v. Mayberry (Wis.) 6 L. R. A. 61; Lowe v. Rawlins (Ga.) 6 L. R. A. 73; Dutcher v. Hobby (Ga.) 10 L. R. A. 472; Campbell v. Foster Home Asso. (Pa.) 26 L. R. A. 117; Stewart v. Wheeling & L. E. R. Co. (Ohio) 29 L. R. A. 438, and Union Mortgage Bkg. & T. Co. v. Peters (Miss.) 30 L. R. A. 829.

Hill had paid no part of the purchase price of the land, and not much of the amount due by him to Mrs. Gaston, and she desired to have the balance due her paid by him. Patty, acting for himself and Mrs. Gaston and Mrs. Jeffries, accepted from Hill his note for $650, payable to Mrs. Jeffries, in payment of the debt owing to him for the purchase money of the land, and in payment of the balance due to Mrs. Gaston. He delivered up to Hill the notes by which these debts were evidenced, and canceled the deeds of trust by which said notes had been secured, and accepted from Hill a deed of trust, upon the land and personalty, to secure the note then executed by him to Mrs. Jeffries. This note and deed Patty retained in his possession until his death, which occurred in December, 1890. Mrs. Jeffries died in August, 1890, not having been advised by Patty of the fact that he had made the investment of her money. After the death of Patty, the note and deed of trust were delivered by his representative to the administrator of Mrs. Jeffries. Hill had made some small payments to Patty on the note, and also paid two or three small sums to the administrator of Mrs. Jeffries. It was then discovered that the wife of Hill had not joined in the deed securing the note to Mrs. Jeffries, by reason of which, since a part of the land was a homestead, the security, as to it, was invalid, under our statute requiring the wife to join in the conveyance of the homestead. Hill, it appears, thereupon promised to procure his wife to join him in the execution of a new deed of trust, but afterwards refused to do so, and the appellant exhibited his bill, setting up the facts, and praying that the deed of trust executed by Hill to Patty on the 18th of January, 1889, be reinstated and enforced. On final hearing it was agreed that the sum due by Hill was $500, for which the court rendered a final personal decree against him, and directed the land, in excess of the homestead exemption, to be sold for its payment, and, on the cross bill of Hill, decreed cancelation of the deed as to the land composing the homestead.

It is said by counsel that the chancellor was controlled in his decision by the case of *Howell* v. *Bush*, 54 Miss. 437. In that case Howell, who owned an encumbered homestead, borrowed the money from Bush to pay off the debt, agreeing to give, as security, a deed of trust on the property. This deed he executed, but there, as here, the wife did not join in the deed, and Bush sought subrogation to the rights of the encumbrancer, whose debt the money he loaned had paid. The court held that, since Bush had carved out and selected his own security, and had canceled, and intended to cancel, the original encumbrance, and since neither fraud nor mistake of fact was alleged or proved, the original encumbrance could not be revived for his protection. If Mrs. Jeffries had loaned the money to Hill, and taken the invalid security, the case of *Howell* v. *Bush* would have controlled. The reason of that case, however, was that the lender had carved out his own security, which failed of effect because of a mistake of law. It does not decide that there can be no subrogation, in any event, to a security which was discharged, and intended to be discharged, by the parties. We need not again examine this question, as it is fully discussed in the opinion of the court, and in the dissenting opinion of Judge Whitfield, in *Union Mortgage, Bkg. & T. Co.* v. *Peters*, 72 Miss. 1058, 30 L. R. A. 829. Starting with the proposition that, under circumstances, a security, though once intentionally canceled, may be revived and enforced by a court of equity, the single inquiry is whether the facts of this case bring the complainant within the principle on which relief will be granted. In the administration of relief by subrogation, it will be found that the jurisdiction of equity rests largely upon the prevention of frauds and relief against mistakes; and the expansion of the rule has so nearly covered the field that it may now be said that, wherever a court of equity will relieve against a transaction, it will do so by the remedy of subrogation, if that be the most efficient and complete that can be afforded. We are of the opinion that the complainant was, and is, entitled to the relief prayed in this cause, for the reason that the arrangement made between Patty, the agent of Mrs. Jeffries, and the defendant, was one which Patty had no right to make, and because the defendant, by the very nature of the transaction, was bound to know, and did know, that the agent was, while professing to act for Mrs. Jeffries, directly interested in the negotiation, and could therefore only bind his principal by her consent, she being fully informed of what he was doing or had done. We need not cite authorities for the proposition that the agent must be loyal to his principal, and, like all other fiduciaries, is forbidden to make a profit by a breach of trust. An agent employed to sell cannot be a buyer, nor one employed to buy be a seller, in the matters intrusted to him by his principal. Wharton, Agency, §§ 232, 239, 594, 760. "When an agent, without knowledge of his principal, becomes engaged in an adverse interest, he is guilty of a gross breach of trust, making himself personally liable to his principal for the damage, and vitiating, . . . at the principal's election, any contract made under the influence of such disloyal engagements. And this rule obtains even where the agent reaps no benefit from the transaction." Id. § 244; *Baughn* v. *Shackleford*, 48 Miss. 255. In *Ex parte James*, 8 Ves. Jr. 337, Lord Eldon said that "this doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this: That the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases."

The fact is apparent that, in making the loan to Hill, Patty, the agent, was acting in a matter in which his interests were adverse to those of Mrs. Jeffries. He had sold the land to Hill years before, and no part of the purchase price had been paid. It is not unreasonable to assume that it was not, to him, a desirable investment of his own funds, and that he took advantage of the opportunity, afforded by the circumstances of having Mrs. Jeffries' money

in his hands, to transfer his claim against a slow debtor to his principal. Whether this be true, however, is immaterial, for Mrs. Jeffries was entitled to the exercise of his judgment, uninfluenced by his personal interests, in making loans of her money, and this she did not have. Whether the investment in the particular case would have been a desirable one if the deed had been executed by both Hill and his wife, is not the question. That would be "the circumstances," as Lord Eldon puts it, of the particular case; but the rule, as he says, rests, not upon the particular case, but upon general principles. The disqualification to make the arrangement, and thereby bind Mrs. Jeffries, arose from the fact that, in so doing, he was acting for her and for himself. Nor can it be doubted that Hill knew precisely what was being done, that Patty was to retain the money of his principal in payment of the sum due him, and that he (Hill) was to execute his note to Mrs. Jeffries to represent the sums he had before owned to Patty and Mrs. Gaston. In truth, the very transaction demonstrated that Patty was representing both himself and his principal; for he agreed, as an individual, to cancel the deed of trust and the note he held against Hill, and deliver them over to him, and this was done as a part and parcel of the arrangement. Dealing thus surreptitiously with the agent was a fraud upon the principal, and Hill, equally with Patty, was subject to the right of the principal to repudiate the contract upon receiving knowledge of its character. *Norris* v. *Tayloe*, 49 Ill. 18, 95 Am. Dec. 568; *Panama & S. P. Teleg. Co.* v. *India Rubber, G. P. & Teleg. Works Co.* L. R. 10 Ch. 515. In the case of *Panama & S. P. Teleg. Co.* v. *India Rubber, G. P. & Teleg. Works Co. supra*, the complainant had contracted with the defendant company to lay a submarine cable, payments to be made, as the work progressed, upon the estimates and certificates of Sir C. T. Bright, the complainant's engineer. After the contract had been made, the defendant made a contract with Bright to lay the cable. The complainant had paid the defendant company £60,000 on the contract, when it discovered that its engineer had entered into the contract with the defendant, and thereupon exhibited its bill for cancelation of the contract and to recover the sum it had paid. Full relief was afforded, the court holding that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in equity. James, L. J., said: "That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him." In that case, as in this, the fraud upon the principal did not consist in an actual purpose to cheat the principal. In that case, the fault was in dealing with the agent in such manner as to create personal interests inconsistent with the discharge of his full duty to the principal. In this it was in dealing with him in reference to a matter in which he had an adverse personal interest. We do not suppose the defendant Hill, at the time the arrangement was made, purposed not to pay the debt to Mrs. Jeffries. But he now refuses to do so, and relies upon the cancelation by Patty of the original security as a reply to the complainant's prayer for subrogation to its benefit; and the complainant responds that this cancelation was a part of a contract entered into between Patty, the agent of Mrs. Jeffries, and the defendant, by which she was not bound, and that the defendant, by the very nature of the transaction, was advised that Patty, by reason of his adverse interest, was incompetent to bind his principal, and both he and Hill took the chance of ratification or repudiation by the principal.

We take it to be the law that Patty could not, without express authority from Mrs. Jeffries, thus transfer to her his claim against Hill, and that Hill, having notice of the want of authority of the agent, stands in no better situation, and that the representative of Mrs. Jeffries has the right to repudiate the contract, and have such restoration of the *status quo* as is now practicable; and since it is evident that only by subrogating the complainant to the security afforded by the deed of trust to Patty can adequate relief be afforded, the chancellor should have so decreed.

So much of the decree as denies to complainant the right of subrogation is reversed, and a decree may be entered here directing sale of the property described in complainant's bill for the amount agreed to be due and all costs.

So ordered.

Whitfield, J., dissenting:

In addition to the facts set out by my Brother Cooper, I deem it important to a proper understanding of this case that certain other facts, shown by this record, and fully set out in the very clear and fair abstract of the case made by the learned counsel for appellant, should be stated. In the opinion of the court it is said that, after some small payments had been made on the note to the administrator of Mrs. Jeffries, "it was then discovered that the wife of Hill had not joined in the trust deed securing the note to Mrs. Jeffries." But the wife of Hill had not joined in the first trust deed, executed in December, 1885, nor in the second, executed in January, 1889,—both made to secure Patty in the payment of the purchase price of the land. Again, it is stated in the opinion of the court that, "on final hearing, it was agreed that the sum due by Hill was $500." To avoid misconception, it should be stated that the admission was that that sum "was due on said note,"—the new note to Mrs. Jeffries,—and not on the purchase money of the land. Patty, some time after the execution of the second trust deed, to secure himself, in January, 1889, had in his hands money belonging to Mrs. Jeffries, as her agent. "He was intrusted by her to invest her money to her best interest, and in none of such investments was she consulted." About the 1st of January, 1890, Patty had Hill execute a note to Mrs. Jeffries for $650, and a trust deed to secure it, in which, as usual between Patty and Hill, Hill's wife did not join. This sum was to pay Patty the balance of the purchase money on the land, and to Mrs. Gaston a loan due her by Hill; Patty having also acted as the agent of Mrs.

Gaston. Patty is dead, and Hill did not testify; so that what took place between them is unknown. This sum of money—$650—was not actually, it seems, handed by Patty to Hill, and then handed back by Hill to Patty as the agent of the two lenders, Mrs. Jeffries and Mrs. Gaston; but the transaction, so far as this record discloses, was, in effect, nothing but a mere loan by Patty to Hill, as agent of Mrs. Jeffries, and a payment, out of that loan, by Hill to Patty, as such agent, of the unpaid purchase money of the land and the debt due Mrs. Gaston. The actual manual handing back and forth of the money would have been a perfectly idle ceremony. The notes and trust deeds, executed by Hill to secure Patty and Mrs. Gaston, were canceled and delivered up, those debts being thereby extinguished and paid off in full. There is absolutely nothing in the record to show any intention whatever, on the part of Patty, as agent of Mrs. Jeffries and Mrs. Gaston, and Hill, to keep those debts alive, or to renew them. The intention of both accorded perfectly with, and is shown by, what they did. They extinguished fully and forever those debts, and the notes and trust deeds evidencing and securing them were canceled and surrendered up to Hill. Further, the note and trust deed for the purchase money were not assigned to Mrs. Jeffries. On the contrary, she, through her agent Patty, chose her own security,—carved out a new and independent security,—and various payments were made thereon. Hill was an illiterate man, who could not "read writing much," but was believed, in the language of one of counsel testifying, to be "a worthy poor man."

This being the case made by the record, it seems to me that it is impossible to distinguish it from *Howell* v. *Bush*, 54 Miss. 437, and that case is decisive of it. That case was thoroughly considered. There was an original opinion, a rehearing, a second opinion, and a further petition for reargument denied. Said Judge Campbell, speaking for a unanimous court: "A new trust deed was given by Howell, and the old one extinguished. There was no intention to keep it alive. It was not relied on, and was therefore canceled. It was not done by fraud or mistake, but honestly and intentionally, for the purpose of getting it out of the way. True, it was done ignorantly as to the law requiring the joinder of the wife to make the new deed of trust valid as against the homestead right; but that does not alter the fact that the parties did not intend to keep the former trust deed alive, but to cancel it, and rely exclusively on the new one taken. When parties capable of contracting make their own arrangements, and there is neither fraud nor mistake of fact, equity will not interpose to thwart their designs or change their agreements. It will not make contracts for parties." And this doctrine has been as expressly declared in *Skaggs* v. *Nelson*, 25 Miss. 94, and *Pitts* v. *Parker*, 44 Miss. 247, and was always the law here, as I understand it, until the unreported case of *McMullen* v. *Home Invest. Co.* (1894), and *Union Mortgage, Bldg. & T. Co.* v. *Peters*, 72 Miss. 1058, 30 L. R. A. 829, in which I dissented. I said, in my dissenting opinion in that case, that it practically overruled *Howell* v. *Bush*, *supra*, and I think the correctness of that remark is unanswerably demonstrated by the result in this case. My brethren, however, profess to adhere to both *Union Mortgage, Bldg. & T. Co.* v. *Peters*, and *Howell* v. *Bush*. How they do so, with all deference, I cannot comprehend; for, as I view them, there never were two cases in more patent and irreconcilable conflict. Entertaining their views of the doctrine of subrogation, it seems to me they should expressly overrule *Howell* v. *Bush*, and not leave it to further mislead the bench and bar. The learned counsel for appellant makes an ingenious argument to avoid the effect of *Howell* v. *Bush*, insisting earnestly that what took place was a renewal of the purchase-money debt, but the parties were changed, and a new creditor introduced, and I understand my brethren to concur with me that that contention cannot be maintained. I conclude, therefore, as to subrogation: First, that the vendor's lien was paid off and discharged when the trust deed to Patty, the vendor, was satisfied, canceled, and delivered up to Hill, and the trust deed to secure Mrs. Jeffries was given, and there was no vendor's lien existing, when the bill was filed, to which complainant could be subrogated. *Skaggs* v. *Nelson*, *supra*, is conclusive of this. For, secondly, if it be said that the vendor's lien can now be assigned, the perfect response is that the fact in this case is it was neither so assigned, nor intended by the parties to be so assigned. Had it been, the note and trust deed to Patty would not have been canceled and delivered to Hill, but assigned, as they might easily have been, to Mrs. Jeffries. And, thirdly, equity never enforces conventional subrogation against the proved intent of the parties. Because what Patty thought at the time of the execution of the trust deed to secure Mrs. Jeffries, and Hill also thought, was a valid trust deed has turned out to be invalid, and their thought about its validity has been found to be a mistake of law, honestly made by both, to substitute the situation as it has ultimated for the situation as it was when the Jeffries trust deed was made, and impute to the parties to that contract an intention they would have entertained had they known that the joinder of the wife was essential to the validity of that trust deed, is, it seems to me, to repeal the statute requiring the joinder of the wife, and to work out subrogation, by *ex post facto* intention; and I see here no element of legal subrogation. See authorities cited in my dissenting opinion in *Union Mortgage, Bldg. & T. Co.* v. *Peters*, *supra*.

Turning, now, to the very clear statement of the feature of the law of agency discussed, as put by my Brother Cooper, I have to say that I heartily approve it. But I have searched the record in vain for any testimony to which that principle applies. The answer emphatically denies any fraud on Hill's part,—any co-operation on his part with Patty to defraud Mrs. Jeffries,—and avers that, if there was any "fraud on Patty's part, it lies between complainant and her agent." And the testimony wholly fails to connect Hill with any fraud which Patty practised on his principal, Mrs. Jeffries. I quite agree with my Brother Cooper's statement of the abstract law, but I differ from him wholly as to its applicability to the concrete case before us. Says Mr. Me-

chem (Mechem, Agency, § 796): "A third person, however, who deals with an agent, is not liable to the principal for a fraud perpetrated by the agent upon his principal in that transaction unless such third person was a party to the fraud." To this proposition he cites the cases of *Mason* v. *Bauman*, 62 Ill. 76, and *Bacon* v. *Markley*, 46 Ind. 116, both directly in point. In the former the court says, at page 81: "It is, however, urged that they knew that Starkweather was appellee's agent. . . . We are unable to comprehend how that fact could charge them with notice that Starkweather was acting fraudulently towards his principal. A man is always bound by the fraudulent acts of his own agent perpetrated on a third person whilst acting under his authority in reference to the subject of his agency; but we are aware of no rule nor any adjudged case which holds that a party can ever be bound by the fraudulent acts of another man's agent. And why should they? They do not appoint the agent; they confer upon him no authority, and do no act that should, in morals or in law, render them liable for the acts of another man's agent upon whom they conferred no power." The case cited by my learned brother (*Panama & S. P. Teleg. Co.* v. *Indian Rubber, G. P. & Teleg. Works Co.* L. R. 10 Ch. 515, 14 Moak, Eng. Rep. 759) was a case of flagrant fraud, clearly proved to have been shared in by the third party,—a case of one party, in effect, bribing the agent of the other party, falling under the cases classed by Mechem (Agency, § 797,—where it is cited) "where the third person conspires with the agent." Nor must this case be confounded with that other and wholly different category, where the agent pays his own debt with the principal's money, the creditor of the agent knowing it was the principal's money,—finely illustrated by the cases cited in the *note* to *Gerard* v. *McCormick* (N. Y.) 14 L. R. A. 234, a category in which, as stated in *Smith* v. *James*, 53 Ark. 137, "it was only necessary that [the third party] should know that the person with whom he dealt was an agent, in order to be apprised that the transaction was beyond the scope of his authority." Here Hill knew that Patty was Mrs. Jeffries' agent, and that the money of Mrs. Jeffries was loaned to him, and that, with that money, made his (Hill's) own by the borrowing, he paid off Patty's trust deed. How is it possible to safely say that, from these meager facts alone, the court below should have found that Patty had, in the dealing, an individual interest adverse to his principal, within the knowledge of Hill, and that Hill conspired with Patty to defraud his principal, Mrs. Jeffries, especially in view of the settled rule that fraud must be established by clear and convincing proof? It is perfectly clear that both Hill and Patty honestly believed the trust deed to Mrs. Jeffries was not only a valid, but an abundantly sufficient, security, when given. If it had been, would any court hold that Patty's interest in paying his debt was adverse to Mrs. Jeffries, whom he had abundantly secured,—much less that Hill aided Patty to defraud her? Since it has turned out that it was invalid, can the mere fact that it has so turned out make his interest adverse? But, even if that were conceded, does the further necessary fact appear that Hill then, at the time, knew all this, and conspired with Patty to defraud Mrs. Jeffries? The learned chancellor below—one of the ablest, most conscientiously painstaking, and accurate judges who ever adorned the bench of this state—has found the issue of fact on this branch of the case against appellant, and in my judgment the decree should be affirmed. I sympathize deeply with the feeling that Hill should not keep a home he has not paid for, but I am restrained from yielding to this prompting by the reflection that a general rule for the administration of justice according to the established principles of law, though not availing against the injustice of a particular instance, is better than the judicial chaos which would result from its nonobservance. Human equity corrects the defects of human law, arising by means of its universality. That equity which is administered by the Omniscient alone is alone equal to meting out absolute right in every case. I regret that I am forced to dissent from my brothers, but, the difference of opinion entertained by me amounting to conviction, no other course is open to me.

MONTANA SUPREME COURT.

STATE of Montana, *Appt.*,
v.
CAMP SING, *Respt.*

(18 Mont. 128.)

1. A statute will not be declared void unless its nullity and invalidity are beyond reasonable doubt.

2. A license tax upon persons and corporations, imposed by the legislature, of which a portion of the proceeds is given to the county, does not violate Const. art. 12, § 4, prohibiting the legislature from levying taxes in any county, city, or town for county, town, or municipal purposes, since it is not clear that a license tax is within the intent of this constitutional provision.

(April 6, 1896.)

APPEAL by the State from a judgment of the District Court for Silver Bow County in favor of defendant in an action brought to recover a license fee for conducting the laundry business. *Reversed.*

Statement by **De Witt, J.**:

The state appeals from a judgment rendered against it upon the sustaining of defendant's demurrer to the complaint. The state brought the action to recover a license

NOTE.—For another question as to division of license taxes between state and counties, see People, Einsfeld, v. Murray (N. Y.) *ante*, 344.

See also 32 L. R. A. 344.

fee of $50, alleged to be due from defendant for conducting the laundry business for six months, and also for costs and penalties amounting to $17. The statute under which the state claimed the license is § 4079 of the Political Code, which is as follows: "Sec. 4079. Every male person engaged in the laundry business, other than the steam laundry business, must pay a license of $10 per quarter: provided, that where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of $25 per quarter, which shall be the license for one place of business only."

The contention of the defendant upon the demurrer is that this license law of the Political Code is unconstitutional and void under article 12 of the Constitution. The sections of that article upon which he bases his contention are Nos. 1 and 4, which are as follows:

"Sec. 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

"Sec. 4. The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, or town, or municipal corporation for county, town, or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes."

This license tax was imposed by the legislative assembly. Pol. Code, § 4079. Under the provisions of §§ 3075 and 4050 of the Political Code, 70 per cent of the license tax provided for is to be retained by the county, and 30 per cent paid over to the state. The district court held that, as a portion of this license tax, to wit, 70 per cent, went to the county, the law was void under § 4, art. 12, of the Constitution, in that the legislative assembly had thus attempted by § 4079, Pol. Code, to levy a tax upon the inhabitants or property in a county for county purposes. Whether this legislation upon the question of licenses is constitutional is the question for determination of the opinion below.

Messrs. **Henri J. Haskell,** Attorney General, **Ella Knowles Haskell,** and **Carpenter & Carpenter,** for appellant:

Sections 4040-4051 of the Political Code are not in contravention of the Constitution of Montana.

The authority given by the Constitution to impose a license tax is found in § 1, art. 12.

A license tax is not a tax within the meaning of the word "taxes" in § 4, art. 12, of the Constitution.

1. In the Constitution are developed two separate and distinct schemes for raising revenue, to wit:

(a) The taxation scheme.

(b) The license scheme.

The license scheme is composite—formed by blending in the legislative assembly the power to license for regulation with the power to license for revenue.

The constitutional scheme of taxation applies only to property.

The words "assess," "levy," and "rate" as used in the Constitution, were intended to apply to taxation upon the ownership of property, and are the apt words to indicate such application.

All taxes are personal.

Green v. *Craft,* 28 Miss. 70.

The tax is imposed upon the person of the owner on account of his ownership of the property.

Rundell v. *Lakey,* 40 N. Y. 517; *Everson* v. *Syracuse,* 29 Hun, 486; Burroughs, Taxn. § 7; Cooley, Taxn. 2d ed. 436.

In § 4 the words "taxes upon the inhabitants or property" express a single idea, and that is a tax for revenue on account of the ownership of property.

When § 4 is read in connection with the license provision of § 1, it is clear that although "taxes upon the inhabitants" and "taxes upon property" separately considered may not always mean the same thing, yet the effect of both expressions combined is to limit the restriction of § 4 to taxation of property, whether as matter of form the tax be assessed upon the property or assessed to the owner.

The word "inhabitants" in said section was not intended to have a technical meaning.

Endlich, Interpretation of Statutes, § 91; *Walnut* v. *Wade,* 103 U. S. 693, 26 L. ed. 529.

The particular provision for license taxes in § 1 is to be treated as an exception to the general tax rule laid down in § 4.

Potter's Dwarr. Stat. 272, 273; Endlich, Interpretation of Statutes, § 399.

The opinions of the framers of the Constitution expressed during the preparation of the instrument are of great weight in its interpretation, when the meaning is not perfectly clear and obvious.

Pollock v. *Farmers' Loan & T. Co.* 157 U. S. 558, 39 L. ed. 811; *Martin* v. *Hunter,* 14 U. S 1 Wheat. 340, 4 L. ed. 106; *Rhode Island* v. *Massachusetts,* 37 U. S. 12 Pet. 657, 9 L. ed. 1233.

Contemporaneous and legislative construction are entitled to high consideration, and are controlling in doubtful cases.

Endlich, Interpretation of Statutes, §§ 357, 527; Sutherland, Stat. Constr. § 307; *Barden* v. *Montana Club,* 10 Mont. 330, 11 L. R. A. 593; *State* v. *Raymond,* 12 Mont. 226; *State* v. *Owsley,* 17 Mont. 94.

Provisions in regard to taxing by value have no application to taxing privileges.

Cooley, Taxn. 2d ed. 570; *Webber* v. *Virginia,* 103 U. S. 350, 26 L. ed. 567; *Webber* v. *Com.* 33 Gratt. 898; *Patterson* v. *Kentucky,* 97 U. S. 501, 24 L. ed. 1115; *People* v. *Russell,* 49 Mich. 617, 43 Am. Rep. 478.

The requirement of a uniform rate of assessment and taxation does not apply to licenses.

Anderson v. *Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63; *Bright* v. *McCullough,* 27 Ind 223; *Thomasson* v. *State,* 15 Ind. 451.

The subject presents questions of legislative policy rather than strict law.

Cooley, Taxn. 2d ed. 601; 1 Hare, Const. 298

The presumption is in favor of the validity of legislation.

Cooley, Taxn. 2d ed. 105; Cooley, Const. Lim. 5th ed., 218.

Legislative discretion is conclusive as to objects of taxation.

Black, Const. 119, 343.

The license tax imposed upon defendant was authorized in the exercise of the police powers of the state.

Prentice, Pol. Powers, 12; *Webber* v. *Virginia*, 103 U. S. 348, 26 L. ed. 566; *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145.

A clear distinction exists between a license, which is a right granted by some competent authority to do an act which, without such a license, would be illegal, and a tax, which is a rate or sum of money assessed on the property of a citizen.

In case the respondent is the owner of the property upon which his laundry is situated, he is taxed upon the value thereof under the general laws of taxation, but, for the privilege of carrying on the laundry business, he is required to pay a license which is not a tax upon property and is not included within the word "taxes" as used in § 4, art. 12, of the Constitution.

People v. *Thurber*, 13 Ill. 557; *Walker* v. *Springfield*, 94 Ill. 370; *Illinois Mut. F. Ins. Co.* v. *Peoria*, 29 Ill. 180; *Ducat* v. *Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *East St. Louis* v. *Wehrung*, 46 Ill. 392; *Lovingston* v. *Board of Trustees*, 99 Ill. 572; *Pleuler* v. *State*, 11 Neb. 547; *Henry* v. *State*, 26 Ark. 525; *Bohler* v. *Schneider*, 49 Ga. 195; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill. 560; *Bright* v. *McCullough*, 27 Ind. 223.

There is a difference between a tax and a license fee or a license tax, and the constitutional provisions in reference to taxation have no application to fees exacted for a license.

Chicago Pkg. & P. Co. v. *Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794; *Ex parte Cohn*, 13 Nev. 424; *Ex parte Siebenhauer*, 14 Nev. 372; *Bohler* v. *Schneider*, *supra*; *Home Ins. Co.* v. *Augusta*, 50 Ga. 530; *Henry* v. *State*, 26 Ark. 523; *Straub* v. *Gordon*, 27 Ark. 625.

The state may impose a license tax by virtue of its police power.

License Cases, 46 U. S. 5 How. 524, 12 L. ed. 265; *Cole* v. *Hall*, 103 Ill. 30; *Rohr* v. *Gray*, 80 Md. 274; *Grand Rapids* v. *Braudy* (Mich.) 64 N. W. 28; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145.

Mr. **Thomas E. Harvey,** for respondent:

The whole of a section must be construed together, and not separate clauses of it.

Sutherland, Stat. Constr. 316.

Section 1, art. 12, treats solely of "the necessary revenue for the support and maintenance of the state."

The framers of the Constitution, anticipating and realizing that the amount of revenue which might be raised and collected by the state by this method under the restrictions contained in § 9, art. 12, relating to the rate of taxation, might not be sufficient to meet "the necessary revenue for the support and maintenance of the state," and in the closing clause of § 1 provide: "The legislative assembly may also impose a license tax upon persons and corporations doing business in the state."

Different sentences in the same section are to be referred respectively to other sentences to which they relate.

Endlich, Interpretation of Statutes, 585.

And this last clause of § 1, by the use of the word "also," refers to the sentence preceding. The word "also" takes the place of the words "for the support and maintenance of the state if they deem it necessary."

The legislative assembly, were this clause eliminated from the Constitution, would have authority to "impose a license tax upon persons and corporations doing business in the state," for there is no restriction upon the authority of the legislative assembly unless one is imposed in the Constitution.

Cooley, Taxn. 570; 1 Desty, Taxn. 302; *Newton* v. *Atchison*, 31 Kan. 151, 47 Am. Rep. 486.

The last clause of § 1, art. 12, was unnecessary for the purpose of conferring authority upon the legislative assembly.

The constitutional convention did not attempt to abolish the distinction between licenses for regulation and revenue.

Section 4 is a limitation upon the power of the legislative assembly.

The word "tax" means a burden—charge imposed upon person or property to raise money for public purposes.

1 Desty, Taxn, 1; Cooley, Taxn. 1.

Licenses are levied for two purposes: (1) for revenue; (2) for regulation; and are sustainable on either or both grounds.

Cooley, Taxn. 572.

License fees are taxes and means of exercising the taxing power of the state when revenue is the main purpose for which they are imposed.

1 Desty, Taxn. 305; Cooley, Taxn. 572; Cooley, Const. Lim. 201, 611; Dill. Mun. Corp. §§ 93, 609; *Santa Barbara* v. *Stearns*, 51 Cal. 499; *People* v. *Martin*, 60 Cal. 153; *El Dorado County* v. *Meiss*, 100 Cal. 268; *State* v. *Moore*, 113 N. C. 697, 22 L. R. A. 472; *People* v. *Naglee*, 1 Cal. 232, 52 Am. Dec. 331, note; *Hynes* v. *Briggs*, 41 Fed. Rep. 468; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Plaquemine* v. *Roth*, 29 La. Ann. 261; *East Feliciana* v. *Levy*, 40 La. Ann. 332.

De Witt, J., delivered the opinion of the court:

Does § 4, art. 12, of the Constitution prohibit the legislature from passing a law such as § 4079, Pol. Code 1895, imposing a license tax upon persons and corporations doing business in the state, when part of the proceeds of such license tax goes to the county; and can such license tax be imposed only by the county, which is part recipient of the funds collected in pursuance of such statute? This important question could have been reached in the case of *State, Toi,* v. *French*, 17 Mont. 54, 30 L. R. A. 415. It was within our contemplation at the time of writing that opinion, but the question was not mentioned or argued by counsel, and was therefore reserved. It has since engaged the con-

sideration of several of the district courts, and of many of the most distinguished members of the bar in the state. The result is that it has been thoroughly briefed and argued at this time by eminent counsel on both sides. We are sensible of current affairs about us, and cannot but be aware that declaring § 4079, Pol. Code, to be unconstitutional, is the losing, for a considerable period of time, of an immense revenue, but we are obliged to close our minds to such considerations. As Mr. Justice Hunt said in *State* v. *Mitchell*, 17 Mont. 67: "It were far better at this time, in the early history of this new state, that a legislative act be declared invalid than that precedent be set by which plain provisions of the Constitution may be nullified by loose and questionable interpretations of our fundamental law. *State, Woods*, v. *Tooker*, 15 Mont. 8, 25 L. R. A. 560." See also *State, Thomas Cruse Sav. Bank*, v. *Gilliam* (Mont.) 31 L. R. A. 721. And in the matter before us it is better that we suffer all the inconveniences of a present loss of revenue than that we let go of the Constitution for the sake of relief from temporary distresses. The argument *ab inconvenienti* must be excluded from all control over the decision.

But, on the other hand, we must keep in mind another rule of constitutional construction. Judge Cooley, in his Constitutional Limitations, said, in speaking of Chief Justice Shaw: "It has been said by an eminent jurist that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject; and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained." Cooley, Const. Lim. 182. Judge Cooley also quotes the following from Chief Justice Marshall in *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 128, 3 L. ed. 175. "The question, whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." He quotes further from Mr. Justice Washington, as follows: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." See also Endlich, Interpretation of Statutes, § 178. Therefore, with these principles before us, and deeply sensible of the importance to the state of this decision, we approach its consideration with the sentiment that we must be at least fairly satisfied of the Constitutionality of the license law before we so declare it. The legislature has full power to enact a license law, unless it is forbidden by the Constitution. In the case of *State, Toi*, v. *French, supra*, after stating the common learning as to the difference between the Constitution of a state and that of the United States, we said: "A state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of their sovereign Constitution. We therefore inquire whether our Constitution restrains the legislature from enacting such a law as §§ 4079, 4080, Pol. Code." We make the same inquiry now. Article 12 of the Constitution treats the subject of revenue and taxation. As observed by both counsel in this case, this article provides two systems for raising money. Without intending to be now wholly technical in the use of words, we may describe them as (1) the taxation system, and (2) the license system. We use these terms now simply for convenience, and not as an expression of an opinion in advance as to whether this license is a tax or not. If the legislature sees fit, all revenues may be raised by taxation. Taxation is the security for the debts and expenses. The license system is a further provision. As exigencies arise or do not arise, or cease to exist, the license system may be or need not be resorted to. That system is elastic and pliable, and can be suited to circumstances. The important question in this case is, What restraint, if any, is placed upon the legislature in creating a license system? Before examining this question, we will notice that which appears in contrast; that is to say, the restrictions which are placed upon the power of the legislature as to taxation. They are very many. They are an inheritance of our history. We will review some of them. The rate of assessment and taxation shall be uniform, under such regulations as secure a just valuation for taxation of all property, etc. Article 12, § 1. Liberal exemptions are provided for. Id. § 2. Mines and mining claims in the state are liberally protected from what might be, perhaps, deemed excessive taxation. Id. § 3. The valuation of the property for taxation for any town and school purposes shall not be greater than the valuation for state and county purposes. Id. § 5. The taking of private property for corporate debts of public corporations is guarded against. Id. § 8. Provision is made for maximum rate of taxation for state purposes. Id. § 9. All state taxes shall be paid into the state treasury, and shall not be drawn out but in pursuance of specific appropriations made by

law. Id. § 10. Taxes shall be levied and collected by general laws and for public purposes only, and shall be uniform upon the same class of subjects, within the limits of the authority levying the tax. Id. § 11. It does not seem necessary to go further in citing the limitations put upon the power of taxation. The whole of article 12 treats this subject of limitation with great care. In almost every section can be found prohibitions or limitations upon the legislative power as to taxation.

But the license system of raising revenue and license taxes are mentioned by name in only one place in the Constitution. That is the last sentence of § 1, which says: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state." With that utterance the Constitution leaves the subject; that is, as far as any direct language is to be found. The license tax is not even controlled by the equality and uniformity requirements of the Constitution. *State, Toi,* v. *French, supra.* But, while the question of license taxes is not mentioned, in terms, elsewhere in the Constitution, the defendant has presented a very able argument to the effect that the last sentence of § 1, art. 12, and also § 4, while not so providing in direct language, must be read and interpreted to the effect that the legislature is indeed prohibited from imposing a license tax, the proceeds of which, or part of the proceeds, are to go to the county. His first argument is found in the use of the word "also" in the last sentence of § 1. He contends that this word carries over into the sentence where it occurs the idea expressed in the sentence which precedes it. That is to say, that when the section says that the legislative assembly may also impose a license tax, etc., it means that it may also impose such license tax for the support and maintenance of the state; and therefore that it cannot be imposed by the legislature partly for the support and maintenance of a county. But we do not think that the word "also" necessarily or reasonably has such meaning. It appears to us to be nothing more than a conjunctive, perhaps connecting the two sentences. It has about the same significance as "furthermore." Webster's International Dictionary gives the following definitions of the word "also:" "In addition; besides; as well; further; too. 'Lay up for yourselves treasures in heaven; . . . for where your treasure is, there will your heart be also.' Matthew vi., 20, 21." The Century Dictionary gives these definitions: "In like manner; likewise; in addition; too; further. 'In fact, Mr. Emerson, himself, besides being a poet and a philosopher, and also a plain Concord citizen.' Holmes on Emerson. 'This ye knowen also well as I.' Chaucer's Canterbury Tales." The simple reading of the whole section, to our minds, is that "the necessary revenue for the support and maintenance of the state shall be provided," etc., "and, in addition to this, and furthermore, the legislature may impose a license tax," etc. The use of the word "also" is to simply connect the ideas of the two systems of revenue mentioned in the section. It introduces the creation of the second system, to wit, the license system. In this sentence the license system first appears, and the sense of the whole section is simply that "there shall be the taxation system, and, furthermore, or also, the license system." Any common illustration of the use of the word "also," as employed in daily life, demonstrates that it does not carry over into the sentence where it is used all of the ideas expressed in the preceding sentence. One may say: "This morning I shall go to the statehouse for the purpose of arguing a case before the supreme court. I shall also stop at the county court house." The word "also" by no means conveys the idea that the speaker intends to stop at the latter place for the same purpose which called him to the former. We are of opinion there is no real merit in defendant's contention as to the use of this word "also."

Therefore, having passed this branch of the contention, there are no such limitations upon the power of the legislature as are contended for by the defendant, unless they are found in § 4 of art. 12. We will examine that section in a moment. We pause at this point to suggest another matter, and that is, to examine the opinions of the framers of the Constitution, which they recorded during the preparation of this article 12. Such opinions may be examined as tending to show the intention. This was done in *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, popularly known as the "*Income Tax Case,*" in which Mr. Chief Justice Fuller said: "We inquire, therefore, What, at the time the Constitution was framed and adopted, were recognized as direct taxes?" What did those who framed and adopted it understand the terms to designate and include? The learned chief justice then went into an extensive examination of the history of the country, and the debates in the constitutional convention of the United States. We have consulted the proceedings and debates of the constitutional convention of this state at pages 1325 *et seq.*, as filed in the office of the secretary of state. There was an earnest debate over § 1, art. 12, and many opinions were forcibly expressed that the state should not adopt a license system at all. It was also proposed to amend the last sentence of § 1, art. 12, to read as follows: "The legislative assembly may also impose a license tax for the regulation of the sale of intoxicating liquors and other occupations requiring police supervision, both upon persons and upon corporations doing business in the state, and no license shall be imposed for any other purpose." The proposed amendment was defeated. The last member who spoke upon the question was the Honorable T. E. Collins, chairman of the committee on finance, and who was also chairman of the same committee in the old constitutional convention of 1884. He said that it would be safe to leave this matter to the legislative assembly. The sentiment of the convention was to this effect. So, instead of putting restrictions upon the power of the legislature as to licenses, as was done as to taxes,

the constitutional convention deliberately, and after earnest debate and consideration, declined to do so. Therefore, with all the evidence, both intrinsic and extrinsic, that the Constitution intended to and did carefully limit the legislative power as to taxation, and the total lack of evidence that it was the intention to so limit legislation upon the subject of licenses, may the language of § 4 be construed as a prohibition upon the legislature to impose a license tax for county purposes? In the first place, if § 4 is such a prohibition, then there seems to us to exist a repugnancy between that section and the last sentence of § 1. The latter says broadly that the legislature may impose a license tax upon persons and corporations, etc. There is no qualification upon this power found in § 1. The power, as we have above construed § 1, is not in that section confined to imposing the license tax for state purposes only. This unlimited power being given directly by § 1, and deliberately, as the debates show, then, if we are to find it afterwards limited by § 4, the words of § 4 to such effect should be clear. Cooley, Const. Lim. above cited. We do not think it is clear, and we will point out the reasons for such opinion.

Of course, if the words "levy taxes," used in § 4, mean "license taxes," then the prohibition contended for by the defendant exists; and, if those words do not mean "license taxes," the prohibition does not exist. In either event it is, in our opinion, immaterial whether the license tax is for regulation or for revenue, and the distinction in license fees, as to whether they are for regulation or for revenue, is not important in this case. Even if the license tax be for revenue (which it probably is), and if it should, therefore, be construed to be a tax as that term is used in the cases distinguishing between a tax and a license fee for regulation, it is, in any event, a license tax provided for by the Constitution, whether imposed for either purpose. It is therefore constitutional for either purpose, unless, of course, license taxes were within the contemplation of the framers when they used the words "levy taxes" and "assess and collect taxes" in § 4. The use of several words in article 12 is, to our mind, important. The article in speaking of ordinary taxation and taxes, uses the words "levy," "assess," and "rate." In the only place in the article where license tax is mentioned, the word is "impose." The former words were apt in speaking of taxes, and the latter, in our opinion, is appropriate in describing licenses. As to the words "assess," "rate," and "levy," we note the following definition from standard dictionaries:

"Assess: Taxes in respect of land and houses are calculated with reference to the estimated value of the property, which is arrived at by a process called 'assessment.'" Rapalje & L. Law Dict.

"Assess: (2) To adjust or fix the proportion of a tax which each person of several liable to it has to pay; to apportion a tax among several; to distribute taxation in a proportion founded on the proportion of burden and benefit. (3) To place a valuation upon property for the purpose of apportioning a tax." Black, Law Dict.

"Assess: To set, fix, or charge a certain sum upon, by way of tax; as to assess each individual in due proportion." Century Dict.

"Assess: (1) To rate or fix the proportion which each person is to pay of a tax; to tax; to adjust the shares of a contribution by several persons toward a common object, according to the benefit received; to fix the value or the amount of a thing; to determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund; to fix the amount payable by a person or persons in satisfaction of an established demand." Anderson, Law Dict.

"Rate: It sometimes occurs in a connection which gives it a meaning synonymous with 'assessment;' that is, the apportionment of a tax among the whole number of persons who are responsible for it, by estimating the value of the taxable property of each, and making a proportional distribution of the whole amount. Thus we speak of 'rating' persons and property." Black, Law Dict.

"Rate: A sum assessed as a tax; in England, a local tax; as the county, the borough, the poor rate. May apply to the percentage of taxation, or to the valuation of the property." Anderson, Law Dict.

"Ratable: 'Ratable estate,' within the meaning of a tax law, is a taxable estate." Anderson, Law Dict.

"Levy: To raise, execute, exact, collect, gather, take up, seize. Thus, to levy (raise or collect) a tax; to levy (raise or set up) a nuisance; to levy (acknowledge) a fine; to levy (inaugurate) war; to levy and execute,—*i. e.*, to levy or collect a sum of money on an execution." Black, Law Dict.

"Levy: (Law) (1) To seize or take (property) by virtue of a judicial writ thereunto commanding. (2) To impose or assess (a tax) on property, and collect it under authority of law." Standard Dict.

The definitions all carry the popular understanding of the words. They are appropriately used when speaking of taxation, and, we believe, with the scholarship, learning, and ability which were present in the constitutional convention, they were deliberately used. They involve the ascertaining of values and fixing taxes in proportion thereto, and are used all through article 12, in regard to taxes and taxation. See sections of the article. But none of these words are used in the last sentence of § 1, art. 12, where the license tax is provided for. There the word is "impose." That word is derived from the Latin word *imponere*, meaning literally "to lay upon." Therefore we find throughout the whole of article 12 distinctive words used in speaking of the taxation system and the license system. Then we come to § 4, which defendant claims refers to licenses. There the words are "levy" and "assess,"—the same words always applied in the article to the subject of taxation strictly. "Impose," the word adopted in treating of license taxes, is not used. It is deliberately omitted from § 4. Before the Constitution was finally adopted, a committee was ap-

pointed, and acted upon the subject of "revision and phraseology." Therefore, with all the debate in the convention, and with a final technical and literary revision of the Constitution, we are of opinion that the use of the words "assess," "levy," and "rate" as to the one subject, and "impose" as to the others, is significant. Such words seem to express an intent that § 4 should refer to taxation strictly, and not to licenses. In any event, it is by no means clear to us that the intent of § 4 was to refer to licenses; and, if the intent is not clear, we cannot put such construction upon it as will nullify the law under consideration. Cooley, Const. Lim. above quoted.

Great importance is attached by the defendant to the case of *People* v. *Martin*, 60 Cal. 153, and that case is claimed by him to be applicable to the question now before us. The section of the Constitution of California which it is urged is practically the same as our § 4, art 12, is § 12, art. 11. It reads as follows: "Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The case of *People* v. *Martin* was an action to recover a license tax by reason of the defendant carrying on the business of selling goods. It was brought under § 3360 of the Political Code of California, which was a portion of the license law enacted by the legislature of California before the adoption of the present Constitution of that state. The California court held that said license law was unconstitutional by reason of Const. art. 11, § 12. Mr. Justice Ross, in delivering the opinion, said: "The important question in the case is, whether or not the word 'taxes,' as used in this section of the Constitution, includes license taxes; for, if it does, the provisions of the Political Code, imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the Constitution and therefore inoperative by virtue of § 1, art. 22, of the same instrument. That the license fees imposed by the provisions of the Political Code were so imposed mainly, if not solely, for the purposes of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes (Cooley, Taxn. pp. 396, 397; 2 Dill. Mun. Corp. § 768). Indeed, the statute itself designates the charge as a license tax (Pol. Code, § 3359). But are they 'taxes' within the meaning of § 12, art. 11, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property, for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for, as already observed, the statute authorizing it required the tax when collected to be paid into the county treasury for the use of the county general fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the legislature; but the Constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public or municipal corporations, the power to assess and collect taxes for those purposes." But the important distinction between the California Constitution and ours, and the California decision and that which we intend to make, is that there is wholly absent from the California Constitution a provision like the last sentence in § 1, art. 12, *viz.*: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." This sentence we have endeavored to construe above, and the construction which we place upon it, and the fact of its absence from the California Constitution, render, in our opinion, the California decision inapplicable. Further than that, the California decision was not thoroughly considered, and was delivered by a divided court. The California Constitution upon the subject of revenue made no such distinctions between the words "impose," "levy," "assess," and "rate" as we find to be clearly made in the Constitution of Montana. It did not, as does ours, specially apply the one word to license taxes, and use the other words in referring to taxation strictly speaking. It cannot be argued that the prohibitory section in our Constitution is borrowed from California, because, by comparing the language of the two, it is seen that they are different. See the two sections above quoted. The California prohibitory section uses the word "impose;" ours uses the word "levy." But the great distinction between the two Constitutions, and the question of prohibition as contained in them, is in that last sentence of § 1 of our art. 12, which we have heretofore fully discussed.

Furthermore, much is made by the defendant of the use of the word "inhabitants" in our § 4. He argues that when the section says, "shall not levy taxes upon the inhabitants or property," the word "inhabitants" means "persons." The same word is used in the California Constitution, and the decision of *People* v. *Martin* turns largely upon that word. See citations from that case, *supra*. Defendant's contention is that the word "inhabitants" means "persons," as distinguished from "property," and that § 4 contains both words, *viz.*: "inhabitants" and "property," and therefore the prohibition is on both, as to levying taxes upon property and upon persons; and that the only kind of tax which could be levied upon persons would be the license tax, which is personal, while the tax upon property is not personal; and that, therefore, the use of the word "inhabitants" can mean nothing but a prohibi-

tion against the legislature levying the only kind of a personal tax, which is a license tax. This argument cannot be maintained, for this reason: that the distinction which the defendant seeks to make as to levying or assessing or imposing taxes upon persons and property is more apparent than real, if, indeed, it is even apparent. The words "persons" and "property" are sometimes used indiscriminately, even in instruments of the gravest importance and dignity. But the fact is that all taxes are levied upon persons, and not upon property. It is the person that is taxed or licensed. In case of taxation, strictly speaking, the property which the person owns is used to determine the amount of the tax which he shall pay; but it is the person who, after all, pays the tax, and not the property. The person is liable, and the property, in addition to being the means of determining what the person shall pay, is also a security for its payment. Upon this subject Judge Grover, of New York, said in *Rundell* v. *Lakey:* "It is, I think, apparent from the various provisions of the statute, that in respect to both real and personal property owned by a resident of the town or ward where the former is situate, that the tax is imposed upon the person of such owner on account of the ownership of such property, and his liability to such tax is conclusively fixed by the completion and delivery of the roll. The counsel for the appellants concedes that this is true as to personal property. I can see no substantial reason for a distinction between an assessment for real or personal property against an individual. Both are alike assessed to the owner. The tax is in both cases imposed upon the owner. Provision is made in both for the collection of the tax from the property of the owner by the collector of the town or ward." 40 N. Y. 516. It was also said in *Everson* v. *Syracuse*, 29 Hun, 486, by Judge Haight, then of the supreme court, and now of the court of appeals, in referring to *Rundell* v. *Lakey*, *supra:* "In that case the conveyance was made after the assessment, and before the tax was levied. The question was as to which of the parties was liable for the tax, the grantor or grantee. It was in that case held that the collector was not only authorized, but it was his duty, to collect the tax, if not otherwise paid, by seizing and selling the goods of the person against whom the tax has been assessed, or of any goods in his possession; that the person against whom the tax was assessed was primarily liable; that the tax levied is not a tax imposed upon the land, but that it is imposed upon the person on account of his ownership of the land, and that he is primarily liable for the payment of it; that the tax, when levied, simply becomes a lien upon the land." We take the following from *Green* v. *Craft*, 28 Miss. 70: "The term 'taxes,' it is said, 'includes all contributions imposed by the government upon individuals for the service of the state.' The individual, and not the property, pays the tax, and the property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law." See also Cooley, Taxn. 2d ed. p. 476. It therefore being true that it is the person that is taxed, there seems to be no particular significance in the use of the two words "inhabitants" and "property" in Const. art. 12, § 4. While these two words are used, the subject-matter is the same. And if the section refers, as we have endeavored to show that it does, to taxation of property, it was not important that the section uses the words "inhabitants" as well as "property," for the result is the same, and the taxation referred to meant a property tax; that is to say, a tax upon a person, levied upon the basis of the property owned by him.

Another argument in favor of the view that it was the intention of the Constitution to commit the subject of license taxes to the legislature may perhaps be found in the fact of that legislative construction. Ever since the adoption of the Constitution, the legislature, either by allowing old laws to remain upon the statute books, or by enacting new ones, has recognized the principle that the subject of license taxes is for the legislature. The business of the state has been conducted upon this principle during its whole history. We mention this matter, not as of great importance, but as entitled to some slight consideration. As noted by Judge Cooley in the citations from eminent jurists given in the earlier part of this opinion, it is not upon slight or doubtful considerations that a court will declare that the legislature has disobeyed the Constitution. Another matter of slight importance, but tending in the same direction, is the fact that this license system has been in this court several times, and, while the question of its constitutionality has never been raised in any way, three decisions have been made which recognized it as a portion of the body of the state law, *viz.: Barden* v. *Montana Club*, 10 Mont. 330, 11 L. R. A. 593; *State* v. *Raymond*, 12 Mont. 226; and *State* v. *Owsley*, 17 Mont. 94. All of those cases were presented by very able counsel, and any one of them could have been determined upon the alleged unconstitutionality of the license-tax law, if the question had been raised. We do not, however, present this matter as one of any particular weight, for it is not entitled to such consideration. There are a few other matters which have been mentioned as reasons for sustaining the demurrer to this complaint. But little has been made of them by counsel, and we do not think even the respondent regarded them as important. We think the additional points so made are not well taken, but will not discuss them. The great question in the case, and that upon which both counsel rested their whole contention, is the constitutional matter which we have decided. That matter, after mature deliberation, we consider clear. Furthermore, we consider it absolutely clear that the unconstitutionality of the law in question is not so apparent as to justify this court in declaring the license law void.

The judgment of the District Court is reversed.

and the case is remanded, with directions to overrule the demurrer, and proceed with the case.

Pemberton, Ch. J., and **Hunt**, J., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE of New Jersey, SINGER MANUFACTURING COMPANY, Prosecutor, *Piff. in Err.*,

v.

William C. HEPPENHEIMER *et al.*

(.....N. J.....)

*1. **A charter which exempts a corporation** or its property from taxation exempts also the shares of its stock held by individuals.

2. **An express exemption** of the shares from taxation, nothing else appearing, will also exempt the company itself from taxation.

3. **The 6th section of the charter of the Singer Manufacturing Company** exempts it from the operation of the act of April 18, 1884, and the supplement thereto of March 16, 1891.

(June 15, 1896.)

ERROR to the Supreme Court to review a judgment in favor of defendants in a certiorari proceeding to set aside an assessment of taxes on plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. **R. V. Lindabury** and **Joseph H. Choate** for plaintiff in error.

Mr. **John P. Stockton,** Attorney General, for defendants in error.

Van Syckel, J., delivered the opinion of the court:

The plaintiff in error is a manufacturing corporation, chartered by special act of the legislature of this state (Pub. Laws 1873, p. 971), with a capital stock of $10,000,000, duly issued. The controversy relates to an assessment of $4,212.50, made by the state board of assessors against the company for the year 1891, under the supplement approved March 16, 1891 (Pub. Laws 1891, p. 150), of "An Act to Provide for the Incorporation of State Taxes upon Certain Corporations, and for the Collection thereof," approved April 18, 1884. It is called a "franchise tax," and is laid upon the entire capital of the company of $10,000,000, less $750,000, the assessed value of its personal and real property in this state. The company is liable to the tax laid upon it, unless it is exempted therefrom by force of the provisions of the sixth section of its charter, which is as follows: "And be it enacted that, whenever $500,000 shall have been paid in, said corporation may organize and proceed to business under this act, and shall immediately thereafter file with the secretary of state of this state a certificate of such payment and organization, whereupon, and not until then, this act shall take effect; and if, and so long as the said corporation shall invest, and keep invested in real estate within this state, the sum of $500,000, the real and personal property of the said corporation, not actually and in fact within the state of New Jersey, and the stock of the said corporation, held or owned by any of its stockholders, shall not be liable to any tax or impost whatsoever." As appears by the case, the company has invested $1,000,000 of its capital stock in manufacturing in this state. Previous to its incorporation in this state, the company was incorporated under the laws of the state of New York, where it had a large factory. It also had a factory in Glasgow, Scotland, one in Austria, and another in the state of Indiana. Upon the granting of its charter by this state, its New York factory was abandoned, and the business was removed to Elizabeth, N. J., where a large factory was erected, giving employment to over 4,000 men. It is admitted that the company has had ever since its incorporation, and that it still has, more than $500,000 invested in real estate in this state.

The question to be solved is whether the 6th section of its charter constitutes an irrepealable contract with the state, and, if it does, whether the imposition of this tax violates the contract. The 6th section contains all the elements of a contract. There is present a subject-matter, parties, and a consideration. On the one side is a complete performance, and on the other, acceptance. That it is a contract under our adjudications there can be no question. *State* v. *Berry*, 17 N. J. L. 80; *Camden & A. R. Co.* v. *Hillegas*, 18 N. J. L. 11; *Proprietors of Bridges* v. *Hoboken Land & I. Co.* 13 N. J. Eq. 86; *Mount Pleasant Cemetery Co.* v. *Newark*, 52 N. J. L. 539. Is this contract irrepealable? If the 6th section of the charter of the company contains the entire contract, it is unassailable by state legislation. Both the Federal and state constitutions inhibit the passage of any law by the state impairing the obligation of a contract. The state attempts to justify this tax by reading into the charter of the Singer Company the 6th section of the act of 1846 (Pub. Laws 1846, p. 16), which is as follows: "The charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature, shall be subject to alteration, suspension, and repeal in the discretion of the legislature." In *New Jersey* v. *Yard*, 95 U. S. 104, 24 L. ed. 352, the Supreme Court of

*Headnotes by VAN SYCKEL, J.

NOTE.—As to the power of a state legislature to exempt property from taxation, see *note* to Hogg v. Mackay (Or.) 19 L. R. A. 77.

As to the general rules of exemption from taxes, see *notes* to Catlin v. Trinity College Trustees (N. Y.) 3 L. R. A. 206, and Church of St. Monica v. New York (N. Y.) 7 L. R. A. 70.

For distinction between capital stock and shares in respect to taxation, see also *notes* to Com. v. Delaware Division Canal Co. (Pa.) 2 L. R. A. 798; People, Union Trust Co., v. Coleman (N. Y.) 12 L. R. A. 762; and Foster v. Stevens (Vt.) 13 L. R. A. 166.

See also 42 L. R. A. 852; 44 L. R. A. 825.

the United States declared that, notwithstanding the act of 1846, it was competent for the state legislature to make an irrepealable contract, and that, therefore, it was in every case a question whether it was intended to preserve to the state the right to repeal the contract at will. Unless, therefore, such an intention can fairly be drawn from the terms of the contract, as agreed upon by the parties, there can be no departure from it.

There is nothing in the language of this contract which gives the slightest foundation for the suggestion that the state reserved the right to deprive the company at will of the benefit it was to receive under the agreement, after full performance by the company. The undertaking is express that, if and so long as the company shall invest and keep invested $500,000 in real estate in this state, the exemption shall continue. There is no uncertainty in that respect. It excludes most clearly the idea that the act of 1846 was to be deemed a part of this charter. It cannot be conceived that either the state or the company entered into a contract by which it was understood or intended that the state should be at liberty to deprive the company of the benefit to be derived from it as soon as the company had performed on its part. Such a proposition could not have been seriously made on the part of the state, nor for a moment entertained on the part of the company. The terms of the contract and the circumstances attending it repel the assumption that the entire engagement is not expressed in the 6th section of the act of incorporation.

The contract must be regarded as irrepealable. The real question in the cause is, What are its true meaning and construction? In my view, it is unfortunate that judicial decision has so firmly established the doctrine that the legislature can barter away so essential an attribute of government as that of the power to tax, but it is now too late to call it in question. When a contract is fairly made, the good faith of the state must be preserved, and the contract performed according to a reasonable and just interpretation of it. The company was induced to erect a large and expensive factory in this state by this agreement to exempt from taxation, and it will be derogatory to the state to resort to any subterfuge or narrow and sharp construction in order to evade the effect of the contract. It may be well to observe here that it could not have been supposed by those who voted for the constitutional amendments of 1875 that it was intended to bestow upon the legislative branch of the state government the power to disregard and violate the contracts into which the state had previously entered. It would be a reflection upon the integrity of those who framed the amendments to infer such a power. The exemption is that the real and personal property of the said corporation, not actually in fact within the state of New Jersey, and the stock of the said corporation, held or owned by any of its stockholders, shall not be liable to any tax or impost whatsoever. It has long been the accepted law of this state that an enactment which exempts a corporation or its property from taxation exempts also the shares of its stock held by individuals. The reasoning of the court upon which that conclusion was rested was that, as the entire burden of taxes levied upon a corporation ultimately fell upon the shares of stock, it must have been the intention of the legislature, in exempting the former, to relieve the latter. *State* v. *Branin*, 23 N. J. L. 484; *State, Vail,* v. *Bentley*, Id. 532; *State, Colt,* v. *Powers*, 24 N. J. L. 400. The converse of this, it seems, must be conceded, so that an express exemption of the shares from taxation will also exempt the company; otherwise, the exemption is, in fact, not an exemption, for every burden cast upon the property of the company is a burden upon the shares which represent that property. I agree with the court below that we must resort to statutory construction to ascertain whether this case is within that rule. The legislature, if unhampered by contract, undoubtedly has power to exempt the company or its property and reserve the right to tax the shares, or to exempt the shares and reserve the right to tax the company and its property. The insistment is that the legislative intent to be drawn from the language of the 6th section of the charter is to relieve from taxation the shares of stock in the hands of stockholders, but to reserve the right of levying upon the corporation itself any legal imposition, except a tax on its real and personal property outside of New Jersey. In my judgment, that is not the correct interpretation of the statute, nor will it, if accepted, legalize the imposition. An exemption of the shares, in the absence of other language, would have exempted from taxation the property within as well as that without the state; and therefore the added words were inserted in order that the real and personal property of the company in this state might be taxed here. That is their apparent purpose and their entire effect. The statute was drawn to secure to the state the benefit of taxing the property which the company, for the grant of its franchises, agrees to bring into the state. "The real and personal property of the company not actually in fact within the state is not to be liable to any tax or impost whatsoever." More comprehensive language to assure absolute immunity could not be employed. The state pledged exemption, not from tax only, but from any imposition whatsoever. The word "imposition" includes every kind of enforced contribution to the public treasury. What the corporators evidently apprehended, and what the charter in express words guards against, was the laying of an imposition of any nature upon the real and personal property of the company outside of this state. It was well settled and understood that New Jersey could not impose a direct tax upon property of its citizens located beyond its jurisdiction. *M'Culloch* v. *Maryland*, 17 U. S. 4 Wheat. 415, 4 L. ed. 603.

It was not, therefore, to shield the company from direct taxation of its property not actually within the state that this provision in its charter was secured. Immunity to that extent existed without the consent of the state. The manifest object was to restrain the state from levying an indirect imposition upon the property of the company outside of the state, in the mode now resorted to, or in any other way. The language is most aptly chosen to protect the company. The "real and personal property of the company not actually in fact within the state" is exempted from any tax or impost

whatsoever. The real and personal property of the company invested in Springfield, in Austria, and Scotland, and other places without our state, was in one sense within our state, in that it was represented by the $10,000,000 of its capital stock issued under its charter here, but it was not actually in fact within the state of New Jersey. The imposition of this tax upon so much of the $10,000,000 of capital stock of the company as is not represented by property in this state is, in its effect, as much an impost on property out of this state as if it was directly put upon the property itself, and not upon the capital which stands for it. It is an attempt to do by indirection what it is agreed in the contract shall not be done. The fact that it is styled a "franchise tax" cannot validate it. It is none the less an interdicted imposition because it is given a new name. The franchise of the company is the right to hold property and exercise its corporate privileges. All those rights and privileges were granted to the company by its charter upon the terms specified in it. Those terms cannot be changed or altered without the consent of both parties to the charter contract. The right to make further exactions upon the company under any pretext involves the power on the part of the legislature to render the grant to the company nugatory, and of no value, by impositions of like character to such an extent that the business of the company cannot be prosecuted with profit to the shareholders. The company cannot be brought within the operation of the act of March 16, 1891, without impairing the obligation of its contract with the state.

The judgment below must therefore be reversed, and the imposition which is the subject of this controversy must be vacated and set aside.

NEW JERSEY SUPREME COURT.

Annie M. GLEASON
v.
Charles BOEHM.

(.....N. J.....)

***1. The duty which this court, in Gillvon v. Reilly,** 50 N. J. L. 26, declared a landlord owes to his tenants of apartments, access to which is by a common passage, he also owes to those who visit such tenants on lawful occasions.

2. He is thereby required to take reasable care to have the common halls and stairways reasonably fit for use for the passage of the tenants, but he is under no obligation to furnish means for their safe use. He is therefore under no duty (unless assumed by contract) to furnish light at night, although such light may be necessary for safe use.

3. A visitor of such a tenant passed down a stairway with which she was unfamiliar, in the dark, without waiting for a companion, who was familiar with it, or seeking from her friend a light to enable her to see the flight of steps, and using no precautions for safety but by feeling with her hands and feet. *Held*, that her conduct was not that of a reasonably prudent person, and that she contributed by her negligence to injuries which she received by falling down such flight.

(February 20, 1896.)

CERTIFICATION by the Hudson Circuit for the opinion of the Supreme Court of a rule to show cause why a new trial should not be granted in a suit to recover damages for personal injuries alleged to have resulted from defendant's negligence in which a verdict has been entered for plaintiff. *Rule to be made absolute.*

The facts are stated in the opinion.

*Headnotes by MAGIE, J.

Mr. **Thomas F. Noonan,** Jr., for plaintiff:

Where the owner of a building divides it into several tenements which he lets to several tenants but retains control of the halls and stairways for the common use of the occupants and those having lawful occasion to be there, he is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he invites the occupants and others to make of them, and he is responsible for any injury which others lawfully using them with due care sustain through his failure to discharge his duty.

Gillvon v. *Reilly*, 50 N. J. L. 26; *Looney* v. *McLean*, 129 Mass. 35, 37 Am. Rep. 295.

The same measure of liability for injuries sustained by negligence of the landlord extends to one socially visiting a tenant as protects the tenant himself, because the use of the hall and stairways for the purpose of enjoying such visits by such visitors is by necessary implication (where not expressly provided for) within the reasonable intent of the demise of the rooms.

Henkel v. *Murr*, 31 Hun, 28; *Godley* v. *Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Brady* v. *Valentine*, 3 Misc. 20; *Palmer* v. *Dearing*, 23 N. Y. 7; *Howe* v. *Ohmart*, 7 Ind. App. 32; *Miller* v. *Hancock* [1893] 2 Q. B. 177; *Looney* v. *McLean*, 129 Mass. 33, 37 Am. Rep. 295; *McMartin* v. *Hanna*, 10 Ct. Sess. Cas. 3.

It was a question for the jury to say whether or not plaintiff was guilty of contributory negligence.

Palmer v. *Dearing, supra; Pinney* v. *Hall*, 156 Mass. 225 (1892).

Mr. **Charles L. Corbin** for defendant.

Magie, J., delivered the opinion of the court:

In an action brought in the Hudson circuit,

NOTE.—As to the responsibility of a landlord for injuries resulting from defects in portions of a building remaining in his possession, see *note* to Dollard v. Roberts (N. Y.) 14 L. R. A. 238.

As to landlord's liability to third persons in general for condition of premises in possession of tenant, see *note* to Lee v. McLaughlin (Me.) 26 L. R. A. 197.

plaintiff obtained a verdict against the defendant for damages for injuries received by her under the following circumstances: On November 27, 1891, plaintiff visited a Mrs. Mitchell, who, as tenant of defendant, occupied rooms or apartments on the second story of his house. Plaintiff had never entered the house before. In going to Mrs. Mitchell's room on this occasion, she passed along a hall, and up a stairway, which were used in common by Mrs. Mitchell and others who were occupying rooms or apartments in the house as defendant's tenants. She remained in Mrs. Mitchell's room until after dark on the evening of November 28, 1891. She then left her friend's rooms, to make a visit elsewhere. She was accompanied by her sister and Mrs. Mitchell's daughter, but preceded them both in passing down the last flight of steps of the stairway which led to the hall. There was no light in the hall, and she, supposing she had arrived upon the floor of the hall, went forward, and fell from the platform of that flight, receiving in the fall the injuries for which she brought suit. There was evidence from which the jury could find that defendant had not demised to his tenants the hall and stairway, but retained control of them for their benefit. There was evidence that defendant employed one of the tenants to light, every night, one light in the upper hall, which was burning that night, and one light in the lower hall, which was not burning at the time of the accident. Whether it had been previously lighted was in question, and the preponderance of evidence was that it had been.

Had plaintiff been a tenant of the house, defendant's duty would have been that declared by this court in *Gillson* v. *Reilly*, 50 N. J. L. 26, *viz.*, to take reasonable care to have the halls and stairways fit for use by the tenant in going to and coming from her part of the house. The court, by its instructions in this case, imposed upon the landlord a like duty in favor of one who was not a tenant but was a visitor of a tenant. No contest has been made over the propriety of this ruling of the court, and very properly. The reasons upon which the rule of duty rests in one case establish a like rule in the other. When houses are rented for dwellings which can only be reached by the use of a common passage, the necessity of such use for the beneficial enjoyment of the thing demised establishes a right to such use, and imposes an obligation upon the landlord to take reasonable care to have and maintain the passage safe for such use. But the use of such rooms for dwellings equally necessitates the use of the passage by tradesmen in delivering goods, by persons having other business with the occupant, or by those who visit him for social reasons. With respect, therefore, to all persons visiting such a tenant upon any lawful occasion, the duty of the landlord is similiar to that which he owes to the tenant. *Miller* v. *Hancock* [1893] 2 Q. B. 177; *Hilsenbeck* v. *Guhring*, 131 N. Y. 674.

At the trial, the claim of plaintiff was that defendant was guilty of a breach of the duty he owed her in two respects: (1) Because the stairway was improperly constructed, and dangerous: (2) because there was no light in the lower hall at the time of the accident. The court charged the jury that they were not to consider the first ground urged for plaintiff. This was clearly right, for there was no evidence upon which a verdict in her favor on that ground could have been supported. But upon the second point the court left the liability of the defendant to the jury, with the instructions that they were to determine whether the maintenance of a light in the hall was necessary to render plaintiff's descent reasonably safe, and, if they found such necessity, that it was defendant's duty to exercise reasonable care to maintain a light there. In my judgment, these instructions improperly enlarged defendant's duty. He was undoubtedly bound to take reasonable care to have the hall and stairway reasonably fit for the passage to and fro of his tenants and their visitors. But no duty was imposed upon him in respect to the safe use of the means of passage provided by him. If those means were such as the rule required to be provided, he had performed his duty. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If, to use it safely at night, a light was requisite, he must provide it, and not the landlord. In Massachusetts it has been held that, when a landlord has rented to various tenants parts of a house to which access is obtained by a common stair, it is not his duty to remove snow and ice naturally accumulating thereon, but the tenant's duty. *Woods* v. *Naumkeag Steam Cotton Co.* 134 Mass. 357, 45 Am. Rep. 344. But for an injury resulting from an accumulation of ice from the rupture of a water pipe, which he was bound to repair, the landlord was liable. *Watkins* v. *Goodall*, 138 Mass. 533. If in this case, upon the failure of natural light, artificial light was necessary to make the descent of the stairway safe, I think it was erroneous to place the duty of providing such light upon the defendant. *Hilsenbeck* v. *Guhring*, *supra*. The landlord doubtless may, and probably usually does, assume the duty of providing necessary light in such cases, by contract with his tenants. There was evidence that defendant had usually provided a light in the lower hall, and had employed a person to light it. Upon this evidence, the court might have been requested to direct the jury to determine whether an implied contract to maintain such light, at least until notice of its discontinuance had been given, might not be inferred, and a corresponding duty to maintain it. But no such request was made, and we cannot consider now whether, if made, it could have been properly granted.

It is further contended by defendant that the verdict against him should be set aside on the ground that the instructions of the court in respect to the contributory negligence of plaintiff were erroneous, and on the further ground that the evidence of such negligence on her part was so conclusive that a verdict finding her to have exercised the required care for her safety ought not to stand. In my judgment, this contention must prevail, and upon both grounds. The instructions permitted the jury, in considering the plaintiff's conduct, to take into account the duty of defendant to maintain a light in the lower hall, which as before stated, was erroneous. They, moreover,

omitted to direct attention to the obvious fact that if plaintiff had waited until Mrs. Mitchell's daughter, who was familiar with the stairway, had come up with her, she could have been guided safely down, and the equally obvious fact that, by returning to Mrs. Mitchell's rooms, she could have procured a light, which would have insured her safe descent. But, assuming that the instructions did not mislead the jury, I think that a verdict finding that a person descending this stairway, with which she was not familiar, in the dark, and, having at hand means to insure her safety, passing on with no precautions except the groping with her hands and feeling with her feet, of which she testified, was exercising the care which a prudent person would exercise, cannot be supported. Where a guest of a tenant in such a house went into a common hall to go to a water-closet, and, there being no light in the hall, by mistake opened the wrong door, and, passing through, fell down a flight of steps, the court of appeals of New York held that his conduct was negligent, and barred any recovery for his injuries. *Hilsenbeck* v. *Guhring, supra.*

For those reasons, *the Circuit Court should be advised to make the rule to show cause absolute.*

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina
v.
John D. SARVIS.

(.....S. C.....)

1. Setting fire to one's own dwelling house is not arson either at common law or under a statute making it arson to set fire to "any house of whatever name or kind," although the property is insured so that the loss may fall on the insurer.

2. Procuring the burning of one's dwelling house with intent to defraud an insurance company is not arson in the absence of a statute making it such.

NOTE.—*Arson in setting fire to one's own building.*

At common law.

The offense of arson may be committed by wilfully setting fire to one's own house provided a neighbor's house is thereby also burned; but if no mischief is done but to one's own it does not amount to a felony though the fire was kindled with intent to burn another's. The wilful firing of one's own house in a town is a high misdemeanor. And if a landlord sets fire to his own house which is in possession of another it is arson, for during the lease the house is the property of the tenant. 4 Bl. Com. 221.

It is not arson for a tenant to burn the house of which he is in possession under the lease unless he thereby sets fire to the house of another person. Holmes's Case, Cro. Car. 376; King v. Breeme, 1 Leach, C. L. 220; King v. Pedley, Id. 242.

It is not arson for a tenant to set fire to the house of which he is in possession. M'Neal v. Woods, 3 Blackf. 485.

It is not arson for one to burn a house which he is legally occupying. State v. Hannett, 54 Vt. 83.

One in possession under a contract to purchase cannot be guilty of arson in burning the house embraced by the contract. State v. Fish, 27 N. J. L. 323.

A husband having rightful possession of his wife's house is not guilty of arson in setting fire to it. Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

But one in possession of a house at the instance of the overseers of the poor, without paying rent, may be guilty of arson in burning it. Gowen's Case, 2 East, P. C. 1027, 1 Leach, C. L. 246.

A landlord may be guilty of arson in setting fire to the house in possession of his tenant. Harris's Case, 2 East, P. C. 1023; Fost. C. L. 113.

It is arson for the owner to burn his building in possession of a tenant. Com. v. Elliston, 14 Ky. L. Rep. 216.

The legal owner of a house who sets fire to it while it is in possession of another person may be guilty of arson; while its occupant by a like act will not become so chargeable. State v. Toole, 29 Conn. 342, 76 Am. Dec. 602.

Setting fire to a house in close proximity to others may be a misdemeanor. Scofield's Case, 2 East, 1023, Cald. 397; Properts' Case, 2 East, P. C. 1030.

And if other houses are burned, the one setting the fire will be guilty at least of a misdemeanor. Isaac's Case, 2 East, P. C. 1031.

One in possession under a lease is not guilty of arson in burning property. Sullivan v. State, 5 Stew. & P. (Ala.) 175.

At common law a person could not be guilty of arson in setting fire to and in burning the house while in the lawful possession of it, without regard to the question of ownership. Garrett v. State, 109 Ind. 527.

But in Rex v. Ball, 1 Moody, C. C. 30, one occupying a room in a house was indicted for setting fire to the house.

One in possession of premises cannot be guilty of arson in setting fire to them, although they are insured and being copyhold, he has surrendered them to the use of a third person, who has not, however, been admitted to possession. King v. Spalding, 1 Leach, C. L. 218.

So a servant who sets fire to his master's house by the master's procurement for the purpose of defrauding the insurers is not guilty of arson. It is not arson to procure one's own house to be burned and the guilt of the servant is only coextensive with that of the master. State v. Haynes, 66 Me. 307, 22 Am. Rep. 569; Com. v. Makely, 131 Mass. 421.

But in a Tennessee case it was said that it was a misdemeanor at common law to burn one's own house for the purpose of injuring or defrauding an insurer. Roberts v. State, 7 Coldw. 359.

A woman cannot be guilty of arson in burning her husband's house. Rex v. March, 1 Moody, C. C. 182.

So, to charge one with having set fire to his own house is not slander unless it is intended to impute that the act was done under such circumstances as would have been a crime. Sweetapple v. Jesse, 5 Barn. & Ad. 27, 2 Nev. & M. 36; Bloss v. Tobey, 2 Pick. 320.

The indictment must state that the property burned belonged to another. People v. Myers, 20 Cal. 80; State v. Lyon, 12 Conn. 487.

Under statute.

Generally.

The statute 24 & 25 Vict. chap. 97, makes the setting fire to a house with intent to injure or defraud any person a felony whether such house may be in

See also 33 L. R. A. 374.

(March 6, 1896.)

CROSS APPEALS from a judgment of the Common Pleas Circuit Court for Horry County entered upon trial of an indictment for arson, the state appealing from the quashing of one count of the indictment, and defendant appealing from the refusal to quash the other count. *Reversed on defendant's appeal, and affirmed on the State's appeal.*

The facts are stated in the opinion.

Mr. **J. M. Johnson** for the State.

Messrs. **W. D. Johnson, J. W. Johnson,** and **C. P. Quattlebaum** for defendant.

McIver, Ch. J., delivered the opinion of the court:

The indictment in this case contained two counts, the first charging that the defendant "did feloniously, wilfully, and maliciously set fire to, and cause fire to be set to, a certain house, to wit, a dwelling house, there situate, of one John D. Sarvis, in which the Farmers' Mutual Fire Insurance Association then and there had an interest, to wit, a policy of insurance, and by the kindling of such fire the aforesaid dwelling house was then and there feloniously, wilfully, and maliciously burned and consumed, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The second count of the indictment charged that the said John D. Sarvis, "with intent to defraud the Farmers' Mutual Fire Insurance Association, a corporation under the laws of said state, which then has [had?] issued a policy of insurance on the dwelling house hereinafter named,

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the possession of the person so setting fire thereto or of others.

Under the English statute the wife of a laborer holding possession of a house the right to use which had been part of his wages, after his discharge and notice to quit, may be convicted for setting fire to the house. Rex v. Wallis, 1 Moody, C. C. 344.

Under the Vermont statute the malicious burning by the owner of a house in possession of his tenant is arson. Com. v. Erskine, 8 Gratt. 627.

Under the Texas statute it is arson for a landlord to burn his property in possession of a tenant. Tuller v. State, 8 Tex. App. 501.

But a tenant who tears down a building erected by himself on the leased premises and burns the materials from which it was composed, before the expiration of the lease, cannot be convicted in Texas under an indictment charging him with burning a building of the landlord. Mulligan v. State, 25 Tex. App. 199.

It is not arson under the Tennessee Code to burn one's own house. Roberts v. State, 7 Coldw. 359.

Under the Ohio statute a tenant may be guilty of arson in burning buildings of which he is in possession under the lease. Allen v. State, 10 Ohio St. 287.

In People v. Gates, 15 Wend. 159, the opinion is given that the New York statute did not intend to make it arson to burn one's own house.

And in People v. Henderson, 1 Park. Crim. Rep. 560, the *dictum* in that case was carried into a decision, and it was held that a person cannot be guilty of arson in the first degree by setting fire to his own house.

But it has been decided that under the New York statute one may commit arson by burning his own dwelling. Shepherd v. People, 19 N. Y. 537.

So, burning one's own house in such a manner that it sets fire to the house of another will render one guilty of arson. Hennessey v. People, 21 How. Pr. 239.

Under the New Hampshire statute a person is guilty of arson in burning his own house. State v. Hurd, 51 N. H. 176.

Under the Nevada statute one burning his own building is guilty of arson. State v. Cohn, 9 Nev. 179.

Under the Missouri statute a tenant may commit arson by burning a house occupied by himself. State v. Moore, 61 Mo. 276.

Under the Louisiana statutes one burning his own house is guilty of arson. State v. Rohfrischt, 12 La. Ann. 382; State v. Elder, 21 La. Ann. 157.

The Indiana statute has made arson a crime against the property as well as against the possession, and now a husband in possession, with his wife, of her property, may be guilty of arson if he sets the property on fire. But even under that statute the dwelling house must be the property of another person than defendant. Garrett v. State, 109 Ind. 527.

In California a tenant may be guilty of crime in burning property of his landlord. People v. Simpson, 50 Cal. 304.

To injure insurer.

By statute in some states it is made a crime to set fire to an insured building with intent to injure the insurer. Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333; Stitz v. State, 104 Ind. 359; Johnson v. State, 65 Ind. 204.

Under the Vermont statute a person may be punished for burning his own dwelling with intent to defraud an insurance company. State v. Babcock, 51 Vt. 570.

The Ohio statute provides for the punishment of one who sets fire to his own property for the purpose of defrauding an insurance company. Searles v. State, 6 Ohio, C. C. 331.

It is punishable under the Tennessee Code to burn one's own property for the purpose of injuring the insurer. Roberts v. State, 7 Coldw. 359.

An indictment will lie for burning a building with intent to injure an insurance company, under the Massachusetts statute. Com. v. Hudson, 97 Mass. 565.

Under the Illinois statute a person setting fire to his property with intent to defraud an insurance company is guilty of arson. McDonald v. People, 47 Ill. 533.

Under the California statutes it is an indictable offense to set fire to one's own property for the purpose of defrauding an insurance company. People v. Hughes, 29 Cal. 257; People v. Schwartz, 32 Cal. 160.

The Alabama statute provides for the punishment of persons who set fire to their own property with intent to injure or defraud an insurance company. Heard v. State, 81 Ala. 55.

Under the Canadian statute wilfully and maliciously setting fire to a house with intent to injure or defraud an insurance company is indictable. Queen v. Bryans, 12 U. C. C. P. 163.

It seems to be an indictable offense in England to set fire to a house for the purpose of defrauding an insurance company. Reg. v. Gray, 4 Fost. & F. 1102.

The English statute will support an indictment for setting fire to a house with intent to defraud and injure an insurance company. Rex v. Gilson, Russ. & R. C. C. 138.

But charging a person with having set fire to his house and burned it up is not slander, even in a state making it felony to burn a house with intent to injure the insurer, if there is nothing to show that the person making the statement knew that the house was insured. Frank v. Dunning, 38 Wis. 270.

H. P. F.

did feloniously, wilfully, and maliciously counsel, hire, procure, and command one Alva Sarvis to feloniously, wilfully, and maliciously set fire to a certain dwelling house of the said John D. Sarvis, there situate, and by the kindling of said fire aforesaid, so set as aforesaid by the said Alva Sarvis, upon the hiring, commanding, and procurement of the said John D. Sarvis, as aforesaid, the aforesaid dwelling house was then and there feloniously, wilfully, and maliciously burned and consumed; the said policy of insurance being then and there of force, outstanding, in favor of the said John D. Sarvis, for a large sum of money, to wit, for the sum of $550; and so the jurors aforesaid, on their oath aforesaid, do say that the said John D. Sarvis then and there, in the manner and by the means aforesaid, feloniously, wilfully, and maliciously did commit the crime of arson, against the form of the statute in such case made and provided, and against the peace and dignity of the state." A motion was made before his honor, Judge Ernest Gary, to quash the indictment, when his honor ruled that the motion must be granted as to the first count in the indictment, but must be refused as to the second count. From this ruling both parties have appealed, the state alleging error in holding the first count bad, and the defendant alleging error in holding the second count good.

I propose, first, to consider the appeal on behalf of the state, which raises the question as to the validity of the first count in the indictment, in which the defendant is charged with arson in "feloniously, wilfully, and maliciously" burning his own dwelling house. There can be no doubt that a person cannot be convicted, at common law, of the crime of arson in burning his own dwelling house, and this I understand to be conceded; for the definition of that offense, as given in 2 Bishop, Crim. L. § 8, is "the malicious burning of another's house," and this is sustained by citations in the notes from standard authorities. And, as is said by the same author, in § 12: "Arson is an offense against the security of the habitation, rather than the property. When, therefore, we say that the house burned must be another's to occupy, consequently, at common law, a man cannot commit arson of his own house, even when it is insured,"—citing *King* v. *Spalding*, 1 Leach, C. L. 218, 2 East, P. C. 1025, and *Proberts' Case*, 2 East, P. C. 1030, with other cases, to which may be added *Breeme's Case*, Id. 1026, and *Isaac's Case*, Id. 1031. See also *Snyder* v. *People*, 26 Mich. 106, 12 Am. Rep. 302, where Judge Cooley used this language: "Arson is an offense against the habitation, and regards the possession rather than the property. . . . The house, therefore, must not be described as the house of the owner of the fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling house of him whose dwelling it then is." In that case the indictment charged the defendant with burning the dwelling house of Mary A. Snyder, who was, at the time, the wife of the defendant; and the syllabus of the case, which is fully sustained by the opinion of the court, reads as follows: "A husband living with his wife, and having a rightful possession, jointly with her, of a dwelling house which she owns and they both occupy, is not guilty of arson, by the common law, in burning such dwelling house; and the rule is not changed by a statute securing to the wife the separate property." From these authorities, as well as others that might be cited, it is very obvious that the gist of the common-law offense of arson is the injury of the habitation, and not of the property constituting the habitation; and, if a person voluntarily chooses to destroy his own habitation, either by fire or otherwise, he does no such unlawful act as would constitute arson. Indeed, if the building burned is his own property, I do not see that, in any sense, his act can be regarded as unlawful, inasmuch as a person may do with his own as he pleases, provided, in so doing, he does not injure the property of his neighbor. If, however, a person sets fire to his own dwelling house, with intent to burn the dwelling house of his neighbor, and the house of his neighbor takes fire and is burned, it is quite possible that he may be convicted of arson. But, as there is no such allegation in this indictment, it is unnecessary to consider further such an hypothesis. But if a person sets fire to his own dwelling house with an intent simply to injure or destroy his neighbor's property,—not his habitation,—he certainly could not be convicted of arson, although he might be responsible for the damages done to his neighbor's property.

It is contended, however, that the common law in respect to arson has been changed by statute, and now a person may be indicted for arson in wilfully and maliciously burning his own dwelling house. The statute relied on for this purpose is incorporated in § 140 of the Criminal Statutes (2 Rev. Stat. p. 311), which reads as follows: "The wilful and malicious setting fire to or burning any house, of whatever name or kind, within the curtilage or common inclosure of any house or room, wherein persons habitually sleep, whereby any such dwelling house or sleeping apartment shall be endangered; also the wilful and malicious setting fire to or burning any courthouse, or other public building, whether owned by the state or a corporation or individuals, and kept or left for public meetings or exhibitions, barn, stable, coachhouse, storehouse, ginhouse, warehouse, grist or saw mill, railroad depot, coach or cotton factory, or other house used for manufacturing purposes, of whatever name or kind, or setting fire to or burning any house habitually used for public religious worship, shall be deemed arson, whether the setting fire to or burning be in the day or night time." The section proceeds to prescribe the punishment for such offense. It seems to me that the sole object of the statutory provision above quoted which was originally enacted in 1861 (12 Stat. at L. 862) was simply to enlarge the character of the houses which could be subjects of arson, and not to make any other change in the recognized definition of that offense. At common law the only buildings which could be the subjects of arson were dwelling houses or other structures appurtenant thereto and within the curtilage thereof. The language used in the statute, "any house of whatever name or kind," clearly implies that

such was the purpose of the statute. At common law the character of the houses which could be the subjects of arson was limited to dwelling houses, or houses appurtenant thereto and within the curtilage; but, by statute, the class of houses which could be the subject of arson is enlarged so as to embrace "any house of whatever name or kind, within the curtilage or common inclosure of a dwelling house, or within the curtilage or common inclosure of any house or room wherein persons habitually sleep, whereby any such dwelling house or sleeping apartment shall be endangered," whether the same be appurtenant to such dwelling house or sleeping apartment, or not; so that the burning of a store or livery stable, which was in no wise appurtenant to the dwelling house or sleeping apartment, if within the common inclosure, whereby such dwelling house or sleeping apartment would be endangered, would constitute the crime of arson. And then the statute proceeds to enlarge still further the class of houses which would be the subject of arson so as to embrace court-houses or any other public buildings, railroad depots, and the various other houses designated in the statute. The words "any house," relied on in the argument, especially when followed by the words "of whatever name or kind," certainly cannot be construed as designed to so totally change the definition of the crime of arson as to subject a person who burns his own house, located in the center of a field, too far distant from the houses of another to endanger them in the slightest degree, to the punishment of arson, no matter what may be the motive of such person for destroying his own property.

As to the allegations in the first count of the indictment with respect to the so-called "interest" of the Farmers' Mutual Fire Insurance Association in the dwelling house alleged to have been burned by the defendant, I am at a loss to conceive what possible effect it could possibly have upon the validity of this count of the indictment. After alleging that the defendant did set fire to a certain house, to wit, "a dwelling house there situate, of one John D. Sarvis," these words follow: "In which the Farmers' Mutual Fire Insurance Association then and there had an interest, to wit, a policy of insurance." This certainly does not amount to an allegation that the building which was burned was the dwelling house or habitation of the insurance company, for, on the contrary, the distinct allegation is that such building was the dwelling house of the defendant. And the further allegation that the insurance company had an interest therein, even if not contradicted by the explanation of such interest, would amount to nothing: for, even if the insurance company did have an interest in the property (which I do not think it had), that would not affect the question, as it was held in *Spalding's Case*, 1 Leach, C. L. 218, extracted from 2 East, P. C. 1025, that a mortgagor in possession burning his own house, could not be convicted of arson, either at common law or under the statute (9 Geo. I. chap. 22), which is not of force here. Besides, there is no allegation, in the first count of the indictment, that the defendant burned his own house with intent to defraud the insurance company. But, even if there was such an allegation in this count, I do not see how, in the absence of any statute upon the subject, it could affect the present inquiry. In England there is a statute making it felony, without benefit of clergy, for a person to burn his own house with intent to defraud "His Majesty or any of His Majesty's subjects, or any body corporate," and the case of *Rex* v. *Gilson*, Russ. & R. C. C. 138, was a prosecution under that statute, in which defendant was charged with burning his own house with intent to defraud an insurance company. Similar statutes have been enacted in several of the states of this Union; but, so far as I am informed, we have no such statute in this state, and, in the absence of any such statute, I am unable to see how the fact that a person has burned his own house with intent to defraud an insurance company renders him liable to an indictment for arson or any other felony. The fact that it has been found necessary, in England and several of the states of this Union, to enact special statutes to cover a case of this kind, affords an additional reason for the correctness of my view. I agree, therefore, with the circuit judge in holding that the defendant could not be convicted of arson under the first count in the indictment.

Coming, then, to the question presented by the appeal on behalf of the defendant, it seems to me that it follows, necessarily, from what has already been said, that the second count in the indictment is also fatally defective. Without going over the argument already presented to show that it is no offense against the criminal law for one to burn his own dwelling house, even for the purpose of defrauding an insurance company which has issued a policy thereon, it will be sufficient to cite the case of *State* v. *Haynes*, 66 Me. 307, 22 Am. Rep. 569, which, in principle, is so much like the case in hand as to justify liberal quotations therefrom. In that case the defendant, who was a servant of Mrs. Ingraham, was indicted for arson, under Rev. Stat. chap. 119, § 1, for feloniously, wilfully, and maliciously burning, in the night-time, the dwelling house of Mrs. Ingraham. The evidence tended to prove, and the jury must have found, that the dwelling house of Mrs. Ingraham was burned in the night-time, under the following circumstances: The house was insured by Mrs. Ingraham. Being insured, Mrs. Ingraham, her daughter, and the defendant conspired together to burn the house, for the purpose of obtaining the insurance. . . . The question presented for determination is whether upon the facts the indictment can be sustained under Rev. Stat. chap. 119, § 1, which is in these words: 'Whoever wilfully and maliciously sets fire to the dwelling house of another, or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwelling house, and it is thereby burnt, in the night-time, shall be punished with death.' . . . In some states the common law has been modified, as in New York, where the wilfully setting fire to, or burning any inhabited dwelling in the night-time is made arson, so that the offense may be committed by one's burning his own dwelling house. So in England the British Parliament has so modi-

fied the law in relation to arson as to render it immaterial whether the house burned be that of the offender himself, or a third person. *Shepherd* v. *People*, 19 N. Y. 537; Stat. 1 Vict. chap. 89, § 3; *Rex* v. *Ball*, 1 Moody, C. C. 30. . . . If Mrs. Ingraham had burnt her own dwelling, she would not have been amenable to the penalties prescribed by § 1. The fire was set at her instance and for her supposed benefit. The servant obeying cannot be more guilty than the master commanding. The precise question before us arose in Tennessee (*Roberts* v. *State*, 7 Coldw. 359), and it was there held that it was not arson to procure one's own house to be burned, and that the guilt of the agent was only coextensive with the guilt of the principal. It is not arson for a man to burn his own house, or to procure it to be done, for the purpose of defrauding an insurance company." Upon the same principles, it is clear that the second count in the indictment fails to state such facts as would constitute the offense of arson, notwithstanding the fact that, in the second count, the defendant is charged with having procured the burning of his own dwelling house "with intent to defraud the Farmers' Mutual Fire Insurance Association" which had issued a policy of insurance on said dwelling house, for the reason that there is no statute in this state, as there is in England, as well as in some of the other states in the Union, making it a felony to burn one's own dwelling house with intent to defraud an insurance company. If, therefore, as has been shown, a person cannot be charged with arson in setting fire to his own dwelling house, for the reason that it is not unlawful for a person to burn or otherwise destroy his own property, unless in so doing he injures or destroys the property of his neighbor, it is difficult to conceive how he could be accessory to any crime when the act is done by another by his own procurement. If it is no crime for him to do the act himself, it cannot be to procure or command it done by another. It is true that there are cases in which one may be accessory before the fact to a crime committed by another, which the party charged may be incapable of committing; as, for example, a female may be an accessory before the fact to the crime of rape, committed by a man upon another female. But in such a case the party charged as accessory is incapable physically of doing the act which constitutes the crime, and if she procures the act to be done by one who is physically capable the law regards the act as done by herself. Still, even in such a case, the act done must be a crime in the person who actually does the act; and, if it is not, then there can be no accessory. So that, in this case, if it would be no crime in John D. Sarvis to burn his own house in his own proper person, he could not be accessory before the fact if the act of burning was done through the agency of another, by his command or procurement. I cannot, therefore, agree with the circuit judge in holding that the second count in the indictment was good, but, on the contrary, think that both counts were fatally defective.

The judgment of this court is that *the judgment of the Circuit Judge that the first count in the indictment be quashed must be affirmed, and his judgment sustaining the second count must be reversed*, and that the indictment be quashed.

CONNECTICUT SUPREME COURT OF ERRORS.

Eugene PELTIER, *Appt.*,
v.
BRADLEY, DANN, & CARRINGTON COMPANY.

(67 Conn. 42.)

1. One who drives a team to the left of the road in order to stop there does not thereby assume the responsibility of an unusual and the highest degree of care to avoid a collision with another vehicle which attempts to keep to the right in passing.

2. The rider of a bicycle has not an absolute right to pass on the right-hand side in meeting a truck which is turning toward that side to the curb of the street, nor can he assume that the driver must turn out for him, but is bound to exercise the same degree of care which the law requires of the driver of the truck to avoid a collision.

3. The driver of a truck for the conveyance of goods is not obliged to turn to the right on meeting a vehicle for the conveyance of persons, under Gen. Stat. §§ 2689 and 2690, as the statute applies only to vehicles for the conveyance of persons.

4. An exception to a finding of fact as to negligence when there is no uncertainty as to the rule by which it is to be governed, but only as to what the conduct was, constitutes no ground of appeal under the act of 1893.

(November 22, 1895.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant in driving a truck against plaintiff who was riding a bicycle along a public street. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Lucius P. Deming, J. Birney Tuttle,** and **John F. Wynne,** for appellant:

The facts do not justify the finding, and the question of negligence in this case is a question of law.

Farrell v. *Waterbury Horse R. Co.* 60 Conn. 239; *Bailey* v. *Hartford & C. Valley R. Co.* 56 Conn. 444; *Beardsley* v. *Hartford*, 50 Conn. 529, 47 Am. Rep. 677; *Nolan* v. *New York, N.*

NOTE.—As to the regulation of bicycle riding, see Twilley v. Perkins (Md.) 19 L. R. A. 632, and *note*.

As to assault and battery by recklessly riding a bicycle against a person, see Mercer v. Corbin (Ind.) 3 L. R. A. 221.

See also 39 L. R. A. 448; 41 L. R. A. 208.

H. & H. R. Co. 53 Conn. 461; *Dyson* v. *New York & N. E. R. Co.* 57 Conn. 9; *Gallagher* v. *New York & N. E. R. Co.* 57 Conn. 442, 5 L. R. A. 737.

The plaintiff saw the defendant when he was 400 feet away, and watched him as he passed (came) up the street. He, the plaintiff, was on the right-hand side of the street. At 70 feet west of the elevator door he turned out and passed a team and resumed his old position 4 or 5 feet from the curb.

Practically the plaintiff traveled 400 feet in a straight line, 4 or 5 feet from the curb, and he was 4 or 5 feet from the curb when the accident happened. Here was a consistent course of conduct. By it Scoville had a right to presume what would be the continuing conduct of the plaintiff.

The plaintiff had watched Scoville 400 feet, during which time Scoville had not changed his course; he had a right to presume that he would continue to drive as he had been driving.

At the corner of State street, 70 feet west of the elevator door, the defendant's truck was to the left of the center of the street.

The center of the street is 11 feet 6 inches from the curb.

The truck is 6 feet wide from hub to hub. Then from the curb to the left hub was 5 feet, allowing 6 inches between the right hub and the center of the street. Scoville saw the plaintiff when he, Scoville, was near the elevator door, and the plaintiff 12 or 15 feet away.

In driving 70 feet Scoville had changed his course 12 inches at most, a change so slight that the most observant could not notice it. In fact, to this point, neither party had changed position.

It is not claimed that the plaintiff changed his course. Scoville had no need to change his course, *i. e.*, "draw in to the curb;" the street was narrow; he was on the left side; when he reached the desired point a change of 4 or 5 feet would bring him to the curb.

Scoville swears: "I should say he [plaintiff] was 12 or 15 feet from the horse's head when I first saw him. I supposed he knew what he was about and had room to go through there. As soon as I saw he was going through I pulled my horse to the right."

Again: "The wagon was nearer the curb when the accident occurred than it was when I first saw the bicycle."

The defendant's team was 3½ feet from the curb when it hit the plaintiff.

These admitted facts show that Scoville was driving through Court street heedless of his surroundings. When near his stopping place he looked up suddenly, saw the plaintiff 12 or 15 feet in front of him, coming towards him, and with the recklessness of sudden fright "pulled" his horse to the left instead of the right and the accident occurred.

Within a space of 12 or 15 feet Scoville drew in to the curb from 5 feet to 3½ feet. This is his own testimony, and it harmonizes with the testimony of the plaintiff: "As I came up head to the wagon and tried to pass it, the driver, without any consideration of my position, turned in his horse."

Scoville was to his left of the center of the street, and being in this position he should have exercised unusual care; and his failure to see an approaching vehicle until within 15 feet was gross carelessness.

Knowles v. *Crampton*, 55 Conn. 344.

The plaintiff had a right to be on the street, for the bicycle is a vehicle, and entitled to all the rights and privileges which the law extends to vehicles.

Taylor v. *Goodwin*, L. R. 4 Q. B. Div. 229; *Mercer* v. *Corbin*, 117 Ind. 450, 3 L. R. A. 221; *Holland* v. *Bartch*, 120 Ind. 46; *Swift* v. *Topeka*, 43 Kan. 671, 8 L. R. A. 772.

The plaintiff was riding on the side where he should be before meeting defendant's team, and followed the law when he attempted to pass.

Gen. Stat. §§ 2689, 2690.

The defendant was not where he should have been. He attempted to pass plaintiff contrary to statute. The defendant occupied his position only permissibly and was charged with entire responsibility for any injury to others arising from the fact that he was out of place.

12 Am. & Eng. Enc. Law, p. 957; Cooley, Torts, 2d ed. 799; *Brooks* v. *Hart*, 14 N. H. 307; *Daniels* v. *Clegg*, 28 Mich. 32.

Though one may pass lawfully on the left side of the road or across it, for the purpose of turning up to a house, store, or other object on that side of the road, yet in so doing he must not obstruct those who are lawfully passing along the same side.

Palmer v. *Barker*, 11 Me. 338.

If the plaintiff did misjudge the course Scoville was going to take and so contribute to the accident, it will not exonerate, or in the least excuse, the defendants.

Inland & S. Coasting Co. v. *Tolson*, 139 U. S. 551, 35 L. ed. 270; *Central R. & Bkg. Co.* v. *Denson*, 84 Ga. 774; *Gray* v. *McDonald*, 104 Mo. 303.

The act of Scoville was *malum in se*, and the law presumes that the existing conditions were known to him,—that he "took the chances," and is therefore liable for all consequences.

16 Am. & Eng. Enc. Law, pp. 434, 435.

A special duty concerning the conduct of persons in certain relations may be created by statute, and a failure to observe such statutory duty is sometimes said to be negligence *per se*.

Whart. Neg. 453; Shearm. & Redf. Neg. 13; *Terre Haute & I. R. Co.* v. *Voelker*, 129 Ill. 540; *Philadelphia, W. & B. R. Co.* v. *Stebbing*, 62 Md. 504; *Billings* v. *Breinig*, 45 Mich. 65; *Salisbury* v. *Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

When any such vehicle shall have occasion to pass a team on the highway, the teamster shall, if necessary and practicable, turn his team so far on one side thereof as to give such vehicle an opportunity to pass it.

Conn. Gen. Stat. § 2691.

Messrs. **Case, Ely, & Case,** for appellee:

The court has found that the plaintiff was guilty of contributory negligence, and that Scoville, the defendant's agent, was not guilty of negligence, and the question of negligence is a question of fact.

Park v. *O'Brien*, 23 Conn. 339; *Dexter* v. *McCready*, 54 Conn. 171; *Fiske* v. *Forsyth Dyeing, L. & B. Co.* 57 Conn. 118.

Plaintiff must show that he was not guilty of negligence and that the defendant was. Having failed to do this, judgment was rightly rendered for the defendant.

Park v. *O'Brien*, *supra*.

He alone should suffer, for the injury would not have happened had it not been for his own negligence.

Bennett v. *New York, N. H. & H. R. Co.* 57 Conn. 422.

There was then no error in finding the plaintiff guilty of contributory negligence and the defendant's driver not guilty of negligence so far as the law is concerned, and so far as the facts are concerned the court will not review them.

Styles v. *Tyler*, 64 Conn. 432; *Curtis* v. *Bradley*, 65 Conn. 99, 28 L. R. A. 143.

There is no law which holds that it is negligence *per se* for a driver to have his team on the left-hand side of the center of the traveled path, and the plaintiff is not relieved from ordinary care of himself on that account.

Brooks v. *Hart*, 14 N. H. 307; *Daniels* v. *Clegg*, 28 Mich. 32; *Wrinn* v. *Jones*, 111 Mass. 360.

Baldwin, J., delivered the opinion of the court:

The plaintiff's main contention is that whoever drives a team upon what to him is the left-hand side of the road thereby assumes the responsibility of exercising an unusual and the highest degree of care to avoid a collision with any other vehicle which he may have occasion to pass, and which is being kept on what to it is the right-hand side of the road. Such is not the law. It is necessary and proper for any driver who is about to stop for the purpose of going upon land or into buildings situated on what to him is the left-hand side of the road to shape his course in that direction; and he is bound simply to exercise ordinary and reasonable care with reference to such teams as he may encounter. Whether such care was exercised by the defendant's driver, under the circumstances of the case, was a pure question of fact, on which the finding of the court below is conclusive. *Wrinn* v. *Jones*, 111 Mass. 360; *Fisk* v. *Forsyth Dyeing, L. & B. Co.* 57 Conn. 118.

It is equally conclusive in charging the plaintiff with contributory negligence. He, too, was bound to exercise the same degree of care which the law required of Scoville, the defendant's driver. It was not his absolute right to pass between the defendant's team and the southern curb of the street, or to assume that Scoville must and would turn out for him. The defendant's right to use its elevator, and to place its truck as close to it as it could, was as perfect as that of the plaintiff to ride through the street. Each party was equally bound to use his rights so as not to injure the other.

We have no statutory rule at variance with these principles. Gen. Stat. §§ 2689, 2690, provide that, when the drivers of any vehicles for the conveyance of persons shall meet each other in the public highway, each shall turn to the right, and slacken his pace, so as to give half the traveled path, if practicable, and a fair and equal opportunity to pass, to the other; and that the driver of any such vehicle who shall, by neglecting to conform to these requirements, drive against another vehicle, shall be liable in treble damages for any injury thereby done, and, if the injury were done designedly, forfeit not exceeding $100 to the state; such damages, if the driver is unable to pay them, to be recoverable of the owner of the vehicle by writ of scire facias. The action before us was not brought upon the statute, and could not have been, since that gives a remedy only against the driver, or, in case of his inability to respond, the owner, of a vehicle for the conveyance of persons. The rule which it lays down is limited to vehicles of the same description. The driver of a truck for the conveyance of goods, when he meets on the road a vehicle for the conveyance of persons, is not under any statutory obligation to turn to the right. It may be reasonable, and, if so, necessary, that he should do so; but this depends solely on what should be the conduct, under the circumstances of the occasion, of a driver of ordinary skill and prudence.

The plaintiff filed written exceptions to certain of the findings of fact made by the court below, and to its refusal to make certain findings of fact which he had requested, and the evidence claimed by each party to be material to such questions of fact has been certified up, and made part of the record, under chapter 174 of the Public Acts of 1893. This act was repealed in 1895, but by Gen. Stat. § 1, such repeal did not affect actions then pending, of which the present suit was one. By the reasons of appeal founded upon these exceptions, the plaintiff asks this court to compare the evidence as to several of the circumstances preceding or attending the collision between the bicycle and the truck, with the findings of the trial court as to what those circumstances were. There was evidence in respect to some of these circumstances tending to support the plaintiff's view of them. There was evidence in regard to all of them tending to support the views taken by the trial court. Negligence becomes a question of law when the case turns upon the standard to be applied to measure the care due from the party whose conduct is the subject of consideration, but seldom, if ever, when it turns on what his conduct in fact was and there is no uncertainty as to the rule by which it was to be governed. *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239, 246. The case at bar is one of the latter description, and the plaintiff's exceptions to the finding constituted no ground of appeal under the act of 1893. *Styles* v. *Tyler*, 64 Conn. 432; *Meriden Sav. Bank* v. *Wellington*, 64 Conn. 553. Whatever points of law he was entitled to raise were fairly presented by the state of facts found by the trial court.

There is no error in the judgment appealed from.

In this judgment the other Judges concurred.

ILLINOIS SUPREME COURT.

FIDELITY & CASUALTY COMPANY of New York, *Appt.*,
v.
John D. WATERMAN, etc., Admr., of James B. Marshall, Deceased.

(161 Ill. 632.)

1. **Death from asphyxiation by illuminating gas** while the insured was asleep is not within a clause of an accident insurance policy providing that the insurance does not cover "injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled."
2. **The word "absorbed," in a provision of an accident insurance policy** that it does not cover injuries from poison or anything accidentally or otherwise absorbed or inhaled, refers only to the process of absorption by sucking up or imbibing through the pores of the body.
3. **The words "absorbed or inhaled," in a provision of an accident insurance policy** that it does not cover injuries from anything accidentally or otherwise absorbed or inhaled, implies a voluntary and intelligent act as distinguished from an involuntary and unconscious act.
4. **Objections not raised by the briefs** in the Illinois appellate court cannot be renewed or made for the first time in the supreme court.

(May 12, 1896.)

APPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Winnebago County in favor of plaintiff in an action to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William G. Challis** and **Garver & Fisher,** for appellant:

The death of the assured did not occur from a cause which makes it liable under its contract of assurance.

Travelers' Ins. Co. v. *McConkey*, 127 U. S. 661, 32 L. ed. 308; *Keene* v. *New England Mut. Acci. Asso.* 164 Mass. 170; *Richardson* v. *Travelers' Ins. Co.* 46 Fed. Rep. 843; *Menneiley* v. *Employers' Liability Assur. Corp.* 72 Hun, 477.

The policy constituted the only relation between the parties. If it does not by a fair and natural import of its provisions give a right of action, then the plaintiff has no right of action. The defendant has a right to limit its liability.

Travelers' Ins. Co. v. *McConkey, supra; Stettauer* v. *Hamlin*, 97 Ill. 312; *Supreme Council R. T. of T.* v. *Curd*, 111 Ill. 284; *Tipton* v. *People*, 156 Ill. 241 (1895); *Keene* v. *New England Mut. Acci. Asso. supra.*

The exception in the case at bar is broad and sweeping. It is not a death resulting from something inhaled by mistake, that is, "to take one thing for another," but injuries fatal resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled.

Haight v. *McVeagh*, 69 Ill. 624.

Messrs. **Arthur H. Frost** and **Robert G. McEvoy,** for appellee:

The means which accomplished the death of Marshall were external, violent, and accidental, but he did not inhale gas. He accidentally breathed the gas. Had the policy intended to cover this cause, it could have been written that the company would not be responsible for death occasioned by gas.

Healey v. *Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371.

Gas was not inhaled within the meaning of that word as it appears in the policy.

Paul v. *Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443.

If there is any ambiguity or uncertainty in the words of a policy, the construction most favorable to the insured must be given.

Hoffman v. *Ætna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *United States Mut. Acci. Asso.* v. *Newman*, 84 Va. 52 (1887).

The interpretation to be given a clause can often be determined by the meaning and scope of clauses which surround it. *Noscitur a sociis* is a rule of law as well as a rule of ethics.

Wakefield v. *Fargo*, 90 N. Y. 218.

Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

Livingston v. *Stickles*, 7 Hill, 255; *Catlin* v. *Springfield F. Ins. Co.* 1 Sumn. 434; *Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 305, 59 Am. Dec. 482; *Hoffman* v. *Ætna F. Ins. Co.* 32 N. Y. 414, 88 Am. Dec. 337.

A policy must be liberally construed in favor of the assured so as not to defeat, without a plain necessity, his claim to the indemnity which in making the insurance it was his object to secure.

May, Ins. 2d ed. § 175; *Healey* v. *Mutual Acci. Asso.* 133 Ill. 561 9 L. R. A. 371; *Niagara F. Ins. Co.* v. *Scammon*, 130 Ill. 644; *Hoffman* v. *Ætna F. Ins. Co.* 32 N. Y. 415, 88 Am. Dec. 337; *Palmer* v. *Warren Ins. Co.* 1 Story, 360; *Crossing* v. *Scudamore*, 2 Lev. 9.

The means of death were external and violent.

McGlinchey v. *Fidelity & C. Co.* 80 Me. 251; *Trew* v. *Railway Pass. Assur. Co.* 7 Jur. N. S. 878; *Healey* v. *Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371.

Gas is not a poison within the meaning of the policy.

United States Mut. Acci. Asso. v. *Newman, supra.*

Even if injury occurred while intoxicated, it must be shown that deceased had drunk enough to disturb the physical or mental faculties so that they are no longer in the natural or normal condition.

NOTE.—On the question what constitutes an accident within the meaning of an accident insurance policy, see *note* to Fidelity & C. Co. v. Johnson (Miss.) 30 L. R. A. 206.

Standard Life & A. Ins. Co. v. *Jones*, 94 Ala. 434.

Plaintiff was entitled to recover.

Menneiley v. *Employers' Liability Assur. Corp.* 72 Hun, 477; *Pickett* v. *Pacific Mut L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661; *Travelers' Ins. Co.* v. *Dunlap*, 160 Ill. 642.

Baker, J., delivered the opinion of the court:

The accident insurance policy in suit in this cause was issued by the Fidelity & Casualty Company of New York on June 14, 1891, to James B. Marshall, the intestate of appellee, insuring him in the sum of $5,000 against death through external, violent, and accidental means for the term of twelve months ending June 14, 1892. The policy also made provision for a weekly indemnity in case of bodily injury through like means, but not causing death. The policy was afterwards renewed for an additional term of one year from June 14, 1892. The intestate was asphyxiated by illuminating gas in the Northwestern Hotel at Aurora, Illinois, on the night of December 5, 1892. He was found dead in bed on the morning of December 6, and the room was full of gas. At the trial there was evidence tending to prove that the gas fixtures in the room were defective; and there was also evidence tending to prove that the deceased was intoxicated at the time of the accident, and that his death was attributable to such intoxication. The case was tried before the court without a jury, and a number of written propositions were submitted to it by appellant to be held as law in the decision of the case, but they were all refused and exceptions taken. The finding and judgment were for the plaintiff below, and that judgment was affirmed in the appellate court.

The principal defenses relied on by appellant are based upon provisions in the policy which read as follows: "This insurance does not cover disappearances, nor war risk, nor voluntary exposure to unnecessary danger; nor injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while, or in consequence of having been under the influence of, or affected by, nor resulting directly or indirectly from, intoxicants, anæsthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, or any disease or bodily infirmity." One ground of defense is that, since the policy expressly states that the insurance does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, and the deceased came to his death by means of the illuminating gas which he inhaled while asleep, therefore, according to the true intent and meaning of the contract, appellant is not liable to the administrator for the sum of $5,000 stipulated to be paid in case of the death of his intestate as the result of external, violent, and accidental means. In *Travelers' Ins. Co.* v. *Dunlap*, 160 Ill. 642, this court held that drinking carbolic acid by mistake for peppermint is not within a clause of an accident insurance exempting the company from liability for injuries or death from "taking poison," as such word means the voluntary intentional taking of poison, and do not include cases of accidental poisoning by mistake, but do include injuries or death from voluntarily taking poison without any suicidal intent. And this court in its opinion referred with approval to the decision of the court of appeals of New York in *Paul* v. *Travelers' Ins. Co.* 112 N. Y. 472, 32 L. R. A. 443, and said: "We think the rule established by the court of appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question." In the *Paul Case*, thus referred to, the policy provided that the insurance should not extend to any death or disability which may have been caused by the taking of poison, contact with poisonous substances, or inhaling of gas, and it appeared that the insured was found dead in bed in his room at an hotel, and that the gas had in some way been turned on, and his death caused by breathing the atmosphere of the room filled with gas; and it was held that the death was not caused by "the inhaling of gas" within the meaning of the policy, and that those words applied only to a voluntary and intelligent action on the part of the insured, such as in medical or surgical treatment for dental work, or with a suicidal purpose. And in the subsequent case of *Bacon* v. *United States Mut. Acci. Asso.* 123 N. Y. 304, 9 L. R. A. 617, the court of appeals approved the decision in the *Paul Case*, and said, "Upon the question decided the case is conclusive, and we have no disposition to alter our views as expressed therein." In *Pickett* v. *Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661, where there was a condition that the insurance should not cover death or injury resulting from or attributable, partially or wholly, to inhalation of gas, and the insured went down into a well to make repairs on a pump, and in a short time was found in the well, dead, from asphyxia, caused by poisonous gas at the bottom of the well, it was held that the condition in the policy against "inhalation of gas" contemplated a voluntary and intelligent act by the insured,—not an involuntary and unconscious act, and was inoperative to relieve the company from liability See also *Metropolitan Acci. Asso.* v. *Froiland*, (opinion filed at Ottawa on March 28, 1896), 161 Ill. 30.

It is urged that the exception in the case at bar is broader and more sweeping than the words found in the cases heretofore decided, the words here being, "poison or anything accidentally or otherwise absorbed or inhaled," and that these words necessarily include every possible way by which irrespirable gases can be got into the human system so as to cause death. The additional word "absorbed," found in the language last above quoted, has no application to the case before us, for that word manifestly has reference only to the process of absorption by sucking up or imbibing through the pores of the body. The claim made is not well grounded if the correctness of the point decided in the cases we have mentioned be conceded. That point, as we understand it, is that the word "inhaling," or "inhalation,"

or "inhaled," as used in exceptions contained in these policies of life or accident insurance, implies a voluntary and intelligent act as distinguished from an involuntary and unconscious act. Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read "poison or anything accidentally or otherwise consciously and by an act of volition drawn into the system by inspiration." This view is fully supported by a late decision of the court of appeals of New York. That court had before it *Menneiley* v. *Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L. R. A. 686, the case of a provision in an accident policy that it does not insure against death or disablement from anything accidentally inhaled. The insured had died at night of asphyxia, caused by involuntarily and accidentally breathing into his lungs, while asleep, illuminating gas, which had accidentally escaped into his room at an hotel. It was held that the case was not distinguishable in principle from the *Paul Case*, and that the provision in the policy did not relieve the insurer from liability. And we may add that this *Menneiley Case*, which had then just been published, was cited by this court with approval in *Travelers' Ins. Co.* v. *Dunlap*, *supra*.

Appellant claims that to place the construction we have upon the policy is not to enforce the contract made by the parties, but to make a new contract for them. This can hardly be so. Appellant is a New York corporation, and made and dated its contract in the city of New York,—and this was done several years after the decision in the *Paul Case* by the court of last resort in that state. It must be presumed that it was then fully advised of that decision, and knew, when it entered into the contract now in suit, what its liabilities were under the agreement that it made. The policy in suit contains a stipulation that the insurance does not cover injuries, fatal or otherwise, received while or in consequence of having been under the influence of, or affected by, nor resulting, directly or indirectly, from, intoxicants. In its brief and argument prepared for this court, all that appellant says in regard to this provision is this: "While the appellate court finds the fact of intoxication against us, we submit that it was error to refuse the propositions on this point, and respectfully refer to clause 2 of our brief in the appellate court, hereto annexed, where this point is considered." Turning to said clause 2, we find that the matter of intoxication is neither mentioned nor discussed therein otherwise than as a contested question of fact, and we also find that neither in that clause nor elsewhere in the brief is there any mention of or reference to any proffered propositions relating to the subject of intoxication. And we further find that the appellate court, in rendering its judgment, passed upon no such propositions of law. If any such refused propositions are to be found in the record, it must be considered, as we have held in numerous cases, that appellant waived in the appellate court all objections to the rulings of the trial court thereon, and cannot renew such objections or make them for the first time in this court.

It is further claimed that there was no compliance with the condition of the policy that affirmative proof of death must be furnished to the company within two months from time of death. It is a sufficient answer to say that there is evidence in the record tending to show a waiver by appellant of proofs of death; that the judgments of the circuit and appellate courts conclusively establish the fact of such waiver; and that no propositions of law were either held or refused which stated what would or could not in law constitute a waiver.

We find no error in the record for which the judgment can be reversed. It is therefore *affirmed*.

Cartwright, J., having heard this case in the appellate court, took no part here.

Samuel PAGE, *Appt.*,
v.
John KUYKENDALL.

(161 Ill. 319.)

1. **A ballot for school directors at an election to choose one for a full term** of three years and one to fill a vacancy for one year cannot be counted when it contains the names of two persons without anything to designate which office either is intended for.
2. **The designation of the office to be filled which a ballot must show,** under 1 Starr & C. Stat. 1008, §§ 52, 53, sufficiently appears, at least as to the person named for the long term, upon a ballot containing only the names of two persons with the words "long term" following one name without any other words to designate the office, when the election is held only for school directors, one to be chosen for a long term and one for a vacancy.
3. **A ballot containing two names with the words "long term" after one of them,** cast at an election which is held only for the election of school directors, one for a long term and one to fill a vacancy, can be counted at least for the person named for the long term, although there is a failure to designate by express words the office for which the other person was named.

(May 12, 1896.)

APPEAL by defendant from a judgment of the Clark County Court in favor of contestant in a proceeding to contest the alleged election of defendant as a school director. *Reversed.*

Statement by **Carter, J.**:

This proceeding was instituted by John Kuykendall and William M. Mott in the county court of Clark county, to contest the election of Samuel Page and William D. Rollings as

NOTE.—The above case seems to be without any very close precedent, and it is apparently the first to construe the statutory provision for the designation upon the ballot of the office to be filled.

As to the question how far statutory provisions as to ballots are mandatory, see *Re* Contested Election of School Directors (Pa.) 27 L. R. A. 234; Stackpole v. Hallahan (Mont.) 28 L. R. A. 502; Moyer v. Van de Vanter (Wash.) 29 L. R. A. 670, and Parker v. Orr (Ill.) 30 L. R. A. 227.

school directors of district No. 7, in township 12, range 11, in said county. The election was held on the 20th day of April, 1895, for the purpose of electing one director for the full term of three years, and one for the term of one year, to fill a vacancy. There were four candidates at said election,—Kuykendall, Page, Mott, and Rollings,—and sixty-three votes were cast. The poll book filed with the township treasurer contains a certificate reading as follows:

Returns of this Election.

Names of Persons.	Whole number of votes cast.
S. P. Page	Received fifty-two (52) votes for school director for the full term.
John Kuykendall	Received thirteen (13) votes for school director for the full term.
W. D. Rollings	Received fifty (50) votes for school director for the full term.
William Mott	Received eleven (11) votes for school director for the full term.

We, the undersigned, do hereby certify that the foregoing is a true tally list and correct statement of votes cast at the said election, and that S. P. Page was duly elected school director for the full term, and that W. D. Rollings was duly elected school director to fill vacancy.

Dated this 20th day of April, 1895.

Attest: T. E. Velkers, Clerk of the Election.

W. T. Matthis, Samuel Page } Judges of the Election.

The petitioners alleged in their petition that of the sixty-three ballots cast at said election, only the eight cast for said John Kuykendall, and the seven cast for said Samuel Page, and the eight cast for said William M. Mott, in any way or manner designated which candidate the elector desired to serve for the long or three years' term, and which the short or one year term, and alleged that Page and Rollings had been declared elected in violation of law. Defendants answered, denying the material allegations of the petition. A recount of the ballots was had before the court, and it was determined by the court that, of all the legal votes cast, John Kuykendall received nine votes for director for the long term, and William Mott nine votes for director for the short term, and they were declared elected accordingly, and entitled to said offices. From that judgment, defendant Page prosecutes this appeal. The nine ballots counted by the court below as the only legal ballots cast were as follows:

For School Director,
John Kuykendall, long term.
W. M. Mott, short term.

All other ballots were found by the court to be defective, and were counted for no one. There were ten ballots among those rejected by the court, which were as follows:

S. Page, long term.
W. D. Rollings.

Two were as follows:

For School Director,
Sam Page,
Will Rollings.

Seven were as follows:

Sam Page
For Director,
W. D. Rollings.

Thirty-one were as follows:

S. Page,
W. D. Rollings.

Two were as follows:

S. Page.
John Kuykendall.

And two were as follows.

For School Directors,
John Kuykendall,
W. M. Mott.

Messrs. **Graham & Tibbs,** for appellant:

Where an election was held in a school district for school director, and there were no other candidates to be voted for at said election except school director, ballots cast for candidates at said election are not void for uncertainty for the reason that they do not say for school director.

When an election is held in a school district for the election of two school directors only, and four candidates are running, and where there are two to be elected, one for the long or three-year term and one for the short or one-year term, and the ballots read "Sam Page for long term," they should be counted for Sam Page for school director for long term.

People, Aiken, v. *Mateson,* 17 Ill. 167.

Messrs. **Golden & Hamill,** for appellee:

In an election contest a ruling excluding a ballot on account of the insufficiency of the marking will not be reviewed unless the record contains the original ballot or a fac simile copy thereof, a verbal description of the same being insufficient.

Lay v. *Parsons,* 104 Cal. 661.

Where a person places more names on his ticket than there are officers to be elected, the ballot cannot be counted for any of them for that office.

6 Am. & Eng. Enc. Law, p. 345, and authorities cited notes 1, 2; *Chamberlin* v. *Hartley,* 152 Pa. 544.

A ticket cast at a town election had, under the name of the office "For assessor," the printed name of one of the candidates, and under his name was written the name of another candidate, but there was no erasure of either name. It was held that the ballot could not be counted for either candidate.

Blankinship v. *Israel,* 132 Ill. 514.

Carter, J., delivered the opinion of the court:

Of the sixty-three ballots contained in the record as having been cast at the election in question for school directors, all were rejected by the trial court in the contest proceeding but nine, and, these nine being for the contestants, the contestants were declared elected. The appeal is prosecuted by Page alone. We are therefore only to consider whether Page or Kuykendall received the greater number of votes cast for the office in question at said election; the thirty-one ballots containing nothing but the two names, thus:

S. Page.
W. D. Rollings.

—And two other, similar in form, were clearly insufficient to express the intention of the voter. Appellant contends that, as the only

office to be filled at this election was school director, it was not necessary that the office should be designated on the ballot, to make the intention of the voter clear. It is plain, however, that if this contention were conceded, notwithstanding the statute requires such designation, it is still wholly uncertain which of the two persons whose names are on the ballot the elector intended to vote for, for the long term, and which for the short term. This choice could be determined only by the voter himself, as expressed by his ballot; and, when the ballot wholly fails to express the choice, it is void and cannot be counted. *Chamberlin* v. *Hartley*, 152 Pa. 544; *Re Contested Election*, 96 Pa. 224.

There were eleven of the rejected ballots which contained the title of the office above the names, but were equally as uncertain as those above mentioned, and in the same respect. We are of the opinion that the county court did not err in refusing to count these ballots. There were, however, ten other ballots rejected by the court concerning which a more serious question arises.

Sections 52 and 53 of the statute in regard to elections are as follows:

"Sec. 52. The manner of voting shall be by ballot. The ballots shall be printed or written, or partly printed and partly written, upon plain paper, with the name of each candidate voted for, and the title of the offices. When the ballot is printed, the same shall be printed upon plain paper, in plain type, in straight lines, with a blank space below each name, of a width not less than equal to the width of the line in which the name is printed.

"Sec. 53. The names of all candidates for which the elector intends to vote shall be written or printed upon the same ballot, and the office to which he desires each to be elected shall be designated upon the ballot."

1 Starr & C. Anno. Stat. (Ill.) p. 1008.

Counsel for appellee insists that these ten ballots also are fatally defective, because the title to the office is not designated on them, and because, as they contain two names, it is impossible to ascertain the intention of the voter as to whether he intended to vote for both for the long term or not, or what his intention really was. It is plain that, where there are more offices than one to be voted for, ballots making no designation of the office will be insufficient for uncertainty; and, where there are two officers to be elected for different terms, ballots which do not designate the terms should be rejected. 6 Am. & Eng. Enc. Law, p. 345. It is, however, the general rule that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot. *Parker* v. *Orr*, 158 Ill. 609, 30 L. R. A. 227. And the circumstances surrounding the election may be considered in ascertaining the voter's intention, or to explain imperfection in the ballots. *Behrensmeyer* v *Kreitz*, 135 Ill. 59; *McKinnon* v. *People*, *Malyacher*, 110 Ill. 305. This election was only for school directors. It was ordered for that purpose alone. This is fully shown by the pleadings and the evidence, and it cannot be said, we think, that there is any uncertainty as to these ten ballots having been cast for school directors, or, at least, for a school director. Besides, it is apparent from the ballots themselves that there was an attempt on the part of the voter to comply with the statute, and to designate the office; for, after the name of S. Page, and on the same line, are written the words "long term." The only officers to be elected were two school directors, —one for the long or full term of three years, and one for the short term to fill a vacancy. Had there been no other name on these ten ballots than that of Page, we think no doubt could arise that it was the intention of the voters casting these ballots to vote for Page for the office of school director for the full term. We think, also, that there being no candidates to be voted for at this election for any office other than that of school director, the attempted and partial designation of the office on these ballots as to Page was, under the circumstances, a sufficient compliance with the statute requiring the title of the office to be written or printed on the ballot, and that the office to which the voter desires each candidate voted for to be elected shall be designated on the ballot. 6 Am. & Eng. Enc. Law, p. 344, and note 1.

It is claimed, however, that as these ten ballots also contain the name of W. D. Rollings without any designation of the office to which the voter desired him to be elected, other than that which followed the name of Page, the ballots should not, under the statute, be counted for either candidate. Section 58 of the statute provides: "If more persons are designated for any office than there are candidates to be elected, . . . such part of the ticket shall not be counted for either of the candidates." In the case of *Blankinship* v. *Israel*, 132 Ill. 514, there was but one office and one term to be filled, and two names were preceded by the words "For assessor," and this court held that the ballot should not, under the statute, be counted for either candidate. But can it be said here the ten ballots in dispute have more names designated for any office than there are candidates to be elected? The office here is that of school director. Two candidates were to be elected,—one for the long and one for the short term. It is clear these electors intended to vote for Page for the long term, and it may be and probably was intended that the one year term should apply to Rollings, but the ballots fail to make the designation. As Rollings' case is not before us, it is unnecessary to construe these ballots as to him any further than the effect they may have upon the rights of Page. It cannot be said, in view of the form of these ballots and of the fact that two officers were to be elected, that the words "long term" had the same relation to the name of Rollings as to the name of Page, as did the title "For assessor" in *Blankinship* v. *Israel*, *supra*, in respect to the two names in question in that case. In the case at bar there was simply a failure to designate any office to which these electors desired Rollings to be elected, unless, by the designation of Page for the long term, it might be implied that the voter intended to vote for Rollings for the short term, —the only remaining place to be filled; and the latter view should be adopted, rather than the one that he intended to vote for both for

the long term,—if it were necessary in the decision of the case to adopt either view. A construction will not be adopted which would deprive the elector of his vote when his ballot is equally susceptible of another construction which will give it effect. Our conclusion is that these ten ballots should have been counted for Page, and that the county court erred in rejecting them and in declaring that Kuykendall, and not Page, was entitled to the office.

Questions upon the pleadings and the procedure in the case have been discussed by counsel, but, as they would not affect the result, we have not thought it necessary to consider them. The court seems to have regarded the proceeding in some respects as a suit at law, and entered a judgment accordingly. It is sufficient to say that the practice in such cases is, to all intents and purposes, the same as in chancery, and not as in a suit at law. *Dale* v. *Irwin*, 78 Ill. 170; *Talkington* v. *Turner*, 71 Ill. 234; *Kreitz* v. *Behrensmeyer*, 125 Ill. 141. The judgment of the county court is reversed, and the cause remanded, with directions to dismiss the petition as against Page, at the cost of appellee, Kuykendall.

Reversed and remanded.

William S. EDEN, *Plff. in Err.*,
v.
PEOPLE of the State of Illinois.

(161 Ill. 296.)

1. **The common law** does not prohibit ordinary labor on Sunday.
2. **A barber is deprived of property** without due process of law by a statute making it unlawful for him to do business on Sunday while it does not apply to any other class of business.
3. **It is a judicial question** whether a trade or calling is of such a nature as to justify police regulation.
4. **The police power does not justify a statute** which makes it unlawful for barbers to do business on Sunday without interfering with any other class of business.

(May 12, 1896.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of violating a statute against keeping his barber shop open on Sunday. *Reversed.*

The facts are stated in the opinion.

Messrs. **Burnham & Baldwin,** for plaintiff in error:

Neither the common law nor any general statute of the state of Illinois prohibits the pursuit of one's ordinary labor, business, or calling in a quiet manner on Sunday.

Richmond v. *Moore*, 107 Ill. 429; *State* v. *Brooksbank*, 6 Ired. L. 73; *Sayles* v. *Smith*, 12 Wend. 57, 27 Am. Dec. 117; *Drury* v. *Defontaine*, 1 Taunt. 131; *Rex* v. *Brotherton*, 1 Strange, 702; *Comyns* v. *Boyer*, 1 Cro. Eliz. pt. 2, p. 485.

Any legislation which is not general in its scope, and which affects only one class or body of citizens, is in conflict with the spirit of this government, the Constitution of the United States, and the Constitution of the state of Illinois.

Calder v. *Bull*, 3 U. S. 3 Dall. 386, 1 L. ed. 648; U. S. Const. 14th Amend.; Ill. Const. 1870, art. 2, § 2, art. 4, § 22; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent, City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340; *People* v. *Gillson*, 109 N. Y. 389; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Johnson* v. *St. Paul & D. R. Co.* 43 Minn. 223, 8 L. R. A. 419; Cooley, Const. Lim. *393; *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Godcharles* v. *Wigeman*, 113 Pa. 431.

Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact.

Ritchie v. *People, supra; Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Toledo, W. & W. R. Co.* v. *Jacksonville*, and *People* v. *Gillson, supra; Millett* v. *People*, 117 Ill. 296, 57 Am. Rep. 869; *Calder* v. *Bull, supra; Re Jacobs*, 98 N. Y. 109, 50 Am. Rep. 636.

Messrs. **T. J. Scofield** and **M. L. Newell,** with *Mr.* **Maurice T. Moloney,** Attorney General, for defendant in error:

The law in question is general in its scope, and not subject to the objection that it is class legislation.

The offense that is punishable is the disturbance of the peace and good order of society.

Johnson v. *People*, 42 Ill. App. 597.

Sunday statutes are a proper exercise of the police power of the state, are intended for the promotion of the moral and physical well being of the people, and interfere with no vested rights.

24 Am. & Eng. Enc. Law, p. 530.

The Sunday closing laws are a proper exercise of the police power of the state, and are intended for the promotion of the moral and physical well being of the people, and interfere with no vested rights.

Lindenmuller v. *People*, 33 Barb. 576; *Ex parte Sundstrom*, 25 Tex. App. 133; *Swann* v. *Swann*, 21 Fed. Rep. 299; *Minden* v. *Silverstein*, 36 La. Ann. 912; *Charleston* v. *Benjamin*, 2 Strobh. L. 508; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145; *State* v. *Ludwig*, 21 Minn. 206; Cooley, Const. Lim. 5th ed. 726, and cases cited.

The legislature may by law establish, as a civil and political institution, the first day of the week as a day of rest, and may prohibit upon it the performance of any manner of la-

NOTE.—See *Ex parte* Jentzsch (Cal.) *post*, 664, and *footnote* thereto.

See also 31 L. R. A. 689; 32 L. R. A. 664; 34 L. R. A. 68; 41 L. R. A. 854; 45 L. R. A. 504; 46 L. R. A. 848.

bor, business, or work, except only works of necessity and charity, and may prohibit anything which tends to injure the public morals or disturb the peace and good order of the day.

State v. *Ludwig*, 21 Minn. 205; *Brimhall* v. *VanCampen*, 8 Minn. 13, 82 Am. Dec. 118; *Lindenmuller* v. *People*, 33 Barb. 548; *Specht* v. *Com.* 8 Pa. 312, 49 Am. Dec. 518; *Megowan* v. *Com.* 2 Met. 3; *Charleston* v. *Benjamin*, *supra*; *Ex parte Andrews*, 18 Cal. 679; *State* v. *Ambs*, 20 Mo. 214; *Shover* v. *State*, 10 Ark. 259; *Voglesong* v. *State*, 9 Ind. 112; 1 Dill. Mun. Corp. § 330, note 2, and authorities cited; Cooley, Const. Lim. 476, 477, 696; *Soon Hing* v. *Crowley*, *supra*.

The business of a barber, while it may disturb nobody, is not a work of necessity or charity.

Phillips v. *Innes*, 4 Clark & F. 234; *Com.* v. *Waldman*, 140 Pa. 89, 11 L. R. A. 563.

The legislature is constituted the judge and arbiter of these matters.

Ex parte Sundstrom, 25 Tex. App. 150; *Soon Hing* v. *Crowley*, *supra*; Tiedeman, Pol. Powers, 175-188, and notes; Cooley, Const. Lim. **476, 478, 588, 594; *Specht* v. *Com.* and *State* v. *Ambs*, *supra*; *Com.* v. *Dextra*, 143 Mass. 28; *Vogelsong* v. *State*, and *Shover* v. *State*, *supra*; *Bloom* v. *Richards*, 2 Ohio St. 387; *Lindenmuller* v. *People*, and *Ex parte Andrews*, *supra*; *Ex parte Burke*, 59 Cal. 6; *Ex parte Koser*, 60 Cal. 177; *Frolickstein* v. *Mobile*, 40 Ala. 725; *Bohl* v. *State*, 3 Tex. App. 683; *Albrecht* v. *State*, 8 Tex. App. 313; *Gabel* v. *Houston*, 29 Tex. 343; *Com.* v. *Collins*, 2 Cush. 556; *Sunday Law Cases*, 30 Tex. 527; 1 Bishop, Crim. L. § 26; 9 Crim. L. Mag. 130, 131, 594, 733; *Parker* v. *State*, 16 Lea, 476.

Every sovereign state possesses within itself absolute unlimited legislative power except so far as it is prohibited by the fundamental law.

Ex parte Sundstrom, 25 Tex. App. 149; Potter's Dwarr. Stat. 458, 462; Cooley, Const. Lim. 5th ed. 712, *577; Tiedeman, Pol. Powers, 1, 9.

The power of the legislature to enact Sunday laws is ample.

People, Meyer, v. *Hazelwood*, 116 Ill. 319; *People* v. *Wright*, 70 Ill. 398; *Hawthorn* v. *People*, 109 Ill. 312, 50 Am. Rep. 610; *People, Grinnell*, v. *Hoffman*, 116 Ill. 589, 56 Am. Rep. 793; *Holmes* v. *Mattoon*, 111 Ill. 27, 53 Am. Rep. 602; *Williams* v. *People*, 121 Ill. 84; *Jensen* v. *Fricke*, 133 Ill. 171; *Cummings* v. *Chicago*, 144 Ill. 563; *Ward* v. *Farwell*, 97 Ill. 593; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145.

The fact that the legislature did not include other occupations, and the reasons for not doing so, are things which cannot be inquired into by the courts.

Cooley, Const. Lim. 5th ed. 222-225; *Soon Hing* v. *Crowley*, *supra*; *Lindenmuller* v. *People*, 33 Barb. 548; *Ex parte Sundstrom*, 25 Tex. App. 133; *Holmes* v. *Mattoon*, *Williams* v. *People*, and *Jensen* v. *Fricke*, *supra*; *West Chicago Park Comrs.* v. *McMullen*, 134 Ill. 170, 10 L. R. A. 215.

The law does not take away private property.

Wynehamer v. *People*, 13 N. Y. 378; 3 Story, Const. Law, 163; *Vanderbilt* v. *Adams*, 7 Cow. 349; *People* v. *Walbridge*, 6 Cow. 512; *New York* v. *Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648.

Messrs. **S. P. Shope, Thomas H. Gault,** and **Otto C. Eigholz,** for defendant in error:

The plaintiff in error was not himself a barber but the proprietor of a great hotel, and insisted upon keeping open these shops and in effect compelling the workmen therein to perform the ordinary business upon the Sabbath.

It is idle to talk of the freedom of the employee to work for whom he pleases and to rest at his will.

Tiedeman, Pol. Powers, 182; *Ex parte Newman*, 9 Cal. 502; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Burke*, 59 Cal. 6; *Ex parte Koser*, 60 Cal. 177.

That Sunday is a day of rest and quietude of cessation from labor and to be observed as such by the public at large is as firmly engrafted upon the policy of our body politic as if it had been directly commanded by the organic law.

All experience has shown that incessant toil lessens the capacity for mental or physical labor, brings early decay and decrepitude, and retards and obstructs the growth and development of the immature. Sunday laws therefore, like all true laws, are founded upon the necessity of our common nature, the conditions of our well being, progress, and happiness.

Tiedeman, Pol. Powers, 184.

To make Sunday a day of rest it is not sufficient to interdict labor only. The means of enjoyment of the day, making it really a day of rest, are indispensable. To deny these means is to destroy the rational end and purpose of its institution.

There is nothing in Sunday laws that interferes with a natural, indefeasible, or constitutional right of all men to worship according to the dictates of their own conscience. Their command simply is that there shall be a cessation from labor upon the day.

Voglesong v. *State*, 9 Ind. 112; *Lindenmuller* v. *People*, 33 Barb. 549; *Story* v. *Elliot*, 8 Cow. 27, 18 Am. Dec. 423; *Bloom* v. *Richards*, 2 Ohio St. 387; *Specht* v. *Com.* 8 Pa. 312, 49 Am. Dec. 518.

Statutes of this character have been enacted in order that the great mass of the people might enjoy and observe the day as conscience and inclination might dictate, free from labor themselves and undisturbed by secular pursuits by others, and have been generally sustained as constitutional enactments.

Scales v. *State*, 47 Ark. 476, 58 Am. Rep. 768; *Johns* v. *State*, 78 Ind. 332, 41 Am. Rep. 577; *Com.* v. *Has*, 122 Mass. 40; *Liberman* v. *State*, 26 Neb. 464; *Frolickstein* v. *Mobile*, 40 Ala. 725; *Com.* v. *Wolf*, 3 Serg. & R. 48; *Cincinnati* v. *Rice*, 15 Ohio, 225; Cooley, Const. Lim. 725; *State* v. *Baltimore & O. R. Co.* 24 W. Va. 783.

The passage of laws intended to require the cessation of labor on Sunday is in proper cases a legitimate exercise of the police power of the state.

Tiedeman, Pol. Powers, 180; *State* v. *Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803; *McPherson* v. *Chebanse*, 114 Ill. 46, 55 Am. Rep. 857; *Richmond* v. *Moore*, 107 Ill. 429, 47 Am. Rep. 445.

The police power of a state comprises the right to preserve and promote the public health, public morals, and the public peace.

Hawthorn v. *People*, 109 Ill. 311, 50 Am. Rep. 610.

Of the policy or expediency of the law the legislature is the sole judge, and the law is valid although a certain class—barbers—have been selected upon whom it shall operate.

Cooley, Const. Lim. 6th ed. 153, 154.

The act under consideration is not void as being repugnant to any provision of the Constitution.

Unless it is clearly and irreconcilably repugnant to some provisions of the organic law it must be held to be a valid enactment and enforced by the courts.

Cooley, Const. Lim. 201, 204; *People, Bussey*, v. *Gaulter*, 149 Ill. 39; *Owners of Lands* v. *People, Stookey*, 113 Ill. 296.

The legislation is not special.

People v. *Wright*, 70 Ill. 388; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *People, Meyer*, v. *Hazelwood*, 116 Ill. 319; *Louisville, N. A. & C. R. Co.* v. *Wallace*, 136 Ill. 91, 11 L. R. A. 787; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145; *People* v. *Bellet*, 99 Mich. 152, 22 L. R. A. 696.

The legislature may deem it advisable to prescribe peculiar rules for the several occupations and to establish distinctions in the rights, obligations, duties, and capacities of citizens. If the laws be otherwise unobjectionable all that can be required in this case is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the legislature must be the judge.

Liberman v. *State*, 26 Neb. 464; *Cincinnati* v. *Rice*, 15 Ohio, 225; Tiedeman, Pol. Powers, 161; Cooley, Const. Lim. 6th ed. 584; *Vermont Loan & T. Co.* v. *Whithed*, 2 N. D. 82; *Ungericht* v. *State*, 119 Ind. 379.

Shaving, etc., of a customer is not a work of necessity.

Com. v. *Jacobus*, 1 Pa. Legal Gaz. 491, cited in 15 Cent. L. J. 148; *Ungericht* v. *State, supra*; *State* v. *Frederick*, 45 Ark. 347.

Craig, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted in the criminal court of Cook county for the violation of an act to prohibit barber shops from being kept open on Sunday, and for a violation of the law he was fined $25. The act was passed at the last session of the legislature, and contained two sections as follows:

"(Sec. 1). Be it enacted by the people of the state of Illinois, represented in the general assembly, that it shall be unlawful for any person or persons to keep open any barber shop or carry on the business of shaving, haircutting, or tonsorial work on Sunday, within this state.

"(Sec. 2). Any person by himself, agent, or employee violating the provisions of § 1 of this act shall, upon conviction thereof, be fined in any sum not exceeding two hundred ($200) dollars for each and every offense."

It is contended in the argument that by the act in question that part of the 14th Amendment to the United States Constitution (§ 1) has been violated which reads as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws." It is also contended that the act violates § 2 of art. 2 of the Illinois Constitution of 1870, *viz.*: "No person shall be deprived of life, liberty, or property without due process of law;" and also art. 4, § 22, the general clause of which reads: "In all other cases where a general law can be made applicable, no special law shall be enacted." It is conceded in the argument that if the legislature had enacted a law prohibiting all business on Sunday, its validity could not be questioned; that such a law would violate none of the constitutional provisions relied upon. The common law of England, as adopted in this state as part of our jurisprudence, does not prohibit the citizen from pursuing his ordinary labor on Sunday. Nor is a contract entered into between two parties in this state void because executed on Sunday. *Rex* v. *Brotherton*, 1 Strange, 702; *Drury* v. *Defontaine*, 1 Taunt. 131; *Sayles* v. *Smith*, 12 Wend. 57, 27 Am. Dec. 117; *Richmond* v. *Moore*, 107 Ill. 431, 47 Am. Rep. 445. On the other hand, at common law Sunday has always been regarded *dies non juridicus*,—a day upon which courts could not transact other than necessary or ministerial business. In England, however, the law which permitted the transaction of business and the pursuit of one's ordinary labor was changed by statute (29 Car. II.) which provides that "no tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any worldly business or work on the Lord's day," works of necessity and charity being excepted. This statute has substantially been adopted by the legislatures of many of the states in the Union. This state has not, however, followed the other states in the adoption of the English statute, but we have legislated on this subject for ourselves in a manner thought to be for the best interests of our people. That legislation will be found in paragraph 261 of our Criminal Code, as follows: "Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding $25. This section shall not be construed to prevent watermen and railroad companies from landing their passengers, or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever thinks proper to keep any other day as a Sabbath." The preceding paragraph (260) provides: "Sunday shall include the time from midnight to midnight." There is a wide and well-marked distinction between the English statute and ours. The English statute prohibits labor and business on Sunday, while our statute merely prohibits labor and amusement which disturbs the peace and good order of society. In *Richmond* v. *Moore, supra*, in speaking of the difference between the two statutes, it is said (p. 433): "A mere glance at that and our statute will show that they are materially different. That prohibits labor and business; ours only prohibits labor or amusement that disturbs the peace and good order of society. The offense by that statute is the per-

formance of labor or business, and by ours it is the disturbance of the peace and good order of society. The British statute is much more comprehensive in its purposes and language than ours. Ours only prohibits labor that disturbs the peace and good order of society, not naming business, whilst the British statute renders the mere act of labor or business penal."

Under the law of this state as it existed prior to the passage of the act in question, each and every citizen of the state was left perfectly free to labor and transact business on Sunday, or refrain from labor and business, as he might choose, so long as he did not disturb the peace and good order of society. By the act in question an attempt has been made by the legislature to inaugurate a radical change in the law as to a class of the laboring element of the state,—the barbers. This statute, as has been seen, declares "that it shall be unlawful for any person or persons to keep open any barber shop or carry on the business of shaving, haircutting, or tonsorial work on Sunday." That act is plain, and its meaning is obvious. The owner of a place where is carried on the barber business is prohibited from doing any business whatever during one day in the week. He may have in his employ a dozen men, and yet during one day in seven he is deprived of their labor, and also deprived of his own labor. The income derived from his place and his own labor and the labor of his employees are his property, but the legislature has by the act taken that property from him. The journeyman barber who works by the day or the week or for a share of the amount he may receive from customers for his services is by the law denied the right of laboring one day in the week. He may rely solely upon his labor for the support of himself and family, his labor may be the only property that he possesses, and yet this law takes that property away from him. His labor is his capital, and that capital is all the property he owns. Can a law which takes that from the laborer be sustained? The Constitution of the United States says the state shall not deprive any person of property without due process of law, and our state Constitution declares the same thing. What is understood by the term "due process of law" is not an open question. "Due process of law" is synonymous with "law of the land," and the "law of the land" is general public law, binding upon all the members of the community, under all circumstances; and not partial or private laws, affecting the rights of private individuals or classes of individuals." *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869. Is the act in question a law binding upon all the members of the community? A glance at its provisions affords a negative answer. The act affects one class of laborers, and one class alone. The merchant and his clerks, the restaurant keeper with his employees, the clothing-house proprietor, the blacksmith, the livery stable keeper, the owners of street-car lines, and people engaged in every other branch of business, are each and all allowed to open their respective places of business on Sunday, and transact their ordinary business if they desire, but the barber, and he alone, is required to close his place of business. The barber is thus deprived of property without due process of law, in direct violation of the Constitutions of the United States and of this state. In *Millett* v. *People*, *supra*, the validity of an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner arose, and it was held not competent for the legislature to single out owners and operators of coal mines, and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make, and that such legislation cannot be sustained as an exercise of the police power. In *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492, where the validity of an act of the legislature arose which prohibited persons engaged in mining or manufacturing from keeping stores for furnishing supplies, tools, clothing, provisions, or groceries to their employees while so engaged in mining and manufacturing, the law was held to be in conflict with the Constitution. In the decision of the case it is, among other things, said (p. 180): "The privilege or liberty to engage in or control the business of keeping and selling clothing, provisions of presumptive value, groceries, etc., to employees is one of profit,—and thus, by the effect of these sections, what the employers in other industries may do for their pecuniary gain, with impunity, and have the law to protect and enforce, the miner and manufacturer, under precisely the same circumstances and conditions are prohibited from doing for their pecuniary gain. The same act, in substance and in principle, if done by the one, is lawful; but if done by the other is not only unlawful, but a misdemeanor. . . . The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. In *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853, the case last cited was quoted with approval, and it was held that the act of 1881, which requires the owners and operators of coal mines, when the miner is paid on the basis of the amount of coal mined and delivered by him, to weigh the coal on pit cars before it is screened, and to pay on such weights, is in violation of § 2, art. 2, of the state Constitution, as depriving a class of persons of the liberty and property right of making contracts without due process of law. In *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340, the question of the validity of an act of the legislature arose which required certain specified corporations to pay their employees their wages weekly. It was held that, as the act was applicable only to certain corporations, and did not operate on all corporations for pecuniary profit, and individuals, it was unconstitutional, as depriving the corporations affected thereby of the right of liberty and property without due process of law. In speaking of the term "liberty" as used in the Constitution, it is there said (p. 70): "There can be no liberty, protected by government, that is not regulated by such laws as will pre-

serve the right of each citizen to pursue his own advancement and happiness in his own way, subject, only, to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based . . . is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." In *Ritchie* v. *People*, 155 Ill. 101, 29 L. R. A. 79, the question arose in regard to the validity of a statute which provided that no female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week, and it was held that the right to labor or employ labor and make contracts in respect thereto, upon such terms as may be agreed upon, is both a liberty and a property right, and is included in the guaranty of § 2, art. 2, of the Constitution; and that the act prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional, as being partial and discriminating in its character. In the decision of the case it is said (p. 104): "Labor is property, and the laborer has the same right to sell his labor and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer." If the legislature has no power to prohibit by law a woman from being employed in a factory or workshop more than eight hours in any one day or forty-eight hours in a week, upon what principle, it may be asked, has the legislature the right to prohibit a barber from laboring and receiving the fruits of his labor during any number of hours he may desire to work during the week? If a woman may be allowed to determine the number of hours she may work in a week, why not allow a barber the same right? Moreover, if the merchant, the grocer, the butcher, the druggist, and those engaged in other trades and callings are allowed to open their places of business and carry on their respective avocations during seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering may not do the same thing? Why should a discrimination be made against that calling and that alone? But it is said the law may be sustained under the police power of the state. In Tiedeman on Police Powers, the author (§ 85) says: "The state in the exercise of its police power, is, as a general proposition, authorized to subject all occupations to a reasonable regulation, where such regulation is required for the protection of public interests, or the public welfare. It is also conceded that there is a limit to the exercise of this power, and that it is not an unlimited arbitrary power, which would enable the legislature to prohibit a business the prosecution of which inflicts no damage upon others." The author also lays down the rule that it is within the discretion of the legislature to institute such regulations when a proper case arises; but it is a judicial question whether the trade or calling is of such a nature as to justify police regulation. In *Millett* v. *People*, *supra*, in speaking of the police power of the state as applicable to the case then before the court, it is said (p. 303): "Their requirements have no tendency to insure the personal safety of the miner, or to protect his property, or the property of others. They do not meet Dwarris' definition of 'police regulations.' They do not have reference to the comfort, the safety, or the welfare of society. (Potter's Dwarr. Stat. 458.) In *Austin* v. *Murray*, 16 Pick. 121, it was said: 'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation.' See also . . . *Watertown* v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694, and cases referred to in *Re Jacobs*, 98 N. Y. 109, 50 Am. Rep. 636." In Cooley, Const. Lim. p. 484, in speaking in reference to a regulation made for one class of citizens, it is said: "Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, . . . or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." It will not and cannot be claimed that the law in question was passed as a sanitary measure, or that it has any relation whatever to the health of society. As has been heretofore seen, as a general rule a police regulation has reference to the health, comfort, safety, and welfare of society. How, it may be asked, is the health, the comfort, safety, or welfare of society to be injuriously affected by keeping open a barber shop on Sunday? It is a matter of common observation that the barber business, as carried on in this state, is both quiet and orderly. Indeed, it is shown by the evidence incorporated in the record that the barber business, as conducted, is quiet and orderly,—much more so than may other departments of business. In view of the nature of the business and the manner in which it is carried on, it is difficult to perceive how the rights of any person can be affected, or how the comfort or welfare of society can be disturbed. If the act were one calculated to promote the health, comfort, safety, and welfare of society, then it might be regarded as an exercise of the police power of the state. In *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will, in such case, be an unauthorized exercise of power, and it would be

the duty of courts to declare such legislation void. In *Ritchie* v. *People*, *supra*, in speaking of the police power of the state, the court said (p. 110): "The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end; it cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society." We do not, therefore, think the law was authorized by the police power of the state. If the public welfare of the state demands that all business and all labor of every description except works of necessity and charity should cease on Sunday, the first day of the week, and that day shall be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day (Cooley, Const Lim. p. 725). All will be then placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor, harmless in itself, and condemn that, and that alone, it transcends its legitimate powers, and its action cannot be sustained.

Judgment will be reversed.

Wilkin, J., dissents.

CALIFORNIA SUPREME COURT.

Ex parte Leo JENTZSCH.

(.....Cal.....)

1. **A statute prohibiting barbers to carry on business after twelve o'clock** on Sunday or on a legal holiday, and applying to no other class of labor, is unconstitutional as special, unjust, and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers.

2. **A law is not general** because it operates upon all within a class unless there is a substantial reason why it is made to operate upon that class only and not generally upon all.

(April 17, 1896.)

PETITION for a writ of habeas corpus to procure petitioner's discharge from custody to which he had been committed for violating a statute prohibiting barbers from keeping their shops open during certain hours on Sunday. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. **Darwin C. Allen,** for petitioner:

The Declaration of Rights contained in our Constitution enumerates many of the most cherished ones preserved by our British ancestors in their conflicts with the claims of prerogative.

Among the retained rights is the right of freedom from servitude, imprisonment, and restraint without reason, the right to use one's faculties in all innocent and lawful ways, to live and work where he will, to enjoy the society of his family, to support his household, to nourish and educate his offspring, and to earn his livelihood in any lawful calling.

The courts should declare void any legislative enactment which, under the alleged exercise of police power, impairs or denies these and kindred rights, that bear no relation whatever to a just exercise of that power, and to the control of which no authority, except tyranny, has ever attained.

Cooley, Const. Lim. 6th ed. 481–486; Burlamaqui, chap. 3, § 15; Federalist No. 84; Kent, Com. pt. 4.

Legislation will be considered special which applies to a selected or designated class, even though it embraces the whole of the class, unless there appears some reason why its operation should or may be restricted to the selected class.

Ex parte Westerfield, 55 Cal. 550, 36 Am. Rep. 47; *Ex parte Koser*, 60 Cal. 190; *People* v. *Central P. R. Co.* 83 Cal. 410; *Pasadena* v. *Stimson*, 91 Cal. 248; *Bruch* v. *Colombet*, 104 Cal. 347; *Earle* v. *San Francisco Bd. of Edu.* 55 Cal. 489; *Miller* v. *Kister*, 68 Cal. 142.

Mr. **Henry E. Highton,** *amicus curiæ*, in support of petitioner's claim:

Among the inalienable rights belonging to men are included that of labor, which in itself is innocent, and the acquirement and use of property.

Re Parrott, 6 Sawy. 374; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *People* v. *Central P. R. Co.* 83 Cal. 393; *Dougherty* v. *Austin*, 94 Cal. 601, 16 L. R. A. 161; *Ex parte Koser*, 60 Cal. 191; *Pasadena* v. *Stimson*, 91 Cal. 238.

Mr. **H. G. W. Dinkelspiel,** for the People:

The people of this state through their legislature have declared in favor of the wisdom and policy of the law in question.

Ex parte Koser, 60 Cal. 193.

If the people now wish a change, if the public sentiment is now other than it was, there is a plain, speedy, and adequate remedy, *viz.*, by a repeal or modification of the law.

People v. *Burbank*, 12 Cal. 385; *French* v. *Teschemaker*, 24 Cal. 555.

NOTE.—Opposed to the decision in the above case is that of People v. Havnor (N. Y.) 31 L. R. A. 689, sustaining a New York statute similar to the one here condemned. On the other hand, see the Illinois decision in Eden v. People (Ill.) *ante*, 659.

For constitutionality of Sunday laws generally, see *note* to Judefind v. State (Md.) 22 L. R. A. 721.

See also 32 L. R. A. 659; 34 L. R. A. 68; 41 L. R. A. 854; 45 L. R. A. 504; 46 L. R. A. 848.

Section 310½ does not in any wise abridge any of the constitutional immunities.

Const. art. 1, § 21.

The statute operating alike upon all the persons to whom it applies, and it applying equally to all persons in the same category, is a general and not a special law.

Kumler v. *San Bernardino County Supers.* 103 Cal. 395; *People* v. *San Francisco City and County Super. Ct.* 100 Cal. 120; *McDonald* v. *Conniff*, 99 Cal. 386; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 316, 14 L. R. A. 755; *Wheeler* v. *Philadelphia*, 77 Pa. 348; *Iowa Railroad Land Co.* v. *Soper*, 39 Iowa, 112; *Re New York Elev. R. Co.* 70 N. Y. 350; *Re Church*, 92 N. Y. 1; *Ferguson* v. *Ross*, 126 N. Y. 459.

If the law operates equally upon all the objects embraced within it when they come within the circle or scope of its authority, the uniformity of operation contemplated by the Constitution is attained.

People, Daniels, v. *Henshaw*, 76 Cal. 444; *Ex parte Andrews*, 18 Cal. 680; *Brooks* v. *Hyde*, 37 Cal. 377; *Ex parte Smith*, 38 Cal. 710; *University of California* v. *Bernard*, 57 Cal. 613; *Ex parte Burke*, 59 Cal. 13; *Longan* v. *Solano County*, 65 Cal. 125; *Ex parte Lichtenstein*, 67 Cal. 360, 56 Am. Rep. 713; *Re Linehan*, 72 Cal. 116; *Thomason* v. *Ashworth*, 73 Cal. 73; *Abeel* v. *Clark*, 84 Cal. 229; *Ex parte Halsted*, 89 Cal. 472; *Cody* v. *Murphey*, Id. 524; *Ex parte Clancy*, 90 Cal. 558; *Pasadena* v. *Stimson*, 91 Cal. 249; *Darcy* v. *San José*, 104 Cal. 644; *Chicago, B. & Q. R. Co.* v. *Cutts*, 94 U. S. 155, 24 L. ed. 94; *Hymes* v. *Aydelott*, 26 Ind. 431; *Kilgore* v. *Magee*, 85 Pa. 401; *Wheeler* v. *Philadelphia*, 77 Pa. 338; *Knickerbocker* v. *People, Butz*, 102 Ill. 218.

Henshaw, J., delivered the opinion of the court:

Petitioner was convicted under section 310½ of the Penal Code, which is a new section, enacted in 1895, and which provides as follows: "Every person who as proprietor, manager, lessee, employee, or agent keeps open or conducts, or causes to be kept open or conducted, any barber shop, bath house and barber shop, barber shop of a bathing establishment, or hair-dressing establishment, or any place for shaving or hair-dressing used and conducted in connection with any other place of business or resort, or who engages at work or labor as a barber in any such shop or establishment on Sunday, or on a legal holiday, after the hour of twelve o'clock M. of said day, is guilty of a misdemeanor." It is contended that the section is in violation of the following constitutional provisions:

Article 1, § 1: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Article 1, § 21: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Article 4, § 25, subsecs, 2, 33: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Second. For the punishment of crimes and misdemeanors." "In all cases where a general law can be made applicable."

In construing so-called "Sunday Laws," courts have variously regarded them, some from a religious view, others from a secular, and still others from an anomalous commingling of both. In this state they have never been upheld from a religious standpoint. Under a Constitution which guarantees to all equal liberty of religion and conscience, any law which forbids an act not in itself *contra bonos mores*, because that act is repugnant to the beliefs of one religious sect, of necessity interferes with the liberty of those who hold to other beliefs or to none at all. Liberty of conscience and belief is preserved alike to the followers of Christ, to Buddhist, and Mohammedan, to all who think that their tenets alone are illumined by the light of divine truth; but it is equally preserved to the skeptic, agnostic, atheist, and infidel, who says in his heart, "There is no God." So it has come to be the established rule in this state to view and construe such laws as civil and secular enactments. *Ex parte Andrews*, 18 Cal. 678; *Ex parte Koser*, 60 Cal. 177. Thus construed, these laws, when decreed valid, are upheld as a proper exercise of the police power, as an exercise of the legislative prerogative to regulate the relations, contracts, intercourse, and business of society at large, and its particular members with respect to each other. Herein it is held that the legislature may pass laws for the preservation of health and the promotion of good morals,—propositions which are indisputable.

Says Mr. Justice Field in *Ex parte Newman*, 9 Cal. 521: "Labor is a necessity imposed by the condition of our race, and to protect labor is the highest office of our laws." It is this language which respondent quotes and relies upon in support of the validity of this penal statute. Upon the question thus presented of the proper limits of the police power much might be written, and much, indeed, will have to be written, ere just bounds are set to its exercise. But in this case neither time permits nor necessity demands the consideration. Still it may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but, what is the logical necessity, that we are capable, to a great extent, of individual self-government. If this conviction shall prove ill founded, we have built our house upon sand. The spirit of a system such as ours is therefore at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is twenty-four hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we

do upon the enactment of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him. So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant. We think the act under consideration gives plain evidence of such encroachment. It is sought to be upheld by the argument that it is a police regulation; that it seeks to protect labor against the oppression of capital. The people have passed the law; let not the courts interfere with it. If the people are dissatisfied, they may amend or repeal it.

It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam car and street car operatives toil through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest, and no protection for the overworked employees of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all. As was said in *Pasadena* v. *Stimson*, 91 Cal. 238: "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." And in *Darcy* v. *San José*, 104 Cal. 642: "This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation." In the case of our cities the Constitution itself decrees a classification by population, and the differing exigencies of municipal government require that laws operating upon any class should be held general; otherwise the constitutional scheme itself is overthrown. But in a law such as this no reason has been or can be shown why the followers of one useful and unobjectionable employment should be debarred from the right to labor upon certain days, and others in like classes of employment be not so debarred. If it be constitutional to single one such class, and debar its members from the right to labor on one day in the week, it would be constitutional to prohibit them from following their vocation upon six days of the week. When any one such class is singled out and put under the criminal ban of a law such as this, the law not only is special, unjust, and unreasonable in its operation, but it works an invasion of individual liberty,—the liberty of free labor, which it pretends to protect. *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47, in no wise conflicts with these views. There was an additional vice in that law. While the classification was in itself arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made. It was this ground only which was discussed, and upon which the law was overthrown. Here, however, the designated class is based upon no distinction, and, as is said by Judge Cooley: "Everyone has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law."

The prisoner is discharged.

We concur: **Beatty**, Ch. J.; **Temple**, J.; **McFarland**, J.; **Garoutte**, J.; **Harrison**, J.

Van Fleet, J., concurs in the judgment.

R. W. WIGGINS, *Appt.*,
v.
MUSCUPIABE LAND & WATER COMPANY, *Resp't.*

(.....Cal.....)

1. In the absence of the evidence it will be assumed that findings of fact by the court below were sustained by the evidence and contain all the facts which the evidence established.

2. The apportionment of the flow of a stream by periods of time rather than by a division of its quantity so that upper and lower proprietors may each have the full flow for designated periods instead of a portion of the flow all the time, which equity may order when the absorption and evaporation of the water would prevent any from reaching the lower proprietor if the flow was divided, may be valid as to water used for domestic purposes as well as that used for irrigation.

(June 5, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for San Bernardino County in favor of defendant in an action to enjoin defendant from interfering with plaintiff's water supply. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Harris & Gregg** and **Byron Waters** for appellant.

Messrs. **W. P. Gardiner, E. E. Rowell,** and **Willis, Cole, & Craig,** for appellee.

Harrison, J., delivered the opinion of the court:

The plaintiff is the owner of a rectangular tract of land, having an area of 1,000 acres, lying to the south and west of a larger tract belonging to the defendant, the Muscupiabe Land & Water Company, and through both of these tracts of land there flows a stream of water known by the name of "Devil Canyon Creek." This stream has its source in the mountains north of the defendant's tract, and flows through the canyon in a southerly direction, and thence southerly and southeasterly, through the defendant's tract of land, to the north line of the plaintiff's tract, which it crosses in a southeasterly direction, and again enters the defendant's tract. The length of its course through the defendant's land before it reaches the plaintiff's land is 15,570 feet, and its course southeasterly across the plaintiff's land is 3,200 feet in length, when it again enters the land of the defendant, through which it flows for 13,450 feet. Of the lands of the plaintiff, only the northerly 245 acres are within the watershed of this stream, and riparian thereto. With irrigation this land can be made productive, but without irrigation it is dry and practically useless. The land of the defendant, which lies to the north of the plaintiff's land, adjacent to and bordering upon the stream, is rough, rocky, sandy, and worthless, and for the first 4,000 feet south of the place where the stream enters this land is not susceptible of cultivation. Below this point, and at a short distance to the eastward of the stream, a portion of the defendant's land—about 1,200 acres in extent, lying north of a prolongation of the north line of the plaintiff's tract—is within the watershed of the stream, and if irrigated from the stream, may be made productive. In July, 1891, the defendant diverted upon this land all the waters of the stream above the plaintiff's tract, and thereupon the plaintiff commenced the present action for the damages sustained thereby and to enjoin the defendant from any further interference with the flow of the stream. The cause was tried by the court, which found, in addition to the foregoing facts, the following: "(22) The most valuable use to which the water of said stream can be put is that of irrigation. The portion thereof that would be required for domestic and culinary purposes and for watering stock would not perceptibly diminish the volume of water flowing in the stream, when there is sufficient therein to be available for irrigation. (23) The bed of said stream is sandy and porous, and the air in that locality is, during the irrigating season, dry and hot. The quantity of water usually flowing in the stream varies greatly in different years, and in different seasons of the same year, and considerably in different portions of the day, there being more flowing at night than in the daytime. The usual irrigating season lasts from June 1 to October 1. During the winter season, and when the water is not wanted for irrigation, there is more water flowing therein than is needed, or can be used, by the riparian owners. After the water enters the lands of the Muscupiabe Land & Water Company, a large portion thereof is lost by evaporation and by absorption, before it reaches the 1,000 acre tract of said Wiggins. The flow of the stream also greatly diminishes from the end of the rainy season until about August 15 of each year. (24) In a season of average rainfall, when there is no diversion of the water of said stream, the usual flow of the water therein at the point where it enters the land of said Muscupiabe Land & Water Company, and at the point where it enters the land of Wiggins, computed in miners' inches, measured under a 4-inch pressure, is as follows: 'From July 1 to July 15: At the north line of said company's land, 150 inches; at the north line of Wiggins' place, 50 inches. From July 15 to September 10: At the north line of said company's land, 100 inches; at the north line of Wiggins' place, none. From September 10 to October 1: At the north line of said company's land, 150 inches; at the north line of Wiggins' place, 50 inches. When there is no more than 100 inches at the point where said stream enters the land of said company, the same is all taken up by evaporation and absorption, so that none of it reaches the 1,000-acre tract of said Wiggins.' (25) The said Muscupiabe Land & Water Company has constructed and now maintains a dam across the said stream, and a ditch leading therefrom onto the land of the company aforesaid sufficient in size to carry all the waters of said stream. When, during the irrigating season, the water of said stream is all diverted in said ditch until the bed thereof below the said dam becomes dry, and the water is afterwards turned again down and allowed to flow in said stream uninterrupted, it requires two

NOTE.—For division of stream as between riparian owners who are on opposite sides, see *note* to Warren v. Westbrook Mfg. Co. (Me.) 26 L. R. A. 284.

See also 35 L. R. A. 388.

days' flow before any of it will reach the 1,000-acre tract of Wiggins, owing to the absorption of water by the creek bed, and the evaporation by the heat and dryness of the air, and the said stream does not attain its full flow at the north line of Wiggins' tract until about five days after it is so returned to said stream. (26) If the said stream were divided by quantity at the dam of said company, and the proper proportion in quantity which would be due to each of said riparian owners for his reasonable use thereof was allowed to flow in separate streams to each, the amount allowed to said Wiggins would be so small that none of it would ever reach his land. (27) The amount of water required to irrigate such of the lands of the said company and of said Wiggins as is properly susceptible of irrigation is the equivalent of a constant flow of 1 miner's inch, measured under a 4-inch pressure, to each 5 acres of said land. (28) Under all the circumstances and facts in this case, a reasonable and equitable division of said water between the said Muscupiabe Land & Water Company and the said Wiggins would be to allow to the said Wiggins the full flow of the stream, uninterrupted and continuous, for eight days out of each forty days, beginning April 1 of each year, upon said 1,000 acre tract, and to allow to the said Muscupiabe Land & Water Company the full flow of the stream during the remaining portion of each period of forty days: provided that when there are no more than 100 miners' inches of water, measured under a 4-inch pressure, flowing in said stream at the point where it enters the land of the said Muscupiabe Land & Water Company, the said company should be allowed to divert all the water of said stream, and to continue so to divert the same until there are more than 100 inches aforesaid flowing at said point." The conclusions of law, and the judgment thereon, follow substantially the 28th finding, and by the judgment the plaintiff is enjoined from diverting the water of the stream for use upon any portion of his 1,000-acre tract, except the northerly 245 acres thereof, and the defendant is enjoined from diverting the waters of the stream for use anywhere, except upon its land lying to the north of a line drawn in prolongation of the north boundary of the plaintiff's tract. From the judgment thus rendered the plaintiff has appealed, bringing the appeal here upon the judgment roll alone, without any bill of exceptions, and urges in support of his appeal that the findings of fact are insufficient to sustain or justify the judgment.

One of the grounds for a reversal urged by the appellant is that the judgment fails to provide for his right to use the waters of the stream for culinary or domestic purposes. The claim that this right is denied by the judgment is not sustained by the record. The judgment makes no limitation upon the use to which the water shall be applied by either of the parties, except that it shall not be used upon land which is not riparian to the stream. The principle contended for by the appellant is that the court had no authority to render a judgment by which he would be prevented from a continual flow of the stream for these purposes, and, although he has cited expressions from some opinions in support of this contention, an examination of the cases in which they occur fails to sustain the principle invoked by him. The opinion of Mr. Justice Thornton in *Stanford* v. *Felt*, 71 Cal. 253, was not concurred in by any of the other justices; and in *Alta Land & W. Co.* v. *Hancock*, 85 Cal. 219, it was held that the plaintiff had no interest in the waters of the stream, and consequently the use to which the water might be applied by either party was not before the court for consideration. By the common law a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying his natural wants for domestic uses and for cattle, and the right to its use for his artificial wants, such as pleasure grounds, manufacturing, etc.; and although, in the exercise of this right, the superior proprietor might make any reasonable use of the flow of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, he could not exercise the right for any extraordinary use that would interfere with the rights of the inferior proprietors, or interrupt the regular flow of the stream, if thereby he interfered with its lawful use by them. *Miner* v. *Gilmour*, 12 Moore, P. C. C. 156; *Wadsworth* v. *Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

The power of a court of equity to apportion the flow of water in a stream to the respective riparian owners by periods of time, rather than by a division of its quantity, so that each may have the full flow of the stream during such designated periods, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners, was fully considered and established in *Harris* v. *Harrison*, 93 Cal. 676. It was said in that case: "According to the common-law doctrine of riparian ownership as generally declared in England and in most American states, upon the facts in the case at bar the plaintiffs would be entitled to have the waters of the Harrison canyon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. And this must be taken to be the established rule in California,—at least where irrigation is thus necessary." In an arid country, water for irrigation may become a natural want of man, as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed. *Evans* v. *Merriweather*, 4 Ill. 496, 38 Am. Dec. 106. When, as in the present case, a stream, instead of increasing as it goes towards the sea, constantly diminishes, until it finally disappears, or ceases to have any appreciable volume, it is

very evident that its beneficial use can be regulated better by periods of time, rather than by a division of its quantity. A perpetual use of the water by all of the proprietors would be impracticable, for the reason that a perpetual use by the upper proprietor would, during a large portion of the year, entirely deprive the lower proprietor of any flow, and a just protection of the rights of both is best effected by its division in periods of time. In *Harris v. Harrison* the plaintiff claimed in his complaint the right to divert the waters of the stream for domestic uses as well as irrigation, but the power of the court to apportion the water for purposes of irrigation was the point chiefly presented and considered in the opinion of the court. The same principles, however, which authorize an apportionment of the flow by periods of time, for purposes of irrigation, justify such apportionment for domestic uses. The use to which different proprietors may apply the waters of the stream which flows through their lands is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land, and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights.

The evidence before the superior court has not been brought before us, and we must assume, not only that the findings of fact made by that court were sustained by the evidence, but also that the findings which were made contain all the facts which the evidence before the court authorized it to make. As the appellant must show that the court below has committed error, it was incumbent upon him, if he would controvert the correctness of its judgment by reason of its failure to make suitable provision for his domestic needs, to show that he offered evidence upon this issue, and that the court failed to give due consideration to this evidence. By invoking the aid of a court of equity to protect him in his rights, he binds himself to recognize and observe the rights which the court may determine are held by others in the same subject-matter; and, if he would question the judgment of the court upon these relative rights, he must show that he presented to the court evidence of the rights which he claims the court has failed to protect. Not only does the record fail to disclose that any evidence was offered by the appellant tending to show that he requires any water for domestic uses, but the finding of the court that his tract of land, without irrigation, is dry and practically useless, tends to destroy his claim for such uses. In the absence of the evidence, we must hold that, in its allotment of the amount of water to be given to each party, the court took into consideration all of the uses for which it was shown that the water was available,—domestic uses as well as irrigation; that it considered the rights of the respective claimants, as well in view of the purposes for which the water was required, as of the amount of water available for such purposes. The finding of the court that the only way to provide for a reasonable use of the water is to divide its flow by periods of time, as well as its finding of the specific periods which, "under all the circumstances and facts in this case," would be a reasonable and equitable division of the water, must be held to be justified by the evidence, and to provide for all the uses to which either proprietor is entitled to apply the water. It cannot be said, as a matter of law, that the inferior proprietor has a necessity for a continuous flow for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, and what is a reasonable use is a question of fact, depending upon all the circumstances appearing in each case. If neither of the proprietors has any use for the water other than for domestic purposes, a court would naturally fix the length of the periods during which each should be entitled to the flow, as well as the frequency of their recurrence, different from what it would if the waters of the stream were used for irrigation; but, whenever it should appear from the circumstances of the case that the only method by which either proprietor could have a reasonable use of the stream would be to allow to each its full flow for a reasonable time, the only equitable adjustment of their rights would be to thus apportion the flow. Whether this apportionment should be for alternate weeks, or alternate days, or for a specific portion of each day, must be determined by the facts of each case, and in the absence of the evidence of these facts the action of the trial court must be held to be correct.

The record does not disclose the amount of water flowing in the stream at any other dates than between the 1st of July and the 1st of October, or that there is at any time a flow of more than 150 inches at the point where it enters the land of the defendant; and, although it may be assumed that the loss by absorption and evaporation is greater during the summer than in the winter, the only finding upon this point is that, when there is no more than 100 inches at the point where the stream enters the land of the defendant, the same is all taken up by evaporation and absorption, so that none of it reaches the 1,000-acre tract of the plaintiff, and that in a season of average rainfall this is the actual loss between July 1 and October 1. The loss by absorption and evaporation is so great that without any consumption by the defendant for any purposes, only 50 inches would reach the land of the plaintiff at any portion of this period. How much of this 50 inches is consumed or required by the defendant for domestic purposes or natural wants is not shown, but it is consistent with the findings of the court to assume that it appeared from the evidence before it that the necessities of the superior proprietor for domestic uses were such that, by giving him the right to a continuous flow, none of the water would reach the land of the plaintiff during the irrigating season. It is very evident from the record that the cause was tried with reference to the rights of the respective parties to the water for purposes of irrigation, and that the right to the water for domestic purposes was not considered an issue in the case, or made a subject of controversy at the trial. Although, in his com-

plaint, the plaintiff alleged, in general terms, his right to the waters of the stream "for the irrigation of said land, and for culinary and domestic purposes," his specific allegations that during the irrigating season "no more water reaches his land than is required for irrigating the cultivated portion thereof," and that he has no other source of irrigating the cultivated portion of his tract than from the waters of the stream, and the further allegation that the damage which would be sustained by him in consequence of a diversion of the waters by the defendant, and for which he sought the aid of the court, was the destruction of the fruit trees and vines and alfalfa growing on the land, justify the conclusion that the right to divert the waters for irrigation was the only issue presented to the court. The finding of the court that the most valuable use to which the waters of the stream can be put is that of irrigation, and its further finding that when there is sufficient water in the stream to be available for irrigation the portion that would be required for domestic and culinary purposes would not perceptibly diminish its value, corroborate this conclusion.

It is further contended by the appellant that, inasmuch as the court finds that he has cultivated 85 acres of his irrigable land, and that the respondent has cultivated only 13 acres of its irrigable land, and, as it does not appear that the respondent intends in the future to irrigate or cultivate any greater area, the judgment should not have given the defendant the use of the greater portion of the water. The right of a riparian owner to the use of the water is not, however, measured by the amount which he actually uses, and it is not to be assumed that the same amount of land will be cultivated in every succeeding year. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation, would be properly made a controlling element in adjusting their respective rights to the flow of the stream; otherwise a readjustment would be necessary whenever either party should cultivate a greater or less area. The finding of the court that "the only method by which the plaintiff can be given the reasonable use of said stream is to divide the flow of the stream by time, and allow him full flow of the stream during such time as may be reasonable," furnishes the principle upon which this portion of the judgment rests; and the further finding that "the amount of water required to irrigate such lands of the defendant and of the plaintiff as are properly susceptible of irrigation is the equivalent of a constant flow of 1 miner's inch, measured under a 4-inch pressure, to each 5 acres of said land," gives the basis for the application of the principle in behalf of the respective parties. The judgment protects the plaintiff against any waste or unnecessary diversion by the defendant in case it shall not cultivate its land, or only a small portion thereof, by the provision that, when it shall not actually use all or any portion of said waters upon its irrigable land, the plaintiff shall be entitled to use the same.

The appellant also objects to that portion of the judgment which provides that the defendant may provide means for carrying to the north line of the plaintiff's land, without diminution, all of the waters of the stream in excess of 100 inches which shall at any time be flowing at the point where the stream enters the land of the defendant, and that, if it shall elect to do so, it shall have the right, at any of the times during which the plaintiff is by the judgment entitled to the use of the waters of the stream, to deliver said excess to the plaintiff at the northerly line of his tract, and that, if it shall so deliver said excess to the plaintiff during the time it shall make such delivery, it shall have the right to appropriate to its own use the said 100 inches. This provision in the judgment is based upon the finding that 100 inches of the water of the stream is lost by absorption and evaporation between the time that the stream enters the land of the defendant and before it reaches that of the plaintiff, and accords with the simplest principles of equity in the adjustment of the respective rights to the waters of the stream. The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream, where it enters its land, and preserve and utilize, the 100 inches, which would otherwise be lost by absorption and evaporation.

The judgment is affirmed.

We concur: **McFarland, J.**; **Garoutte, J.**; **Van Fleet, J.**; **Temple, J.**; **Henshaw, J.**

WASHINGTON SUPREME COURT.

Victor E. KROMER *et al.*, *Appts.*,
v.
Frank P. FRIDAY *et al.*, *Respts.*, and EVERETT LAND CO., Intervener, *Respt.*

(10 Wash. 621.)

1. **That persons had not been previously married** is not conclusively shown by their procuring the performance of a marriage ceremony between them.
2. **A finding of community rights in real estate,** unappealed from, whether of fact or of law, by a court having jurisdiction and all the parties before it, although erroneous, is the law of the case and conclusive upon the parties.
3. **Jurisdiction to order a partition sale of community property** is not defeated by the fact that the husband by will directs the property to be retained until his children reach majority, since his will cannot affect his wife's right to her half of the property.
4. **A partition sale cannot be attacked** otherwise than by appeal because the notice of sale was published before the decree was actually signed, if the order was made prior to the publication.
5. **Guardians of minors, and their attorneys of record in a partition suit, may rightfully admit** that the property was community property if that fact has been determined by a court having jurisdiction of the parties and subject-matter in a prior proceeding which remains unappealed from, even if the finding was erroneous.
6. **The question of title** to real estate may be tried in a partition proceeding under the Washington Code.
7. **Facts sufficient to give jurisdiction** of a partition proceeding and suit to try title are shown by allegations of the extent of plaintiff's title, of defendant's title as plaintiff understands it, and that plaintiff and defendant are tenants in common.
8. **Minor part owners of common property** properly represented in a partition suit may be effectually bound by a decree of sale for partition under the Washington Code.
9. **A patent for homestead land will not relate back** to the time of making final proof so as to cut out the rights of a woman under a marriage ceremony performed between the two dates, where long prior to final proof she has been living with the claimant as his wife.
10. **Land obtained under a homestead claim** is in effect taken by purchase within the intent of the Washington community property laws, so that the wife has community rights therein.

(*Stiles, J., dissents.*)

(January 14, 1895.)

NOTE.—*Admissions and waivers by fiduciaries in actions.*

I. *By representatives of infants.*
  a. *By pleadings.*
  b. *By consent decrees.*
  c. *By agreements.*
  d. *By omissions.*
II. *By appearance.*
  a. *By attorney.*
  b. *By guardian ad litem.*
  c. *By guardian.*
  d. *By curator ad hoc.*
III. *By trustees.*
IV. *By executors and administrators.*
V. *By curator ad hoc.*
VI. *By representatives of idiots and lunatics.*
VII. *By confession of judgment.*

The case of KROMER v. FRIDAY holds that a guardian for infants in a partition suit might admit that the property was community property and bind the infants, where such admissions were made in good faith and in no wise contravened the facts as they existed. The fact that the property was community property had been determined by a court having jurisdiction of the parties and subject-matter in the prior proceeding, which was unappealed from. It was said that it would make no difference whether it was an erroneous finding of fact or of law. Wash. Code Proc. 1881, § 558, provided that a guardian of an infant might consent to a partition without a suit. Section 596 provided for the sale of infant's land on partition, and § 561 provided that the confirmation should conclude all parties to the suit. The present suit was one to vacate and set aside a decree of sale and deed in partition, and such decree was held to be *res judicata*. (As to the power of guardians, Wash. Code Proc. 1891, § 415 (292), provided that a judgment might be entered on confession by the guardian in the case of a minor if a guardian for the action had been appointed, but this section was not referred to in the opinion.)

The decision of KROMER v. FRIDAY, while apparently exceptional, may be reconciled with other cases by the fact that the interests of the infants were declared not to have been prejudiced by the admissions.

I. *By representatives of infants.*

a. *By pleadings.*

The general rule almost without exception is that the representative of an infant has not the power to bind the minor by admissions in his pleadings. The exceptional cases are under statutes, as in Missouri and Oregon. In the latter state the statute is similar to that of Washington, as in KROMER v. FRIDAY.

So, a guardian *ad litem* has not the power in a suit to prejudice the interests of the infant, in the pleadings, by admitting the execution or consideration of notes in a suit to enforce a vendor's lien against land purchased by his ancestor. Matthews v. Dowling, 54 Ala. 202.

By admitting in a suit for divorce that the infant defendant had defrauded the plaintiff by the marriage. Cooper v. Mayhew, 40 Mich. 528.

By admissions in a suit to subject land held by the infant to a judgment against his father, and a decree without sufficient proof in such a case is erroneous. Cochran v. McDowell, 15 Ill. 10.

By an answer consenting away the rights of infants and their inheritance, and such answer cannot be used against the infant. Daingerfield v. Smith, 83 Va. 81.

By an answer in a partition suit admitting away the rights of the infants. Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

By admitting anything to sustain an action against an infant; but he may accept short notice of trial, as N. Y. Code Civ. Proc. § 1218, requiring twenty days to elapse between the appointment of a guardian and the entry of the judgment, does not apply where judgment is not taken by default. Newins v. Baird, 19 Hun, 306.

By joining with other defendants in an answer

See also 43 L. R. A. 256; 44 L. R. A. 167.

APPEAL by plaintiffs from a judgment of the Superior Court for Snohomish County dismissing the complaint in an action brought to set aside a judicial sale of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Andrew F. Burleigh, Ronald & Piles,** and **Lichtenberg, Shepard, & Lyon,** for appellants:

The infant appellants by this suit directly, not collaterally, attack the partition decree in the court that rendered it.

12 Am. & Eng. Enc. Law, p. 147 J; *Harman* v. *Moore*, 112 Ind. 221; *Dady* v. *Brown*, 76 Iowa, 528; *Dumestre's Succession*, 40 La. Ann. 571; *People* v. *Mullan*, 65 Cal. 396; *Hanson* v. *Hanson* (Cal.) 20 Pac. 736; *Great West Min. Co.* v. *Woodman of Alston Min. Co.* 12 Colo. 46.

The infant plaintiff, Victor E. Kromer, is the owner of the land in fee and in severaity, subject to a trust. He holds it by purchase, not by descent. His estate and title thereto vested in him under the will of his father and the decrees of the probate court.

The infant's rights are those of a purchaser —not of an heir. As he holds the land under a will, it is a deed and conveyance.

2 Bl. Com. *201, 241, 287, 372, 378; 1 Warvelle, Vendors, § 3; 4 Kent, Com. 13th ed. 574, *501, 402, *373.

The decree of the probate court, September, 1885, admitting the will to probate, and recorded in the auditor's office as required by § 1359, Code 1881, makes the will itself a disposition of the interest and estate, and the probate of the will vests the title in him.

Brown, Jur. § 59*a*, p. 169; Black, Judgm. §§ 635, 636, 638; *Lyon* v. *Gleason*, 40 Minn. 434; *Bleidorn* v. *Pilot Mountain Coal & M. Co.* 89 Tenn. 166; *Clow* v. *Plummer*, 85 Mich. 550; *Roach* v. *Martin*, 1 Harr. (Del.) 548, 27 Am. Dec. 746; *Dublin* v. *Chadbourn*, 16 Mass. 442; *Woodruff* v. *Taylor*, 20 Vt. 65; *Windsor* v. *McVeigh*, 93 U. S. 279, 23 L. ed. 916; *Gaines* v. *New Orleans*, 73 U. S. 6 Wall. 642, 18 L.ed. 950; *Tarver* v. *Tarver*, 34 U. S. 9 Pet. 174, 9 L. ed. 91; *Bent* v. *Thompson*, 138 U. S. 114, 34 L. ed. 902; *Hanford* v. *Davies*, 1 Wash. 480; *Balch* v. *Smith*, 4 Wash. 497; *Lawrence* v. *Bellingham Bay & B. C. R. Co.* Id. 664; *Dunn* v. *Peterson*, Id. 170; *Newport* v. *Newport*, 5 Wash. 114.

In the nature of proceedings *in rem* are the decree probating the will and the decree of distribution.

1 Greenl. Ev. 14th ed. §§ 543, 550; Black, Judgm. §§ 635, 636, 638; Brown, Jur. § 58; *Exton* v. *Zule*, 14 N. J. Eq. 509; *Kearney* v. *Kearney*, 72 Cal. 591; *Woodruff* v. *Taylor*, *supra*.

Mrs. Kromer and all claiming under her are bound by each of these decrees, not having either contested within one year the validity of the will or appealed from the decrees.

Code 1881, §§ 1360–1365, 1678, 1679.

Each of these decrees, though erroneous,

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which makes improper admissions. Wood v. Truax, 39 Mich. 628.

By admissions in an answer in a suit to set aside a patent to the ancestor of the infants, as Mansf. (Ark.) Dig. § 4957, provides that no judgment can be rendered against an infant until after a defense by a guardian, and § 5042 provides that it shall be the duty of a guardian of an infant to file an answer denying the material allegations of the complaint prejudicial to such defendant. Driver v. Evans, 47 Ark. 297.

By his concessions, as Gantt's (Ark.) Dig. § 4578, provides that he shall deny every material allegation prejudicial to the infant. Pillow v. Sentelle, 39 Ark. 61.

By adopting an answer made by the infant's ancestor while living, which does not put in issue every material fact, as Gantt's (Ark.) Dig. §§ 4578, 4595, provided that the guardian *ad litem* can admit nothing in his answer, the burden of proof of which would otherwise be on the plaintiff or complainant. He must put in issue every material fact. Evans v. Davies, 39 Ark. 235.

So, a guardian cannot prejudice the interests of his ward by adopting an answer filed by an administrator *de bonis non*, denying nothing of his own motion. A guardian of an infant should put in issue and require proof of every material allegation of a complaint prejudicial to the infant, whether it be true or not. He can make no concession on his own knowledge. Pinchback v. Graves, 42 Ark. 222.

Nor can he do so by an answer admitting a parol contract for a conveyance of land to have been made by the ancestor. Or by an agreement of his solicitor that the case may be heard on bill and answer. Prutzman v. Pitesell, 3 Harr. & J. 77.

The effect of admissions is controlled by the same principles as the power to admit, and the minor is not bound by admissions in pleadings made by his representative, which are prejudicial to the interests of the infant.

So, a guardian *ad litem* did not bind the infant where the answer affected the infant's rights by admitting the truth of the charges made in the bill. McClay v. Norris, 9 Ill. 370; James v. James, 4 Paige, 115; Crain v. Parker, 1 Ind. 374; Taylor v. Parker, Smith (Ind.) 225; Thayer v. Lane, Walk. Ch. (Mich.) 200; Reavis v. Fielden, 18 Ill. 77; Stinson v. Pickering, 70 Me. 273; Hough v. Canby, 8 Blackf. 301; Thompson v. Doe, Hare, Id. 336; Hough v. Doyle, Id. 300.

And where the answer was "that he admits the allegations of complainants' bill so far as he knows, but that he knows nothing of his own knowledge," as this did not entitle complainant to a decree against the infant without proof. Ingersoll v. Ingersoll, 42 Miss. 155.

And where the answer denied generally such of the allegations as it might be important to controvert, and submitted the rights of the minor to the court, as this amounted to no answer at all and was useless. The guardian *ad litem* must make a full defense, without regard to the truth of the denials, as to anything which may be prejudicial to the minor. Varner v. Rice, 44 Ark. 236.

And where the answer admitted the existence of a debt of the ancestor, no personalty, and that a sale previously made to pay debts was a judicious one, and ratified it. Crabtree v. Niblett, 11 Humph. 488.

And where the answer admitted that the infant's ancestor owed a debt in controversy. Such answer cannot be read in evidence for any purpose. Bank of Alexandria v. Patton, 1 Rob. (Va.) 499.

And where the answer made admissions prejudicial to the interests of the infants. The case must be referred to the master for proof. Eaton v. Tillinghast, 4 R. I. 276.

And where the answer admitted that the assets of an estate were insufficient to pay the debts, and that the debts were due. Satisfactory proof should have been required to prove these facts before directing a sale of land to pay debts, where the infants were interested. Bank of United States v. Ritchie, 33 U. S. 8 Pet. 128, 8 L. ed. 890.

though wrong, aye, though procured by fraud, until reversed by the probate court itself, or an appellate court on a direct appeal from or contest of such decree, as provided for by statute, is binding and conclusive on Mrs. Kromer.

Re Garraud's Estate, 36 Cal. 277; *Freeman* v. *Rahm*, 58 Cal. 111; *Woodruff* v. *Taylor*, *Windsor* v. *McVeigh*, *Gaines* v. *New Orleans*, *Tarver* v. *Tarver*, and *Rent* v. *Thompson*, *supra*; *State* v. *McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Kieley* v. *McGlynn*, 88 U. S. 21 Wall. 503, 22 L. ed. 599; *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524.

The decree of partition rendered by the superior court of Snohomish county, July 7, 1890, is void.

The court had no jurisdiction, because: (1) The statute was not complied with (a) in the sale and confirmation thereof.

The sale was not advertised for four weeks. Code 1881, § 359; *Sadler* v. *Niesz*, 5 Wash. 182; *Broder* v. *Conkling*, 98 Cal. 360.

(b) In the partition suit in either complaint, answer, or proof of title.

The interest and title thereof were not fully set forth in the complaint.

Prichard v. *Littlejohn*, 128 Ill. 123; *Miller* v. *Sharp*, 48 Cal. 394; *Morenhout* v. *Higuera*, 32 Cal. 290; *Van Cortlandt* v. *Beekman*, 6 Paige, 492; *Ramsay* v. *Bell*, 3 Ired. Eq. 209, 42 Am. Dec. 163; *Young* v. *Pickens*, 49 Ind. 23; *Savery* v. *Taylor*, 102 Mass. 509; *Hughes* v. *Devlin*, 23 Cal. 507; *Rinehart* v. *Lugo*, 75 Cal. 639; *Hamilton* v. *Morris*, 7 Paige, 39; *Mills* v. *Miller*, 2 Neb. 314; *Harman* v. *Kelley*, 14 Ohio, 502, 45 Am. Dec. 552.

These statutory provisions must be complied with because the partition statute, as far as it affects the title, is derogatory of the common law.

Elwood v. *Northrup*, 106 N. Y. 172; *Atkins* v. *Kinnan*, 20 Wend. 241, 32 Am. Dec. 534; *Battell* v. *Torrey*, 65 N. Y. 294.

At common law title was not passed upon.

Cook v. *Allen*, 2 Mass. 462; *Pierce* v. *Oliver*, 13 Mass. 212; *Nicely* v. *Boyles*, 4 Humph. 177, 40 Am. Dec. 638; *Nash* v. *Cutler*, 16 Pick. 500; *Goundie* v. *Northampton Water Co.* 7 Pa. 238; *McClure* v. *McClure*, 14 Pa. 137; *Brock* v. *Eastman*, 28 Vt. 658, 67 Am. Dec. 733; *Louvalle* v. *Menard*, 6 Ill. 39, 41 Am. Dec. 161; *McBain* v. *McBain*, 15 Ohio St. 337, 86 Am. Dec. 481; *Tubler* v. *Wiseman*, 2 Ohio St. 211; *Grice* v. *Randall*, 23 Vt. 239; *Small's Appeal*, 23 W. N. C. 20; *Davis* v. *Agnew*, 67 Tex. 206.

Therefore, when partition statutes enlarge the proceedings from a mere possessory action, by allowing the title also to be put in issue, the court determines the title as well as severs the unity of possession.

Clapp v. *Bromagham*, 9 Cow. 569; *Hart* v. *Steedman*, 98 Mo. 402; *Green* v. *Walker*, 99 Mo. 68; *Bollo* v. *Navarro*, 33 Cal. 465; *Godfrey* v. *Godfrey*, 17 Ind. 6,79 Am. Dec. 448; *De Uprey* v. *De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Whit-*

The admission by a guardian *ad litem* and by an administrator in their answer in a former suit, that the complainants in the present suit were heirs and distributees of an estate, cannot be used against the infants to support a decree in the latter suit. Finn v. Hempstead, 24 Ark. 111.

So, a guardian could not bind an infant where a disclaimer of title was filed, in a suit to quiet title, as this was of no effect in the absence of evidence that the interests of the infants were not prejudiced. Isert v. Davis, 17 Ky. L. Rep. 686.

And where the answer to a bill in chancery against the ward was offered in evidence in a court of law in an ejectment case, as the infant was not concluded by the admissions. Eggleston v. Speke, 3 Mod. 258.

And where the answer for infants was that they have no knowledge of the facts charged in the bill, and submit to such decree as may be consistent in equity, as this did not dispense with proof. Stewart v. Duvall, 7 Gill & J. 180.

And where the answer of an infant by his guardian was offered in evidence against the infant. Benson v. Wright, 4 Md. Ch. 278.

And where the admission was in a cross bill filed by a guardian. Moore v. Woodall, 40 Ark. 42.

Infants cannot be prejudiced by misstatements or omissions of their guardian in his answer. Lenox v. Notrebe, 1 Hempst. 251.

And admissions made in a petition filed by a guardian *ad litem* claiming a surplus fund for infants, in an action by a judgment creditor claiming a lien on the fund, were not binding against the interests of the infants. Smith v. Smith, 13 Mich. 258.

The court of equity refused to allow infants to maintain a suit by next friend to avoid a deed of trust made by their father on the ground of usury, as this would require payment of the principal and be prejudicial to their interests; and the infants have a remedy by an action to recover the land. Salter v. Embrey (Miss.) 18 So. 373.

A judgment against a minor was not sustained on an *ex parte* affidavit of his tutor, admitting the essential facts of the case. Aiken v. Gatlin, 48 La. Ann. 877.

And a declaration in an affidavit by a tutor as to the time when an indebtedness began, made for the purpose of having a mortgage in favor of the minor recorded, was not conclusive on the minor. Neal v. Lapleine, 48 La. Ann. 424.

And the answer of the administrators that the averments of the bill are true, in a suit against administrators and heirs to enforce a vendor's lien, did not conclude the infants. McIlvoy v. Alsop, 45 Miss. 374.

And an answer of an infant admitting facts in a suit by an assignee of an insolvent against the infant, attacking a conveyance in trust for the infant as fraudulent, could not be read as evidence against such infant. Holden v. Hearn, 1 Beav. 445.

In Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638, it was said that the court will not suffer a minor to be prejudiced either by the admissions of his guardian *ad litem* or by his laches.

In Berrett v. Oliver, 7 Gill & J. 191, and Cavender v. Smith, 5 Iowa, 187, it was said that it is the duty of a court of equity to see that the rights of the infants are not prejudiced or abandoned by the answers of their guardians.

In Chaffin v. Kimball, 23 Ill. 36, and Walton v. Coulson, 1 McLean, 120, it was said that the answer of a guardian *ad litem* admitting the truth of the charges in the bill could not affect the infant's rights.

In Tucker v. Bean, 65 Me. 352, it was said that a guardian *ad litem* cannot bind the rights of an infant, by consent, and the answer of a guardian that he knows nothing of the matter, leaving the plaintiff to prove his case if he can, is not sufficient.

In Quigley v. Roberts, 44 Ill. 504, it was said that a guardian cannot admit the allegations of a bill so as to bind the infant.

In Price v. Crone, 44 Miss. 571, it was said that

temore v. *Shaw*, 8 N. H. 397; *Forder* v. *Davis*, 38 Mo. 115; *Martin* v. *Walker*, 58 Cal. 590; *Hancock* v. *Lopez*, 53 Cal. 370.

It can only be a real action as a result of the statute, and is such when the title is put in issue; then and only then the judgment may be conclusive.

Nicely v. *Boyles*, *supra*; *Millikan* v. *Patterson*, 91 Ind. 515; *L'Hommedieu* v. *Cincinnati*, *W. & M. R. Co.* 120 Ind. 435.

And doubly necessary when the real object sought by the partition proceeding is not a partition but a sale.

Vesper v. *Farnsworth*, 40 Wis. 357; *Smith* v. *Smith*, 10 Paige, 470.

In a real action, that is to say when the title is at issue, a trial and adjudication, besides severing the unity of possession, passes on the validity of the title, but no new title is thereby created.

Hart v. *Steedman*, *Martin* v. *Walker*, and *Hancock* v. *Lopez*, *supra*; *Grigsby* v. *Peak*, 68 Tex. 235; *Davis* v. *Agnew*, 67 Tex. 206; *Van Schuyver* v. *Mulford*, 59 N. Y. 426.

(2) The partition complaint on its face showed that Friday was not a tenant in common.

The court has no jurisdiction to partition land unless it is held in cotenancy.

Freem. Cotenancy & Partition, §§ 431, 469; Code 1881, § 552; *Stevens* v. *Enders*, 13 N. J. L. 271; *Young* v. *Rathbone*, 16 N. J. Eq. 224, 84 Am. Dec. 151; *Eberstein* v. *Oswalt*, 47 Mich. 254; *Withers* v. *Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

(3) The land was subject to a precatory trust by force of the directions for the benefit of the testator's widow and daughters.

Lewin, Tr. *132; Flint, Trustees, §§ 52, 56, 152; 2 Woerner, American Law of Administration pp. 874, 875, 877; Schouler, Wills, §§ 595–597; *Warner* v. *Bates*, 98 Mass. 274; *Knox* v. *Knox*, 59 Wis. 172, 48 Am. Rep. 487; *Cummings* v. *Corey*, 58 Mich. 494; *Colton* v. *Colton*, 127 U. S. 300, 32 L. ed. 138; *Boyle* v. *Boyle*, 152 Pa. 108 (1893); *Lucas* v. *Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766; *Harrison* v. *Harrison*, 2 Gratt. 1, 44 Am. Dec. 365; *Murphy* v. *Carlin*, 113 Mo. 112.

The land being held subject to such trust, it could not be partitioned.

Freem. Cotenancy & Partition, 581, § 439; *Outcalt* v. *Appleby*, 36 N. J. Eq. 73; *Gerard* v. *Buckley*, 137 Mass. 475; *Cubbage* v. *Franklin*, 62 Mo. 364; *Springer* v. *Savage*, 143 Ill. 301.

Fraud upon the court in obtaining the partition decree avoided it.

By omitting the terms of the will and the decrees of the probate court, Friday concealed material and important facts from the court. By alleging the respective interest of all these minors contrary to the terms of the will, Friday misrepresented vital facts. This concealment, this misrepresentation, was fraud.

2 Pom. Eq. Jur. 1st ed. 919; *Richmond* v.

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the answer of an infant cannot be excepted to for insufficiency, nor can any admission made by him be binding. The rights of an infant will not be permitted by the court to be prejudiced by any omission of the guardian *ad litem*.

In Reddick v. State Bank, 27 Ill. 148, it was said that no confession by the guardian of an infant could bind him.

In Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291, it was said that an infant is not bound by the admissions of her guardian *ad litem*.

In Ashford v. Patton, 70 Ala. 479, where the guardian *ad litem* answered that he believed the facts set forth in the several paragraphs of said bill were true, it was said that if, in dereliction of duty, the guardian should file an answer admitting the allegations of the bill, every material fact must be proved.

In Sconce v. Whitney, 12 Ill. 150, it was said that it is the duty of the court to exact of the guardian a vigorous defense of the infant's interests.

In Hiatt v. Brooks, 11 Ind. 508, it was said that an answer of a guardian would not be evidence against the heirs in a suit by them against an administrator to recover for misapplication of effects.

In Enos v. Capps, 12 Ill. 255, it was said that an answer of a guardian *ad litem* admitting the allegations of a bill to be true would not dispense with the necessity of proof.

In Leving v. Lady Caverly, Prec. in Ch. 229, an answer of a superannuated defendant, put in by his guardian, was allowed to be read in evidence against him, differing from the case of an infant because the infant mends and is to have a day to show cause after he becomes of age, but the other grows worse and is to have no day.

Where the answer of the guardian admitted facts prejudicial to the infants, and it was claimed that the case was heard on the answer without testimony, the presumption was that there was evidence, either in the exhibits or otherwise, to warrant the court in finding that all the allegations of the petition were true. Rankin v. Kemp, 21 Ohio St. 651.

In Mills v. Dennis, 3 Johns. Ch. 367, where an order of reference was made to the master for an order of sale of an infant's property to be reinvested and to pay the debts, it was said that the plaintiff must also prove his debt before the master, in the same manner as if nothing had been admitted by the answer.

In Lloyd v. Kirkwood, 112 Ill. 329, it was said that if the infant is defending and his guardian has failed to file some pleading essential to the admission of his defense, or has filed one so imperfect as not to be sufficient for that purpose, it is the duty of the court, whenever the fact is disclosed, to see that the proper pleading is filed.

In Freeman v. Russell, 40 Ark. 56, it was said that the guardian *ad litem* must put in an answer denying all material allegations of the bill.

In Thompson v. Doe, Hare, 8 Blackf. 336, where the guardian *ad litem* filed an answer admitting the allegations of the petition, the order of sale was erroneous but not a nullity, and the purchase was valid.

In Greenman v. Harvey, 53 Ill. 386, it was said that a guardian cannot confess a bill against his ward.

In Stephenson v. Stephenson, 6 Paige, 353, it was said that a guardian *ad litem* could not put in an answer which could be used as evidence either for or against the infant.

In Rhoads v. Rhoads, 43 Ill. 239, it was said that nothing can be admitted, but everything must be proved against an infant.

In Wells v. Smith, 44 Miss. 296, it was said the minor is incapable of making admissions or waiving her rights.

But in English v. Savage, 5 Or. 518, the admissions of the guardian *ad litem* in his answer, to the effect that the guardian had given bond sufficient to entitle him to a sale of the minor's property, bound the infant in a subsequent suit to set aside a sale, as a judgment against an infant was only

Tayleur, 1 P. Wms. 734; *Barnesly* v. *Powel*, 1 Ves. Sr. 119; *Adair* v. *Cummin*, 48 Mich. 375; *Kennedy* v. *Daly*, 1 Sch. & Lef. 375; *Wright* v. *Miller*, 1 Sandf. Ch. 103; *Pitcher* v. *Carter*, 4 Sandf. Ch. 1; *Long* v. *Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638; *Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 449; *Michigan* v. *Phœnix Bank*, 33 N. Y. 9; *Dobson* v. *Pearce*, 12 N. Y. 164, 62 Am. Dec. 152; *Reigal* v. *Wood*, 1 Johns. Ch. 402; *Lockwood* v. *Mitchell*, 19 Ohio, 448, 53 Am. Dec. 438; *Lockhart* v. *John*, 7 Pa. 139; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 32 L. ed. 630; *Mitchell* v. *Kintzer*, 5 Pa. 216, 47 Am. Dec. 408; 1 Story, Eq. Jur. 200, § 186; *DeLouis* v. *Meek*, 2 G. Greene, 55, 50 Am. Dec. 501.

A guardian *ad litem* could not consent away an infant's rights.

Daingerfield v. *Smith*, 83 Va. 81; *Bank of United States* v. *Ritchie*, 33 U. S. 8 Pet. 128, 8 L. ed. 890; *Thayer* v. *Lane*, 1 Walk. Ch. (Mich.) 202; *McIlvoy* v. *Alsop*, 45 Miss. 374; *Curtis* v. *Ballagh*, 4 Edw. Ch. 635; *Loomer* v. *Wheelwright*, 3 Sandf. Ch. 135; *James* v. *James*, 4 Paige, 115; *Price* v. *Crone*, 44 Miss. 571; *Tucker* v. *Bean*, 65 Me. 352; *Fischer* v. *Fischer*, 54 Ill. 231; *Eaton* v. *Tillinghast*, 4 R. I. 276; *Johnson* v. *McCabe*, 42 Miss. 259; 1 Dan. Ch. Pr. 169, *Infants*, note; *Mills* v. *Dennis*, 3 Johns. Ch. 367; *Walton* v. *Coulson*, 1 McLean, 120; *Chaffin* v. *Kimball*, 23 Ill. 33; *Wells* v. *Smith*, 44 Miss. 296; *Bennett* v. *Bradford*, 132 Ill. 269; *State*, *Luck*, v. *Atkins*, 53 Ark. 303; *Ingersoll* v. *Ingersoll*, 42 Miss. 155; *Quigley* v. *Roberts*, 44 Ill. 304; *Claxton* v. *Claxton*, 56 Mich. 557; *Long* v. *Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638; *Pitcher* v. *Carter*, 4 Sandf. Ch. 1; *Hill* v. *Young*, 7 Wash. 33.

This admission by the guardian was a fraud, even though his motive were pure and honest, though no wrong were intended by him.

Adair v. *Cummin*, 48 Mich. 380; *Rae* v. *Missouri*, 84 U. S. 17 Wall. 532, 21 L. ed. 707; *Humes* v. *Scruggs*, 94 U. S. 22, 24 L. ed. 51; *Converse* v. *Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Loomer* v. *Wheelwright*, 3 Sandf. Ch. 154; Adams, Eq. *420; *Pitcher* v. *Carter*, 4 Sandf. Ch. 1, 18; *Kennedy* v. *Daly*, 1 Sch. & Lef. 375; *Wright* v. *Miller*, 1 Sandf. Ch. 103; *Ralston* v. *Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Curtis* v. *Ballagh*, 4 Edw. Ch. 635; *Lockwood* v. *Mitchell*, 19 Ohio, 448, 53 Am. Dec. 438; *Mills* v. *Dennis*, and *Long* v. *Mulford*, *supra*; *Prince* v. *Clark*, 81 Mich. 167.

The decree of partition being obtained by fraud, either actual by reason of plaintiff's acts or constructive by reason of the guardian's acts, or by both, is void.

Merklein v. *Trapnell*, 34 Pa. 42, 75 Am. Dec. 634; *Lockhart* v. *John*, 7 Pa. 137; *Mitchell* v. *Kintzer*, 5 Pa. 216, 47 Am. Dec. 408; *Winn* v. *Dickson*, 15 La. Ann. 273; *Stunz* v. *Stunz*, 131 Ill. 210; *Oliver* v. *Montgomery*, 39 Iowa, 601; *Young* v. *Tucker*, Id. 596; *Daleschal* v. *Geiser*, 36 Kan. 374; *Tucker* v. *Whittlesey*, 74 Wis. 74; *DeLouis* v. *Meek*, 2 G. Greene, 55, 50

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voidable on the same grounds as might be used by an adult. Besides, under the provisions of Or. Code, p. 156, the doctrine of "parol demurrer" was not recognized in this state, and under Or. Code, §§ 248 and 251, a guardian *ad litem* had full power to bind an infant defendant by admissions, even to confessions of a judgment. (This section only provides for confession of judgment.)

In Collins v. Trotter, 81 Mo. 275, where the answer of the guardian of mutes (defendants) admitted the signing of the note sued upon, but claimed they were of unsound mind, it was held that Mo. Rev. Stat. 1879, § 3653, providing that the execution of the note sued upon is admitted by failure to deny the same under oath, does not apply to persons of unsound mind, and the guardian can admit nothing in his answer that will bind the infant. But the failure to object to the introduction of the note in evidence is an admission that binds the ward, as Mo. Rev. Stat. §§ 5795, 5804, providing that the guardian shall give bond and prosecute and defend all actions, place the guardian in such a position that his admission will bind the same as if acting in his own right.

See *infra*, VI. for persons of unsound mind.

As to admission, see Johnson v. McCabe, 42 Miss. 255, *infra*, I. b.

By guardian *ad litem*, see Guy v. Pierson, 21 Ind. 18, *infra*, II. b.

b. *By consent decrees.*

The power of representatives of minors to bind them by consent judgments or decrees has been denied where the interests of the infant were prejudiced.

So, the power to bind an infant and prejudice his rights was denied where a guardian *pro forma* for an infant plaintiff and heir, in a suit for specific performance of a contract to convey land, consented that a decree be made conveying the land to another party. A court of chancery will not permit the rights of an infant to be sacrificed though the consent of a guardian be given. Walton v. Coulson, 1 McLean, 120.

And where an order was made directing that funds be paid to solicitors of general guardians out of a surplus in a foreclosure sale. General guardians do not represent infants for any purpose in such a litigation as this, and, whether proper parties at all or not, their solicitors are not authorized to act so as to bind the rights of the infant. Guardians *ad litem* are appointed for this purpose, but they cannot bind the infants except in strict accordance with the rule framed for their protection. By chancery rule 94 no money can be turned over to the general guardian without taking new security, unless a showing is first made that the security is adequate. Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

And where a statutory guardian of minors consented to a decree, as Fla. Code, § 1783, provided that a guardian could not borrow money and bind his ward, or by any contract bind his ward's property or create a lien thereon. Braswell v. Downs, 11 Fla. 62.

And where the attorney for a guardian *ad litem* consented that a judgment might be taken against the infant defendant. Litchfield v. Burwell, 5 How. Pr. 341.

And where the attorney for infants consented to a decree. Bennett v. Bradford, 132 Ill. 269.

And where the attorney for infant plaintiffs agreed to a dismissal of the suit. This did not affect the infants or estop them from afterwards suing upon the same cause of action. A next friend can only claim and pursue the rights of a minor, and is powerless to yield or cede them to others, and the same is true of their attorney. Chicago, R. I. & P. R. Co. v. Kennedy, 70 Ill. 350.

And where a guardian *ad litem* withdrew his answer pleading nonassumpsit and infancy, and agreed to a judgment by default against the infant. Peak v. Pricer, 21 Ill. 164.

And where a guardian *ad litem* of an infant plaintiff of his own motion made an absolute settlement

Am. Dec. 491; *Adair* v. *Cummin*, 48 Mich. 375; *Greene* v. *Greene*, 2 Gray, 366, 61 Am. Dec. 454; *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929; *Moffat* v. *United States*, 112 U. S. 24, 28 L. ed. 623.

Under the law of notice, applied to the records and proceedings, also to the conduct and acts of the parties, the defendants and intervener acquired no estate or title in and to the land, but the same remains vested in the infant plaintiff as sole owner.

Marston v. *Humes*, 3 Wash. 267; 1 Dan. Ch. Pr. 154; 3 Bl. Com. 300; *Joyce* v. *McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Plasket* v. *Beeby*, 4 East, 491; *Harris* v. *Youman*, Hoffm. Ch. 178; *Dow* v. *Jewell*, 21 N. H. 470; *Price* v. *Carver*, 3 Myl. & C. 157; *Mills* v. *Dennis*, 3 Johns. Ch. 367; *Coffin* v. *Heath*, 6 Met. 76; *Carey* v. *Kemper*, 45 Ohio St. 93; *Weeks* v. *Weeks*, 106 N. Y. 626; *Lord* v. *Merony*, 79 N. C. 14; *Hale* v. *Clauson*, 60 N. Y. 339; 2 Pom. Eq. Jur. 1st ed. §§ 604, 644, 646, 647, 649, 655, 658, 664; *Howard* v. *Kopperl* (Tex.) 5 S. W. 627; *Baker* v. *Bliss*, 39 N. Y. 70; *Parker* v. *Conner*, 93 N. Y. 124, 45 Am. Rep. 178; *Bennett* v. *Buchan*, 76 N. Y. 390; *Evans* v. *Templeton*, 69 Tex. 375.

The law required each and all of these defendants to examine each and every muniment of title, deed, or instrument forming an essential link in the chain of instruments through which they derived title.

Acer v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Nelson* v. *Allen*, 1 Yerg. 361; 2 Pom. Eq. Jur. 1st ed. §§ 626–628, 630; *Stewart* v. *Matheny*, 66 Miss. 21; *Cambridge Valley Bank* v. *Delano*, 48 N. Y. 326; *Price* v. *McDonald*, 1 Md. 403, 54 Am. Dec. 657; *McPherson* v. *Rollins*, 107 N. Y. 316; *Knapp* v. *Bailey*, 79 Me. 195; *Arnold* v. *Hagerman*, 45 N. J. Eq. 186; *Lang Syne Gold Min. Co.* v. *Ross*, 20 Nev. 127; *Hume* v. *Franzen*, 73 Iowa, 25; *Cordova* v *Hood*, 84 U. S. 17 Wall. 1, 21 L. ed. 587; *Clark* v. *Holland*, 72 Iowa, 34; *Anthony* v. *Wheeler*, 130 Ill. 128; *Roll* v. *Rea*, 50 N. J. L. 264.

The partition decree is one step and link in the chain of defendant's title.

Dumestre's Succession, 40 La. Ann. 571, Affirmed 42 La. Ann. 415; *Galatian* v. *Erwin*, Hopk. Ch. 48; *Mitchell* v. *Kintzer*, 5 Pa. 216, 47 Am. Dec. 408; *Long* v. *Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638.

It was absolutely incumbent on Friday and each of these defendants to make this examination of their title.

2 Pom. Eq. Jur. 1st ed. §§ 604, 605, 607, 610; *Hamilton* v. *Nutt*, 34 Conn. 510; *Martin* v. *Nash*, 31 Miss. 324; *Cambridge Valley Bank* v. *Delano*, 48 N. Y. 336; *McPherson* v. *Rollins*, 107 N. Y. 316; *Deason* v. *Taylor*, 53 Miss. 697; 2 Pom. Eq. Jur. 1st ed. § 607, p. 44, note 1; *Singer* v. *Sheible*, 109 Ind. 575.

In addition to this examination of each muniment of title being required of him, Friday's quitclaim deed reciting that the interest con-

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of the whole matter in controversy. The authority conferred upon him is to prosecute, and not to settle. Edsall v. Vandemark, 39 Barb. 598.

And where a guardian *ad litem* stipulated that "a final decree should be entered in the cause for the plaintiff upon the trial and evidence adduced in the other cause tried by the court, in which a decree was entered for plaintiff, the evidence and points of controversy upon the title being substantially similar,"—it was said a guardian *ad litem* has but one duty, and that is to defend the action. It is unnecessary to say that when there are several actions pending between the same parties, involving precisely the same fact, the guardian may not agree to submit the whole upon the single examination of witnesses, or, which is in effect the same thing, that the decision of one shall decide the whole. Such an agreement may be consistent with his duty, but that is not this case. McClure v. Farthing, 51 Mo. 109.

And where a guardian *ad litem* consented to a decree in partition and to a compromise of the infant's rights in such decree,—especially where the court had not jurisdiction in such a case to make partition. Stansbury v. Inglehart, 9 Mackey, 134.

And where the guardian *ad litem* of the infant defendants consented to the granting of an order for the mortgage of the infants' real property, the decree could be attacked collaterally. Losey v. Stanley, 147 N. Y. 560.

Neither the guardian *ad litem* nor any other person has power to waive proof or to consent to any decree against an infant; and an answer "that he knows nothing of the matters and things in complainant's bill, and not confessing or admitting, etc.," is not an answer of the infant as it should be, but is a personal answer of the guardian. Johnson v. McCabe, 42 Miss. 255.

The effect of consent by a representative of minors to decrees and judgments is governed by the same rule as the power to bind, and judgments or decrees which are prejudicial to the minor and taken by consent alone will not bind him.

So a decree against a minor cannot be rendered upon the agreement of his guardian that the allegations of the bill are true, as an infant is not bound by the agreement. Gooch v. Green, 102 Ill. 507.

And minors are not bound by a decree in foreclosure rendered by consent of their guardian, where their title was under a trust deed prohibiting any lien to be created on the property, and the mortgagee had notice of such trust deed. Taylor v. Franklin Sav. Bank, 50 Fed. Rep. 289.

And the court will not make a decree by consent where infants are concerned, without first referring it to the master to ascertain whether it is for their benefit. But it was said that when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the master and he had made a report thereupon that it would be for their benefit. Dow v. Jewell, 21 N. H. 470; Wall v. Bushby, 1 Bro. Ch. 484.

But the mere statement on the face of a decree directing sale of an infant's property, that there was consent, does not operate to show that the decree was based on that alone; and it will be presumed that there was a reasonable exercise of discretion intended for the benefit of the minor. Bent v. Miranda (N. M.) 42 Pac. 91.

An agreement by a guardian *ad litem* and an administrator in a suit, admitting that the title of the land in suit was in other parties, will not render the judgment therein void on a collateral attack because no evidence was adduced. It was said that "it may be true that a guardian *ad litem* cannot consent to a judgment against the minor, or an administrator against the estate, so as to waive proof, and that a judgment so obtained is erroneous," but the "judgment cannot be held void because it was agreed to as stated." (The question in this case arose upon the objection to the judgment being offered in evidence.) Hollis v. Dashiell, 52 Tex. 187.

"If an infant suffer a decree against him by consent, he may at any time reverse it for that error of his being an infant; otherwise if he be defend-

veyed to him was that of "formerly Emma Kromer and wife of Erskine D. Kromer, deceased,"—was a fact that put Friday on "due inquiry."

Wade, Notice, pp. 5–8, §§ 10–13; 2 Pom. Eq. Jur. 1st ed. § 30, pp. 595, 603; *Parker* v. *Conner*, 93 N. Y. 118, 45 Am. Rep. 184; *Williamson* v. *Brown*, 15 N. Y. 354; *Cambridge Valley Bank* v. *Delano*, 48 N. Y. 326; *Lodge* v. *Simonton*, 2 Penr. & W. 439, 23 Am. Dec. 38; *Parke* v. *Chadwick*, 8 Watts & S. 96; *Knapp* v. *Bailey*, 79 Me. 195; *Sergeant* v. *Ingersoll*, 15 Pa. 313; *Acer* v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355.

No one taking a quitclaim deed can stand in the relation of a bona fide purchaser.

May v. *Le Claire*, 78 U. S. 11 Wall. 217, 20 L. ed. 50; *Baker* v. *Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *O'Neal* v. *Seixas*, 85 Ala. 80; *Peters* v. *Cartier*, 80 Mich. 124; *Goddard* v. *Donaha*, 42 Kan. 754; *Cummings* v. *Finnegan*, 42 Minn. 524; *Watson* v. *Phelps*, 40 Iowa, 482; *Gest* v. *Packwood*, 34 Fed. Rep. 372; *Hastings* v. *Nissen*, 31 Fed. Rep. 597; *Laurens* v. *Anderson* (Tex.) 1 S. W. 379; *Richards* v. *Snyder*, 11 Or. 501; *Hoyt* v. *Schuyler*, 19 Neb. 652; *United States* v. *Sliney*, 21 Fed. Rep. 894; *Runyon* v. *Smith*, 18 Fed. Rep. 579; *Wightman* v. *Spofford*, 56 Iowa, 145; *Martin* v. *Morris*, 62 Wis. 418; *Gress* v. *Evans*, 1 Dak. 381; *Johnson* v. *Williams*, 37 Kan. 179.

Hewitt and the Everett Land Company were either purchasers at a judicial sale or claim under such purchase. They therefore bought at their peril. *Caveat emptor* is the rule applicable to them.

Freem. Void Judicial Sales, § 1, p. 2; Freem. Cotenancy & Partition, § 548; Brown, Jur. 65; 12 Am. & Eng. Enc. Law, p. 208; Freem. Executions, § 301; *Burns* v. *Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Sackett* v. *Twining*, 18 Pa. 199, 57 Am. Dec. 599; *Williamson* v. *Berry*, 49 U. S. 8 How. 495, 12 L. ed. 1170; *Bishop* v. *O'Conner*, 69 Ill. 431; *Bassett* v. *Lockard*, 60 Ill. 164; *Arnold* v. *Donaldson*, 46 Ohio St. 73; *Smith* v. *Wortham*, 82 Va. 937; *Ware* v. *Houghton*, 41 Miss. 370, 93 Am. Dec. 258; *Jagers* v. *Griffin*, 43 Miss. 138; *The Monte Allegre*, 22 U. S. 9 Wheat. 616, 6 L. ed. 174; *McBane* v. *Wilson*, 8 Fed. Rep. 737; *Frost* v. *Atwood*, 73 Mich. 67; *Williams* v. *Glenn*, 87 Ky. 87.

The partition decree does not protect defendants.

Dodge v. *Briggs*, 27 Fed. Rep. 160; *McGee* v. *Wallis*, 57 Miss. 638, 34 Am. Rep. 484; *Bishop* v. *O'Conner*, *supra*; *Fleenor* v. *Driskill*, 97 Ind. 27; *Grigsby* v. *Peak*, 68 Tex. 235; *Van Schuyver* v. *Mulford*, 59 N. Y. 430; *Avery* v. *Akins*, 74 Ind. 283; *Wade* v. *Deray*, 50 Cal. 376; *Christy* v. *Spring Valley Waterworks*, 68 Cal. 73.

Alleging community interest was a denial of the boy's title to the land in severalty, and the probate court had no jurisdiction in such a

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ant, by an adversary bill, and a decree pronounced." Anonymous, 3 Rep. in Ch. 21.

A decree appearing upon its face to have been made, not upon the consent of the defendants and the guardian *ad litem* merely, but upon the representation of counsel and adjudication of the court that it was a decree fit and proper to be made as against the infants, will be binding upon them. Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162.

Where minors, pending a bill filed by other persons, were made parties plaintiff by amendment, a next friend representing them, there was no need to serve them with a copy of the bill; and where a decree in their favor was taken at the first term, the decree purporting on its face to have been taken at that term by consent of parties, there was no irregularity, much less any absolute invalidity. Wallace v. Jones, 93 Ga. 419.

As to consent, see Gronfier v. Puymirol, 19 Cal. 629, *infra*, II. c.

c. *By agreement.*

The same rule applies to stipulations and agreements concerning pending suits, as to admissions in pleadings, although there are exceptional cases on questions of practice and peculiar statutes.

So, a guardian had no authority and did not bind the infant by an agreement prejudicial to the infant, where such guardian stipulated as to the facts in a suit for partition. Claxton v. Claxton, 56 Mich. 557.

And where he agreed to a statement of facts that adverse parties had made improvements in good faith believing themselves to be the true owners of the land; and this rule also applied to their attorneys. McCloy v. Arnett, 47 Ark. 445.

And where he consented to a distribution, although 2 N. Y. Stat. at L. 97, § 72, provided that on final settlement of an executor or administrator a surrogate may order, upon the consent of the parties in writing, the delivery of undisposed assets among the parties. Carman v. Cowles, 2 Redf. 414.

And where he submitted a controversy to the court on an agreed statement of facts. Fisher v. Stilson, 9 Abb. Pr. 33; Lathers v. Fish, 4 Lans. 213.

A general guardian and a guardian *ad litem* had no power to consent to the relinquishment of their land for public improvements under an order of the court on their petition asking for power to abandon the land, as the only mode of devesting infants of their title to land was by proceedings pursuant to the Revised Statutes for the sale of infants' estate, and N. Y. Laws 1883, chap. 319, authorizing the city to take land for the opening of a street on consent in writing of the owners, did not authorize the taking of an infant's land by such consent. Battell v. Burrill, 10 Abb. Pr. N. S. 97, Affirmed, 50 N. Y. 13.

And the administrator of a guardian who has entered up a judgment bond given to the guardian as guardian had no power thereafter to release the lien of a judgment to the prejudice of the interests of the ward. Brown v. Thompson, 156 Pa. 297.

And the guardian had no authority and could not bind the infant by releasing an agent of the adverse party from liability for a tort, in order to render such agent a competent witness. Fraser v. Marsh, 2 Stark. N. P. 41.

So, a guardian *ad litem* had no authority and did not bind the infant where such guardian *ad litem* excuted a release in favor of a party defendant in order to render him a competent witness, and at the same time perpetrated a fraud on the court by taking from the witness a new note depending for its validity on the success of the suit. Walker v. Ferrin, 4 Vt. 523.

And where he waived cross interrogatories, and stipulated that the answers to the interrogatories might be read by the referee, and that the referee might proceed in the case without further notice to him. Litchfield v. Burwell, 5 How. Pr. 341.

And where he agreed to a stipulation not authorized by the ward, who had just come of age, which permitted facts occurring since the filing of the original and so-called supplemental bills to be introduced in evidence as if a new supplemental bill had

proceeding or any other to decide an issue involving a trial of title.

Stewart v. *Lohr*, 1 Wash. 341; *Theller* v. *Such*, 57 Cal. 447; 1 Woerner, American Law of Administration, p. 344; *Homer's Appeal*, 35 Conn. 113; *Proctor* v. *Atkyns*, 1 Mass. 321; *Buddecke* v. *Buddecke*, 31 La. Ann. 572; *Berris* v. *Higley*, 87 U. S. 20 Wall. 375, 22 L. ed. 383; *Anthony* v. *Kasey*, 83 Va. 338; Freem. Judgments, § 118; *Seamster* v. *Blackstock*, 83 Va. 232; *Fox* v. *Nachtsheim*, 3 Wash. 684; *Levy* v. *Shurman*, 6 Ark. 182, 42 Am. Dec. 690; *Chadwick* v. *Chadwick*, 6 Mont. 566; *Wise* v. *O'Malley*, 60 Tex. 588; *Lynch* v. *Divan*, 66 Wis. 491.

Under the homestead law, the sole ownership of the land is vested in the homesteader; it is his sole and separate property.

Anderson v. *Carkins*, 135 U. S. 483, 34 L. ed. 272; *Sturr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761.

Under the homestead law, the land was E. D. Kromer's separate and sole estate because it was a gift to him from the United States government.

Cooke v. *Bremonde*, 27 Tex. 457, 86 Am. Dec. 630; *Noe* v. *Card*, 14 Cal. 577; *Fuller* v. *Ferguson*, 26 Cal. 547; *Panaud* v. *Jones*, 1 Cal. 514; *Scott* v. *Ward*, 13 Cal. 459; *Wilson* v. *Castro*, 31 Cal. 420; *Reynolds* v. *West*, 1 Cal. 323; *Ingoldsby* v. *Juan*, 12 Cal. 564; *Wilkinson* v. *American Iron Mountain Co.* 20 Mo. 128; Freem. Cotenancy & Partition, §§ 133 *et seq.*; *Hughey* v. *Barrow*, 4 La. Ann. 250; *Rouquier* v. *Rouquier*, 5 Mart. N. S. 98, 16 Am. Dec. 186.

Whether the land under homestead law was acquired as a gift or by purchase Erskine D. Kromer's estate and title vested in him at the date of making his final proof and payment.

3 Washb. Real Prop. 4th ed. chap. 3, §§ 36 *et seq.*; 19 Am. & Eng. Enc. Law, 323, 332, 334, 347; *Sturr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. ed. 86; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. ed. 1063; *United States*, *McBride*, v. *Schurz*, 102 U. S. 397, 26 L. ed. 172; *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210, 18 L. ed. 339; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *Benson Min. & S. Co.* v. *Alta Min. & S. Co.* 145 U. S. 428, 36 L. ed. 762; *Eltzroth* v. *Ryan*, 89 Cal. 135; *Brazee* v. *Schofield*, 2 Wash. Terr. 216.

At the date of making the final proof and payment Kromer was unmarried, though living with the Indian woman who afterwards became his wife. They were not husband and wife, the marriage taking place subsequent to such proof and payment.

Peck v. *Peck*, 155 Mass. 479; *Ulula's Succession*, 44 La. Ann. 61; *Re McLaughlin's Estate*, 4 Wash. 570, 16 L. R. A. 699; *Re Smith's Estate*, 4 Wash. 703, 17 L. R. A. 573; *Wilbur* v. *Bingham*, 8 Wash. 35.

The land and title thereto having been acquired before marriage though patent not issued until afterwards, the land was the separate estate of Kromer deceased.

Freem. Cotenancy & Partition, § 134; *Hatch*

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been filed, as it attempted to bind without authority an infant just come to maturity concerning transactions during minority, wherein neither guardian nor attorney had any implied power, and which stipulation did not indicate what kind of facts were to be given in evidence as a ground of recovery. Turner v. Jenkins, 79 Ill. 228.

And where he stipulated in an action that it should abide the event of another action which had been tried in the same court and was then pending on appeal in the supreme court. Eidam v. Finnegan, 48 Minn. 53, 16 L. R. A. 507.

Under Mo. Rev. Code 1855, § 12, p. 1232, requiring the answer to deny the material allegations in the petition or to deny any knowledge or information of the matter alleged sufficient to form a belief, the omission by a guardian *ad litem* to comply with this statute will not prejudice the infant. It was said that the courts will never permit a guardian *ad litem* to do any act, or make any admission, or enter into any agreement or stipulation, which tends in any degree to prejudice or compromise the infants' rights. Revely v. Skinner, 33 Mo. 98.

In Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047, it was said that it is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot by admission or stipulation surrender the rights of the infant. The court whose duty it is to protect the interests of the infant should see to it that they are not bargained away by those assuming or appointed to represent them.

In Hitt v. Ormsbee, 12 Ill. 166, it was held that, "as to the infant defendant, the case is still more defectively made out. As to him, nothing can be admitted, but everything must be proved. Beyond the admissions of the answers, there is no evidence that the premises were purchased with the funds of Ormsbee." The suit charged the ancestor with obtaining a conveyance in fraud of the grantor's creditors, and the answers referred to were those of adults, and the case does not show that the infant answered.

A judgment in a friendly suit by a minor where his attorney was employed by the defendant in a case for personal injuries, submitted without a jury or evidence, does not bind the infant, as an infant is not bound by the admission of anybody. Atchison, T. & S. F. R. Co. v. Elder, 50 Ill. App. 276, Affirmed, 149 Ill. 173.

An agreement for delay by an attorney appointed by an infant would not bind the infant, as an infant cannot appoint an attorney. Lang v. Belloff, 53 N. J. Eq. 298.

The consent to a reference by an attorney representing an infant defendant, where no guardian *ad litem* was appointed, does not bind the infant. Gamache v. Prevost, 71 Mo. 84.

And a guardian *ad litem* cannot consent that evidence against the infant may be taken before an unauthorized person, or that incompetent evidence may be used. Fischer v. Fischer, 54 Ill. 231.

And a guardian *ad litem* cannot waive the rights of an infant by the admission of incompetent evidence without objection. Cartwright v. Wise, 14 Ill. 417.

In Howell v. Mills, 53 N. Y. 322, it was said that a guardian *ad litem* could not consent to a collusive arrangement to prevent competition at a judicial sale of land in which the infant had an interest, to the prejudice of such infant.

In Waugh v. Robbins, 33 Ill. 183, it was said that natural or legal guardians cannot by consent waive the requirement that full proof must be made before a decree can be rendered against infants.

The exceptional cases recognizing the right of a representative of a minor to consent or stipulate in matters concerning suits are those relating to practice, in which cases the rights of the minor were not prejudiced, or cases controlled by a statute.

A guardian *ad litem* and solicitor for an infant, appointed after evidence had been taken, had the power to agree to submit the case without ar-

v. *Ferguson*, 57 Fed. Rep. 966; *Re Lamb's Estate*, 95 Cal. 397; *Benson Min. & S. Co.* v. *Alta Min. & S. Co. supra.*

Messrs. **Crowley, Sullivan, & Grosscup,** and **A. D. Austin,** for respondents:

The relationship sustained between the deceased, Erskine D. Kromer and Emma Kromer, from and after the year 1868, and facts surrounding that relationship, constitute sufficient proof of their marriage before the original homestead entry.

Re McLaughlin's Estate, 4 Wash. 570, 16 L. R. A. 699; *Yates* v. *Houston*, 3 Tex. 433.

Kromer's children are estopped by conduct from denying marriage.

Sadler v. *Niesz*, 5 Wash. 182; *Schwabacher* v. *Van Reypen*, 6 Wash. 154; *Dickerson* v. *Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Kirk* v. *Hamilton*, 102 U. S. 68, 26 L. ed. 79.

Prior to the acquisition by Friday of title to any interest in this land, its validity was settled by judicial finding.

The probate court had jurisdiction to determine the facts on which its power depended.

The power to hear and determine a case is jurisdiction.

United States v. *Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Scott* v. *McNeal*, 5 Wash. 309.

If the minor devisees represented by the guardian had been possessed of the entire title, the court would have had power under the statutes, upon proper proof, to order a sale as prayed for by the petition. But the showing by the widow of an adversary interest over which the probate court had no power deprived the court of that jurisdiction. The hearing of her objections was a judicial action within the power of the court.

This was a judicial finding of fact necessarily involved in the exercise of jurisdiction to determine the power of the court to hear the original petition. It constitutes an estoppel against appellants from claiming in a subsequent action the entire premises.

Herman, Estoppel, §§ 102–105; *Gallaher* v. *Moundsville*, 34 W. Va. 730; *Burner* v. *Hevener*, Id. 774.

The wife has a community interest in a United States homestead patented to her husband during coverture.

Yates v. *Houston*, 3 Tex. 433; *Noe* v. *Card*, 14 Cal. 577; *Pierce* v. *Frace*, 2 Wash. 81; *Brazee* v. *Schofield*, 2 Wash. Terr. 209.

The settler takes by purchase.

United States v. *Waddell*, 112 U. S. 76, 28 L. ed. 673; *Philbrick* v. *Andrews*, 8 Wash. 7.

The doctrine of relation is a legal fiction. It may be invoked when it is necessary to do exact justice, but will not be invoked to do injustice.

Ellis v. *Pomeroy Imp. Co.* 1 Wash. 572; *Gibson* v. *Chouteau*, 80 U. S. 13 Wall. 92, 20 L. ed. 534.

Equitable rights are not affected by statute.

Pierce v. *Frace*, 2 Wash. 93; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 37 L. ed. 72; *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72, 20 L. ed. 485.

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gument to the court, the testimony to have the same effect as if taken by an examiner, after the infant's answer had been filed, where there was no showing made that other evidence could be procured. Biddinger v. Wiland, 67 Md. 359.

And infants are bound by the guardian *ad litem* admitting the use of affidavits instead of evidence on interrogatories, where there is no *mala fides*. Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291.

The guardian *ad litem* in a partition suit has full authority to bind his wards by a stipulation in the nature of a waiver of proof, under 2 Wagner (Mo.) Stat. p. 973, § 49, providing that a guardian *ad litem* in a partition suit has the same power as any general guardian, and § 48, providing that the acts of a guardian in such suit shall be binding. Le Bourgeoise v. McNamara, 82 Mo. 189.

And a minor was bound by an agreement of his guardian with other parties in a partition sale, allowing the payment of the money before the time it was to become due, as Mo. Rev. Stat. § 3346, provided that guardians are authorized to do and perform any matter respecting the division of any lands as herein directed which shall be binding on such ward, as if done by the ward after the disabilities are removed. State, Rice, v. Cayce, 85 Mo. 456.

And a guardian *ad litem* may consent to the removal of a suit from one circuit court to another, as the court could do by the consent of all the parties what it would have the right to do upon the motion of any one. Lemmon v. Herbert (Va.) 24 S. E. 249.

A settlement made by executors, heirs, devisees, and guardian of infants, on an intricate matter of an estate, was confirmed by the chancellor on a petition by the parties for such confirmation, where such settlement was for the advantage of all parties. Worthington v. Worthington (Ky.) 35 S. W. 1039.

Under chap. 167, § 53, Va. Code 1873, providing that chancery causes may, by consent of parties given in open court and entered of record, be submitted to the judge of the court in which such cause is pending, for decree to be made therein in vacation, such a decree will not be set aside, where the guardian *ad litem* consented and no showing is made that the infant was prejudiced. Morriss v. Virginia Ins. Co. 85 Va. 588.

A guardian *ad litem* may consent to an appeal to any other grand division, as such consent could not possibly prejudice the substantial rights of the infant, under Ill. Const. 1870, art. 6, §§ 2, 5, 8, providing that appeals and writs of error may be taken to the supreme court held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division. Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047.

And a guardian *ad litem* may waive the execution of an appeal bond on an appeal to the supreme court of Illinois, without affecting the jurisdiction of the supreme court. *Ibid.*

The plaintiff, having been admitted by the court to prosecute as next friend for the infant in an action for a legacy, may discharge this judgment, and it will be a bar to any future action for the legacy. Miles v. Boyden, 3 Pick. 213.

In Tillotson v. Hargrave, 3 Madd. 494, it was said that the solicitor of infants could bind them by his conduct as though they were adults. But the court refused to allow the master to use affidavits on a reference, although this was the matter admitted by the solicitor.

In Eidam v. Finnegan, 48 Minn. 53, 16 L. R. A. 507, it was said that one cannot admit "that concessions or admissions such as are ordinarily made in the progress of a cause, and which are entirely consistent with good faith, and which it is frequently for the interest of a party to make, may not be made by the guardian."

In Bulow v. Witte, 3 S. C. N. S. 308, where the petition of trustees for the sale of land of infants was referred to a master, and the report recom-

The husband is the trustee of the community.

Sadler v. *Niesz*, 5 Wash. 182; *Brotton* v. *Langert*, 1 Wash 73; *Adams* v. *Black*, 6 Wash. 528; *Hill* v. *Young*, 7 Wash. 33.

Power to will does not affect interest of surviving spouse.

Conn v. *Davis*, 33 Tex. 203: *Beard* v. *Knox*, 5 Cal 252, 63 Am. Dec. 125; *Re Silvey's Estate*, 42 Cal. 213.

The widow is not estopped by accepting legacy.

Lewis v. *Lichty*, 3 Wash. 213; *Toney* v. *Spragins*, 80 Ala. 141.

The surviving spouse takes her moiety absolutely in her own right upon the death of the other spouse subject only to community debts.

Hill v. *Young*, *supra*; *Webre* v. *Lorio*, 42 La. Ann. 178.

The probate court upon distribution under the will had the power to distribute all that part of the estate which passed by virtue of the will, but the interest of the widow is not derived from the deceased, does not pass to her, and is not created in her by virtue of heirship.

Hill v. *Young*, *supra*.

The probate court had no power to adjudicate the adversary right of the widow as against the devisees under the will.

Stewart v. *Lohr*, 1 Wash. 341; Freem. Judgments, § 264; *Houston* v. *Musgrove*, 35 Tex. 595.

A quitclaim deed is not notice of defective title.

Moelle v. *Sherwood*, 148 U.S. 21, 37 L. ed. 350; *United States* v. *California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354; *Ankeny* v. *Clark*, 1 Wash. 549.

The determination of the fact of title by the court is conclusive upon all the parties to the suit.

Hancock v. *Lopez*, 53 Cal. 362; *De Uprey* v. *De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Morenhout* v. *Higuero*, 32 Cal. 290; *Gates* v. *Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Nash* v. *Church*, 10 Wis. 303, 78 Am. Dec. 678; *Hill* v. *Young*, *supra*; *Clemens* v. *Clemens*, 37 N. Y. 74; *Bloomer* v. *Sturges*, 58 N. Y. 176; *Danaher* v. *Prentiss*, 22 Wis. 311; *Tallman* v. *McCarty*, 11 Wis. 402; *Blakeley* v. *Calder*, 15 N. Y. 617; *Howell* v. *Mills*, 56 N. Y. 226; 1 Freem. Judgments, § 260.

Failure of defendant to answer does not affect jurisdiction.

Jordan v. *Van Epps*, 85 N.Y. 436; *Danaher* v. *Prentiss*, 22 Wis. 317.

Jurisdiction to partition was regularly acquired.

Voorhees v. *Jackson*, *Bank of United States*, 35 U. S. 10 Pet. 449, 9 L. ed. 490.

Error will not avail to cancel the title of the purchaser.

Pursley v. *Hayes*, 22 Iowa 11, 92 Am. Dec. 350; *Allman* v. *Taylor*, 101 Ill. 185; *Irwin* v. *Jeffers*, 3 Ohio St. 390; Freem. Judgments,

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mending a sale was concurred in by a guardian *ad litem* and confirmed, and sale made, the infants were bound.

In an action of accounting filed by a minor, a written statement made before the master as to the disputed items, where the minor was represented by guardian in person and by solicitor, binds the minor as to the making up of the issues on the account. Patterson v. Johnson, 113 Ill. 559.

As to agreement, see McClure v. Farthing, 51 Mo. 109, *supra*, I. b.

d. *By omissions.*

The waiver by omissions of a representative of an infant to make a material issue in the pleadings, or to insist upon proper claims, or to complete the issues, will not prejudice the rights of the minor. But there are some exceptions, to the extent that the infant is bound by the rules of variance and joinder of defenses, and where the statute concludes all parties. This note is not intended to include cases of ordinary default judgments or decrees *pro confesso*. Such cases hold that an infant cannot be bound by the failure to plead.

So, a minor is not bound where his guardian fails to insist upon a legal defense of the statute of frauds apparent on the face of the record. Grant v. Graigmiles, 1 Bibb. 203.

And where the guardian *ad litem* does not question the jurisdiction of the court by his answer. Bowers v. Smith, 10 Paige, 193. See Jones v. Jones, *infra*.

And where a guardian *ad litem* fails to make a defense in his answer against a petition by executors for authority to make a mortgage. Curtis v. Ballagh, 4 Edw. Ch. 635.

And where a guardian *ad litem* fails to deny in his answer all the material allegations of the petition prejudicial to the infant. Brenner v. Bigelow, 8 Kan. 496.

And where a guardian failed to pray for judgment for interest in an action against executors who retained the infant's money for several years without excuse. Stephens v. Van Buren, 1 Paige, 479.

And where a guardian *ad litem* fails to answer after demurrer has been sustained to his answer, as this will not authorize a judgment against an infant for want of answer without evidence. Richards v. Richards, 17 Ind. 636.

And where the guardian *ad litem* failed to make a defense that could have been legally availed of. Stark v. Brown, 101 Ill. 395.

And where an infant fails to reply, as this is not an admission of the facts charged in the answer, and does not dispense with proof. Legard v. Sheffield, 2 Atk. 377.

But in Thurston v. Nutton, 3 P. Wms. 238, note, it was held that the failure of an infant to reply to an answer authorizes the answer to be read in evidence against the infant, as the defendant is deprived of the opportunity of examining witnesses to prove his answer.

And infants are not excepted from the provisions of N. Y. Code, § 149, providing that matters of confession and avoidance must be set up in the answer; and such evidence cannot be admitted in favor of the infant under an answer of general denial by a guardian *ad litem*. Roe v. Angevine, 7 Hun, 679.

And under N. Y. Code Civ. Proc. § 1577, providing that when a sale in partition has been confirmed by final judgment it shall be binding and conclusive and bar those persons from right and title, the failure of the guardian *ad litem* to make a defense that could have been made in such a case will render him liable in damages, and this is the only remedy. Reed v. Reed, 46 Hun, 212.

In the case of infants, it has been erroneously thought that it is merely necessary to put in what is called a common infant's answer, submitting his rights to the protection of the court; but that is not so, for, in reality, the preparation of an infant's answer may in some cases require great consideration. He may have a defense, yet at the hearing it

§ 509; Schouler, Dom. Rel. § 361; *Thomson* v. *Tolmie*, 27 U. S. 2 Pet. 169, 7 L. ed. 385; *M'Pherson* v. *Cunliff*, 11 Serg. & R. 429, 14 Am. Dec. 642; *Perkins* v. *Fairfield*, 11 Mass. 227; *Grignon* v. *Astor*, 43 U. S. 2 How. 319, 11 L. ed. 283.

Jurisdiction for one purpose gives jurisdiction for all purposes.

Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; *Cromwell* v. *Hull*, 97 N. Y. 209; *Reed* v. *Reed*, 107 N. Y. 547; *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; *Whitman* v. *Fisher*, 74 Ill. 147; Rose, Judicial Sales, § 402.

Neither direct nor collateral attack can be made on the sale for error, though apparent on the record.

Dilworth v. *Rice*, 48 Mo. 124; *Castleman* v. *Relfe*, 50 Mo. 587; *Brevoort* v. *Brevoort*, 70 N. Y. 140; *Kane* v. *Rock River Canal Co.* 15 Wis. 179; *Blakeley* v. *Calder*, 15 N. Y. 619.

Partition will lie against infants.

Freem. Cotenancy & Partition, 2d ed. § 467; *Albright* v. *Flowers*, 52 Miss. 246; Code 1881, § 596.

Notwithstanding trust of his interest.

Beard v. *Knox*, 5 Cal 252; *Re Silvey's Estate*, 42 Cal. 210; *Conn* v. *Davis*, 33 Tex. 203; *Sill* v. *Blaney*, 159 Pa. 264; *Thaw* v. *Ritchie*, 136 U. S. 519, 34 L. ed. 531.

The guardian had power by statute to confess judgment.

Code 1881, §§ 2, 292.

Minors are bound by the same rule as adults.

1 Herman, Estoppel, p. 178, § 164; 1 Dan. Ch. Pr. 5th Am. ed. 163, 164; *English* v. *Savage*, 5 Or. 518; *Ralston* v. *Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Tillotson* v. *Hargrave*, 3 Madd. 494.

Attorneys may waive formal proof.

Wood, Practice Evidence, § 170; 1 Greenl. Ev. § 178; *Alton* v. *Gilmanton*, 2 N. H. 520; *Young* v. *Wright*, 1 Campb. 140; *Oscanyan* v. *Winchester Repeating Arms Co.* 163 U. S. 263, 26 L. ed. 541; *Hollis* v. *Dashiell*, 52 Tex. 187; *Gunter* v. *Fox*, 51 Tex. 383; *Bennett* v. *Hamill*, 2 Sch. & Lef. 577; *Joyce* v. *McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; Freem. Judgm. § 151; *Hurt* v. *Long*, 90 Tenn. 445; *Payne* v. *Masek*, 114 Mo. 631; *English* v. *Savage*, *supra*; *Green* v. *Walker*, 99 Mo. 68; *San Fernando Farm Homestead Asso.* v. *Porter*, 58 Cal. 81.

The owners of a community interest may maintain partition.

Hill v. *Young*, 7 Wash. 33.

Fraud must be actual and positive.

Ross v. *Wood*, 70 N. Y. 10; *Foster* v. *Wood*, 6 Johns. Ch. 87; *Smith* v. *Nelson*, 62 N. Y. 287; *Cromwell* v. *Hull*, 97 N. Y. 299; *Jones* v. *Leech*, 46 Iowa, 186; *Quinn* v. *Wetherbee*, 41 Cal. 247; Freem. Judgments, 4th ed. § 508; *Richmond & P. R. Co.* v. *Shippen*, 2 Patton & H. (Va.) 327; *Green* v. *Dodge*, 6 Ohio, 80, 25 Am. Dec. 736.

Messrs. **Brown & Brownell** also for respondents.

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may be found impossible to make it effectual, in consequence of its not having been properly raised and the proper facts put in issue by his answer. Lane v. Hardwicke, 9 Beav. 143.

And where the answer of the infant did not put in issue all the allegations of the bill for a sale of land, it will be presumed, in the absence of evidence from the record, that sufficient evidence was introduced upon the trial. Wells v. Smith, 44 Miss. 296.

A guardian *ad litem* will be held to have waived, by answer, the fact that a bill of complaint was not signed, where the objection is first made in the supreme court, as it is a mere irregularity and a question that pertains to practice; and the rights of an infant defendant will not be considered prejudiced if the guardian *ad litem* answers without suggesting the omission, which will be equivalent to an express waiver. Turner v. Jenkins, 79 Ill. 228.

Some cases hold that the omission of the guardian *ad litem* to act in matters affecting the interests of the infant do not bind the minor. But in regard to questions of practice it would seem that inaction should be controlled by the same rules as agreements, for which see *supra*, c.

That the infant defendants, who were made new parties on an amended bill, did not object to reading the evidence taken on the original bill, will not justify an order that this evidence be read as against the infant. Quantock v. Bullen, 5 Madd. 81.

Mere nonaction of a guardian *ad litem* who had no notice of the taking of testimony will not be construed as a waiver of the infant's rights, whether relating to the practice or substance of the defense. It was said that the guardian *ad litem* cannot admit away any of the substantial rights of the infant. Turner v. Jenkins, *supra*.

But the failure of the guardian *ad litem* to question the jurisdiction of the court in prematurely rendering a decree against infants will not waive their rights. Jones v. Jones, 56 Ala. 612. See Bowers v. Smith, 10 Paige, 193.

The waiver of the right by infants to take a personal decree on the admission of assets by an executor, and the taking of a decree for an accounting, will not bind them. Wall v. Bushby, 1 Bro. Ch. 484.

As to omission, see Cartwright v. Wise, 14 Ill. 417, and Revely v. Skinner, 33 Mo. 98, *supra*, c.

II. *By appearance.*

a. *By attorney.*

An attorney cannot waive service of process on an infant. Evans v. Davies, 39 Ark. 235.

And cannot enter the appearance of minor heirs who were not brought into court by proper summons of notice. Bonnell v. Holt, 89 Ill. 71; De La Hunt v. Holderbaugh, 58 Ind. 285.

And cannot appear for an infant defendant and waive service of process, under Kan. Code, §§ 77, 78, providing for personal service and publication of service of process. Armstrong v. Wyandotte Bridge Co. 1 McCahon (Kan.) 166.

So, a general appearance by the defendants by counsel will not bind infants who are not served with process. Valentine v. Cooley, Meigs, 613, 33 Am. Dec. 166.

And an infant defendant is not bound by an appearance of attorneys employed by his natural guardian to defend for him, where such infant was not notified and no person was appointed by the court to make his defense. Priest v. Hamilton, 2 Tyler (Vt.) 50.

A minor defendant can only appear by guardian. An agreement by an attorney cannot be made to operate as an appearance for him. Russell v. Texas & P. R. Co. 68 Tex. 646.

In Clarke v. Gilmanton, 12 N. H. 515, it was said that infants could not appoint an attorney to appear for them, and could take no step to conclude their interests by acknowledging that service had been legally made.

In Mercer v. Watson, 1 Watts, 330, it was said that an attorney could not enter an appearance for an infant defendant.

In Bird v. Pegg, 5 Barn. & Ald. 418, it was said

Scott, J., delivered the opinion of the court:

The plaintiffs have appealed from a decree of the superior court of Snohomish county dismissing their complaint, and adjudging, in effect, that they have no title to the property in controversy, which is a certain tract of land of about 147 acres, in the present city of Everett. The complaint set up title in fee in the plaintiff Victor E. Kromer, with subsidiary interests for a limited period in his three sisters, Emma and Mattie Kromer, who were joined as plaintiffs, and Alice Kromer, who declined to join as plaintiff, and was made a defendant. The title is claimed by the plaintiffs through their deceased father, Erskine D. Kromer, by will. The complaint attacks, and seeks to vacate on the grounds of lack of jurisdiction and fraud, a decree of sale and deed in partition in said court under which the defendants Rucker and Hewitt and the Everett Land Company, intervener, claim title in fee to certain interests in said land, and joins the defendants Friday, Holland, and Plaskett, on account of their connection with said partition and participation in the alleged fraudulent proceedings. The answers of the defendants Rucker and Hewitt, with their counterclaims, and the intervening complaint of the Everett Land Company, set up the validity of the partition proceedings which originated in an alleged community right in the lands in controversy in the widow of Erskine D. Kromer, who is the defendant Emma Holland. The material facts relating to the matters in controversy are as follows: On May 3, 1870, said Erskine D. Kromer made a homestead filing upon the land aforesaid, situate in Snohomish county, Wash. It is claimed that he was at that time a single man, but at or about said time (the exact time not being material) a certain Indian woman, who had previously been known by the name of Emma Kanouke, and who was thenceforth known as Emma Kromer, came to live with him as his wife, and continued to live with him until his death, in 1885. The plaintiffs and said Alice Kromer are their children. On October 26, 1876, said Erskine D. Kromer made the requisite proofs of his capacity to file and compliance with the laws of the United States relating to such homestead entry. On December 21, 1876, he and said Indian woman appeared before a justice of the peace of said county, and had a marriage ceremony performed. On December 30, 1876, a patent for said land was issued to him. At his death he left the following will, purporting to devise the land in controversy: "I will, bequeath, and devise to my beloved son, Victor E. Kromer, the land upon which myself and family reside, situate in said county of Snohomish, Washington territory, to wit, lots numbered 1 and 2, the S. E. ¼ of the N. W. ¼, and the N. W. ¼ of the N. E. ¼ of sec. 30 in T. 29 N. of R. 5 E., containing 147 acres and 55-100 of an acre. It is my will and desire that my family be not separated, and it is my intention that

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that a judgment against an infant on an appearance by an attorney is error.

In Winston v. McLendon, 43 Miss. 254, it was said that an infant could not waive any part of a formula of service of process, by constituting an attorney to appear for him.

But in Rogers v. McLean, 10 Abb. Pr. 306, it was said that a committee of a lunatic infant residing in the state of New York may, without service of summons on the lunatic, cause an appearance to be entered and a guardian appointed for him, which is at least doubtful.

Some cases do not show whether the minor was served with process or not, but hold that an appearance of an infant defendant by an attorney is erroneous.

So, an attorney cannot appear for and bind an infant defendant where there is no guardian *ad litem* appointed. Gamache v. Prevost, 71 Mo. 84; Timmons v. Timmons, 6 Ind. 8; Mockey v. Grey, 2 Johns. 192.

And cannot appear for a married woman in an action of assumpsit against a baron and *feme* where she is an infant, because she ought to appear *per guardianum*. Freeman v. Boddington, Vent. 185.

So, an appearance of an infant defendant by an attorney is not binding. Cruikshank v. Gardner, 2 Hill, 333; Somers v. Rogers, 26 Vt. 585.

And such an appearance is error. King v. Marborough, Cro. Jac. 303; Bird v. Orms, Id. 289.

And an appearance entered by a plaintiff for an infant defendant by an attorney is irregular, and the proceedings may be set aside. Nunn v. Curtis, 4 Dowl. P. C. 729.

A judgment was set aside where the infant defendant appeared by attorney and obtained a judgment of *non pros.*, as the defense should have been made by guardian. Comstock v. Carr, 6 Wend. 526.

And an infant defendant appearing only by attorney is not bound, and the judgment will be vacated on *audita querela* as to him, and also as to others. Starbird v. Moore, 21 Vt. 529.

In Bailey v. McGinniss, 57 Mo. 362, it was said that infant defendants could not appear by attorney.

In Goodridge v. Ross, 6 Met. 487, it was admitted that a general appearance by an attorney for an infant defendant did not bind him.

In Peak v. Shasted, 21 Ill. 138, 74 Am. Dec. 83, it was said that a minor can only appear and defend by a guardian, and not in person or by attorney.

In Bloom v. Burdick, 1 Hill, 131, 37 Am. Dec. 299, it was said that at common law an appearance by attorney for an infant defendant, instead of by guardian, would render the judgment void.

In Bedell v. Lewis, 4 J. J. Marsh. 562, it was said that an infant cannot defend an action by an attorney without the aid of a guardian *ad litem*.

But some cases hold that a judgment against an infant who appears by attorney, and not by guardian, is not void, but voidable. Barber v. Graves, 18 Vt. 290.

And that an infant appeared and defended by attorney, and not by guardian, can only be taken advantage of by writ of error *coram nobis*. Meredith v. Sanders, 2 Bibb, 101.

An infant executor in an action brought against him appeared by attorney where he ought to have appeared by guardian, and it was resolved by the court that this was error, for this doth much concern the infant, inasmuch as by his false plea he shall be bound to answer of his own goods if he hath no goods of his testator, and therefore under the statute he hath a remedy against his guardian for filing a false plea. Wescot v. Cotton, Popham, 130.

Where process was served on the infant, who appeared and defended by an attorney, the judgment was not void, but voidable. Townsend v. Cox, 45 Mo. 401.

my said son, Victor E. Kromer, shall not sell or dispose of said described premises until each of my daughters shall become of full age, *viz.* Alice Kromer, Mattie Kromer, and Emma Kromer, and that they shall each have the privilege of residing upon said premises until they shall each become married, provided they should marry before they shall have arrived at the age of majority; and it is my desire that the rents, issues, and profits of said described premises shall go to support my said son and daughters, hereinbefore mentioned, until said girls shall have become married or arrived at the age of majority, at the expiration of which time my said son, Victor E. Kromer, is hereby empowered to dispose of said premises as he shall see fit. . . . Third. I give and bequeath unto my wife, Emma Kromer, the sum of $200, which my executor is hereby authorized to pay at my death. And it is my will and desire that my said wife, Emma Kromer, reside upon the premises hereinbefore mentioned and bequeathed to my said son, Victor E. Kromer, until her death or marriage. . . . I nominate and appoint my respected friend J. H. Plaskett my executor, and authorize him to administer upon my estate, and to execute this will, without giving bond, and without any direction or control from any court, and without notice to creditors or otherwise." This will was probated September 10, 1885. Said J. H. Plaskett qualified as executor, and a copy was filed in the auditor's office for record in October, 1885. On September 23, 1885, said Plaskett was appointed guardian of the persons and property of said children, and has ever since served as general guardian of their persons and property. On October 25, 1886, the final account of said Plaskett as executor was allowed by the probate court, and distribution made of the real and personal property willed by the deceased. There is some contention as to whether the widow was a party to this proceeding, but we do not regard it as material, and the plaintiffs practically concede that it is not. On December 14, 1889, said Plaskett, as guardian, filed a petition in the probate court, praying for the sale of the real estate in controversy, alleging such facts as the statute required to authorize a sale by a guardian of his minor ward's real estate. It was claimed that the real estate was unproductive and that there were no funds to pay the taxes thereon or to support the children, and that it would be for the advantage of said children to have the same sold. Upon the hearing of this petition, on January 27, 1890, the widow of Erskine D. Kromer, who had previously to that time married one Holland, appeared and filed objections to the order, and asked for partition, claiming, among other things, that the land in controversy was community property of herself and said Erskine D. Kromer, and that she was entitled to one half thereof, as the surviving spouse. The probate court found against her, and entered an order directing a sale of all of the land. On January 28, 1890, she filed a notice of appeal from said order

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And in such a case the objection that a judgment was taken against an infant could only be taken advantage of by writ of error, and the judgment is in full force until reversed. Marshall v. Fisher, 1 Jones, L. 111.

The appearance of counsel without protest, on behalf of an alleged lunatic on an inquisition, and the failure to show that notice was not received by the person in question, will prevent setting aside the inquisition on the ground that notice was not sufficiently given, where one copy was actually given to the attorney, and another to the person having custody of the alleged lunatic, to whom access for the service of the notice was refused. *Re* Lindsley, 46 N. J. Eq. 358.

b. *By guardian ad litem.*

It is a general rule that a guardian *ad litem* cannot enter the appearance of a minor defendant where process was not served on the defendant. To this there are some exceptions, chiefly in regard to the point of practice in taking advantage of the error, and there are some early Ohio cases which held a contrary doctrine, and cases where the record did not show their age, or they were bound by lapse of time.

A guardian *ad litem* cannot enter the appearance of a minor defendant so as to waive the service of process and give the court jurisdiction. Chambers v. Jones, 72 Ill. 275; Pugh v. Pugh, 9 Ind. 132; Wheatley v. Harvey, 1 Swan, 484; Taylor v. Walker, 1 Heisk. 734; Ingersoll v. Mangam, 84 N. Y. 622; Hickenbotham v. Blackledge, 54 Ill. 316.

And cannot by consent make his ward a party to the suit. Dist. Hannum v. Wallace, 9 Humph. 129, where it was held that a guardian *ad litem* might waive the service of a copy of a declaration in ejectment on himself, but could make no other concessions. Frazier v. Pankey, 1 Swan, 75.

And cannot waive the service of process and appear for infants, unless the heirs are present in court, and their appearance will not be presumed. Robbins v. Robbins, 2 Ind. 74.

And cannot bind the minors by an admission that notice was given to them of proceedings to sell land. Donlin v. Hettinger, 57 Ill. 348.

In Abdil v. Abdil, 26 Ind. 287, it was said that the guardian *ad litem* cannot waive service of process on the infant.

An infant not served with process is not bound where a guardian *ad litem* enters an appearance and answers. Genobles v. West, 23 S. C. 154; Dodge v. Foulks, 11 B. Mon. 179; Collard v. Groom, 2 J. J. Marsh. 487; Good v. Norley, 28 Iowa, 188.

And where a decree is rendered on an answer of a guardian *ad litem*, an infant is not bound by admissions improvidently made for him by his guardian *ad litem*. Wells v. Wells, 6 Ind. 447.

And where a guardian *ad litem* answers and consents to the prayer of the petition, as this will not dispense with notice. Robertson v. Robertson, 2 Swan, 197; Young v. Young, 91 N. C. 359.

And where the record does not show he was cited, but the guardian *ad litem* appeared and by his answer admitted the allegations of the bill. Guy v. Pierson, 21 Ind. 18.

And where the minor is not before the court and the guardian *ad litem* answers, in a suit to sell land to pay debts of an ancestor. Crippen v. Crippen, 1 Head, 128.

And where a guardian *ad litem* answers in a suit to foreclose a mortgage, as this does not give an appearance or give the court jurisdiction over him; distinguishing the former Ohio cases in suits by administrators to sell land to pay debts, as those decisions rest on the peculiarity of the proceeding, and the statute, and on the ground that the administrator was the representative of the estate, of the creditors, and indirectly of the heirs. Moore v. Starks, 1 Ohio St. 369.

and judgment of the probate court. This appeal was heard in the superior court of Snohomish county on the 24th day of March, 1890, whereupon the court found and adjudged as follows: "The court finds that the real estate described in the petition of said guardian for an order of sale thereof, and which said probate court ordered to be sold as prayed for in said petition, is community property, and, as such, the said appellant Emma Holland, formerly widow of Erskine D. Kromer, deceased, is entitled to the undivided one half thereof; and that the said probate judge or probate court had no right to order the sale of the entire property, or any part thereof, in the manner in said transcript shown. It is therefore ordered, adjudged, and decreed by this court that the order of sale and judgment rendered by said probate court below is reversed, set aside, and held for naught." But the court made no finding or order as to a partition.

It is contended that the court could not have found upon the facts that said parties were husband and wife prior to the marriage ceremony which was performed between them by the justice of the peace, and that said ceremony was evidence that they were not married prior thereto. There is no doubt that it was some evidence of the fact that the parties had not been previously married, but it was not conclusive. Said parties may possibly have entertained a doubt as to the validity of a previous ceremony, and may have wished to set that doubt at rest by such subsequent ceremony. It does appear that they had lived and cohabited together, and held each other out as husband and wife, for a number of years. It is true this would not constitute a marriage under the laws of the territory, but it was some evidence of marriage; and, in making his homestead proofs, said Kromer testified that he was the head of a family, and submitted the affidavits of two of his neighbors that he was a married man. The parties were all before the probate court in said proceedings, brought by the guardian for authority to sell the land for the purposes therein set forth, for a better investment of the proceeds, etc., and were likewise before the superior court upon the appeal therefrom by the widow; and the court having found therein that said Erskine D. Kromer and said woman with whom he was living were lawfully married, and that the land was the community land of said parties, and there having been no appeal prosecuted therefrom, that decree must stand, if the court had jurisdiction to make the finding. And it would make no difference whether it was an erroneous finding of fact or of law. It would be the law of the case as applied to the lands in question, and conclusive upon the parties. The jurisdiction of the court to find that said parties were husband and wife, and that the land was community property, is strenuously attacked by the plaintiff, and contended for by the defendants. It raises a most important question as to the power of the former probate courts of the territory

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And where a guardian *ad litem*, "being present in court, said nothing in bar or preclusion of the plaintiff's action." This means that he neither assented to the appointment nor appeared for the wards; and it is the duty of the court to see that he accepts the appointment or appears for the minor. Greenup v. Bacon, 1 T. B. Mon. 108.

And where a guardian *ad litem* was appointed and answered, the infants can attack the judgment collaterally, as the statute requires service to be made. Moore v. Starks, *supra*. See Benson v. Cilley, *infra*.

So, a decree was erroneous where a guardian *ad litem* answered for minors who had not been served with process. Campbell v. Campbell, 63 Ill. 502.

But some cases refuse relief on account of the manner of attack and on account of particular statutes. The earlier Ohio cases held that an appearance by guardian *ad litem* would bind the infants.

So, a decree against infants having no notice, but whose guardian *ad litem* answered, is erroneous, but not void. Bank of United States v. Cockran, 9 Dana, 395; Bustard v. Gates, 4 Dana, 436; Emeric v. Alvarada, 64 Cal 529; Preston v. Dunn, 25 Ala. 512.

And it will be presumed that infants were properly before the court where they answered by guardian *ad litem*, in the absence of any other showing in a collateral attack. Horner v. Doe, State Bank, 1 Ind. 130, 48 Am. Dec. 355.

And an appearance by guardian *ad litem* where infants were not served with notice was held binding as against a collateral attack, although it might be ground for reversal. (This was under the Ohio practice.) Nelson v. Moon, 3 McLean, 321. See Benson v. Cilley, *infra*.

A decree is not void when the record shows that the infants were not served with process, but on their motion a guardian *ad litem* was appointed who answered for them, as Geyer's (Mo.) Dig. p. 305, provided that if they were over fourteen years of age they could appear and select their guardian, and these may have been of that age. Day v. Kerr, 7 Mo. 426.

And a decree of sale was not set aside where the minors answered by guardian *ad litem*, and the record did not show that the infants were served with process, but the wards acquiesced for twenty years and did not complain of the decree. Hopper v. Fisher, 2 Head, 256.

An acknowledgment of service by the guardian *ad litem* was binding on the infants where the proceedings were had under the law of Ohio prior to the statute of 1840. This latter statute prohibited a waiver of notice by a guardian *ad litem* in behalf of his ward. Benson v. Cilley, 8 Ohio St. 604. See Moore v. Starks, *supra*.

And a judgment was sustained where the infant was not served with process, but a guardian *ad litem* was appointed, who accepted service of process on petition, releasing all errors and defects of service, and admitted the facts set forth to be true. Robb v. Irwin, 15 Ohio, 689.

In Snevely v. Lowe, 18 Ohio, 368, it was held that an appearance by a guardian *ad litem* without service of process on the infants was binding on them. See Rogers v. McLean, 10 Abb. Pr. 306, *infra*, VI.

c. *By guardian.*

There is some conflict of authority as to the power of a guardian to appear for his ward without service of process on the ward. Some cases hold that he has the power and that the ward will be bound, on the general theory that he has recourse on the guardian if he has been prejudiced; and some hold that an appearance by the guardian will bind where the minor is served with process.

So, the general guardian of an incompetent and insane defendant has the power to appear in the

and of the superior courts of the state upon such appeal. The fact that the proceedings were had in the probate court while we were under a territorial form of government, and in the superior court of the state after statehood, might have some bearing also as to whether the latter court, upon the appeal, was limited by the powers possessed by the former court. A decision of these questions is not necessarily involved in this case, as we view it, and we shall refrain from deciding them at the present time, but have set forth the facts as having some bearing upon the later proceedings

Subsequent to the foregoing, and on April 7, 1890, said widow executed and delivered to defendant Friday a quitclaim deed of her undivided one half of the land. On May 12, 1890, said Friday began an action for partition in the superior court of Snohomish county, alleging, in substance, in his complaint, the filing upon the lands in controversy by said Erskine D. Kromer and his compliance with the United States homestead laws; that during all of said times he was a married man, and that his wife, said Emma D. Kromer, lived with him upon said land; that he died testate; that the children aforesaid were the issue of said marriage, and were living at the time of his death; the appointment of the said Plaskett as guardian, the interests of the children therein to an undivided one half of said lands, and his ownership of the other by virtue of the conveyance from the widow; that the land was so situated and its condition such that a division could not be made without great prejudice to the owners; and praying that the court ascertain and determine the interests of each of said parties, and that partition thereof be had, and in case it could not be made, etc., then that the land be sold, and the proceeds paid to the several owners in proportion to their respective interests. Summons was issued upon this complaint, and was personally served upon all of said children and upon said Plaskett as guardian. On June 6, 1890, a firm of lawyers appeared for said defendants, and filed a general demurrer to the complaint. It does not appear what disposition was made of this demurrer; but on the 3d day of July, 1890, an answer was filed in that action, denying the sale by the widow to the plaintiff, Friday, and that the real estate was so situated that it could not be divided without great prejudice to the owners, and, by way of counterclaim, set up the payment by them of taxes for several years upon all of said land, and that one half of said sums was a just claim against the interest and claim of the plaintiff, etc. On the 3d day of July, the court rendered the following decree:

This case coming on by agreement of the parties hereto on this 3d day of July, 1890, before the Honorable J. R. Winn, judge of said court, at his chambers in Snohomish city, in said county and state, the plaintiff appearing by Craddock & Miller, his at-

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action without service of the summons upon the ward. Redmond v. Peterson, 102 Cal. 595.

And an appearance and defense by a natural guardian was held binding on the infant, although the minor was not served with process. Wrisley v. Kenyon, 28 Vt. 6; Smith v. McDonald, 42 Cal. 484.

Under Cal. Guardian Act, April 19, 1850, § 16, providing that a guardian shall appear for and represent his ward in all legal suits and proceedings unless where another person is appointed for that purpose as guardian or next friend, such guardian has the right to represent the infant in a suit to settle a partnership estate and for the sale of the same. In this case the guardian consented to a reference to try the issues and report a judgment, but the question of consent was not discussed in the opinion. No service of summons was made on the infant. Grouflier v. Puymirol, 19 Cal. 629.

An appearance of minor defendants by the general guardian in proceedings to sell land of an intestate's estate is binding. Ewing v. Hollister, 7 Ohio, pt. 2, p. 138; Ewing v. Higby, 7 Ohio, pt. 1, p. 198, 28 Am. Dec. 633.

And a guardian may waive the service of process for infants even where realty is involved. Scott v. Porter, 2 Lea, 224.

And a guardian's accepting service and waiving process gave the court jurisdiction over the minors and their estate, and a subsequent majority of the wards did not oust the jurisdiction, where the guardian had not ceased to act. Simpson v. Belvin, 37 Tex. 674.

A general guardian had the authority and bound the infants where he appeared, although the service of process was irregular, under Or. Code, p. 556, § 20, providing that every guardian appointed to defend shall appear for and represent the ward in all suits, unless another person is appointed for that purpose. Ankeny v. Blackiston, 7 Or. 407.

The general guardian of a minor may waive process and answer for him. Masson v. Swan, 6 Heisk. 450; Cowan v. Anderson, 7 Coldw. 284.

And a judgment is not erroneous where a guardian appeared and consented to the orders made preparatory to the hearing of the cause, and assumed the management of the cause for the infant defendant, who was not before the court by service of process, as the guardian became responsible to the infant for the faithful performance of the trust. He might admit the charges in the bill. Banta v. Calhoon, 2 A. K. Marsh. 167.

So, an appearance and defense of an infant defendant by a natural guardian binds the infant. But it was said that an appearance by an attorney would not bind him. In this case process was served on the infant. Fuller v. Smith, 49 Vt. 253.

But some cases hold that the guardian cannot bind the ward by waiver of service of process and by entering an appearance.

So, a guardian cannot waive service of process and enter the appearance of the infant. Greenman v. Harvey, 53 Ill. 386.

And cannot admit service of process for the minor. Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457.

And cannot enter the appearance of an infant where an order of revivor must be served, and a decree in such a case is error. Haley v. Taylor, 39 Ark. 104.

And cannot waive personal notice required to be given to them, under Ind. Rev. Stat. 1843, p. 523, providing for notice to minors in proceedings to sell their real estate. Doe, Platter, v. Anderson, 5 Ind. 34.

In Kansas City, St. J. & C. B. R. Co. v. Campbell, 62 Mo. 585, it was held that a guardian or an infant is incompetent to acknowledge service for the infant. The case does not show which was done.

torneys, and the defendants appearing by Frater & Ault, their attorneys, and said minor defendants also appearing by J. H. Plaskett, their guardian, and the court, being fully advised in the premises, finds from the pleadings and evidence submitted the following:

Findings of Fact:

(1) That prior to the 30th day of December, 1876, one Erskine D. Kromer, having complied with the laws of the United States, became the owner in fee simple of the following described property, to wit: Lots one (1) and two (2) and the northwest quarter of the northeast quarter (N. W. ¼ of N. E. ¼) and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of section No. thirty (30), in township No. twenty-nine (29) north, of range No. five (5) east, Willamette meridian, situated in Snohomish county, state of Washington; and on said last-mentioned date a patent was issued to said Kromer under the homestead laws of the United States of said lands. That, prior to that time, said Kromer resided upon said tract, and had entered the same as a homestead upon public lands, of the United States. That the said Erskine D. Kromer was a married man, and thereafter, while residing upon said lands, and during all the time of his said residence upon said tract, was there living with his wife, Emma D. Kromer. (2) That on or about the 8th day of August, 1885, the said Erskine D. Kromer died, testate, in said county, and in the then territory and now state of Washington and that the above-described tract of land was a portion of the estate of said decedent. (3) That, at the time of the death of said Kromer, there were living, as the issue of his said marriage, the following children, to wit, Victor E. Kromer, Emma Kromer, Mattie Kromer, and Alice Kromer, who has since intermarried with one Lloyd Allen, who are heirs at law of said Erskine D. Kromer, deceased. That the only other heir at law of said decedent is his said wife, surviving him, whose name at the time of his decease was Emma D. Kromer, but who has since remarried, and who is now, and has been for a long time past, Emma D. Holland, wife of Samuel S. Holland. (4) That, prior to the commencement of this action, the said Emma D. Holland, for a valuable consideration, sold and by deed duly conveyed, to the plaintiff herein, an undivided one half (½) interest in and to all of the above-described tract of land; and that the said plaintiff is now the owner of said undivided one half of said real property, and is in possession thereof. (5) That, after the death of the said Erskine D. Kromer, the above-named defendant J. H. Plaskett was duly appointed guardian of the persons and estates of the above minor children of the said Erskine D. Kromer and Emma D. Kromer, his wife, and duly qualified as such, and, ever since the time of his said appointment, said J. H. Plaskett has been, and now is, the guardian of the said minor children. (6) That said plaintiff and said minor children and heirs at law of said decedent, *viz.*, Victor E. Kro-

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d. *By curator ad hoc.*

A curator *ad hoc* cannot waive a citation. Ticknor v. Calhoun, 28 La. Ann. 258.

And cannot waive service of process for a minor. Cormier v. De Valcourt, 33 La. Ann. 1168.

And cannot bind his clients as to the statute of limitation, by waiving the citation. Hill v. Barlow, 6 Rob. (La.) 142.

And has no power to appear for the defendant until he is regularly cited, and cannot consent to a judgment binding him. Carpenter v. Beatty, 12 Rob. (La.) 540.

A counsel appointed to defend an absent debtor cannot bind him when he is not properly before the court. Stockton v. Hasluck, 10 Mart. (La.) 472.

III. *By trustees.*

Generally trustees cannot bind the *cestui que trust* by admissions and waivers that are prejudicial to the interest of the trust estate. Some cases hold that they have the power to make concessions, or consent, where the same is made in good faith and the interest of the *cestui que trust* is not prejudiced.

So, a trustee defendant cannot make admissions in a suit to the prejudice of the trust fund and against the *cestui que trust*. Bragg v. Geddes, 93 Ill. 39.

And a trustee of a public trust or his attorney had no power to consent to a decree which took the trust out of the other trustees and placed it in other hands. Vose v. Internal Imp. Fund, 2 Woods, C. C. 647.

And a trustee selling land under execution and accepting redemption money from a creditor having a subsequent execution against the same party does not affect the title to the land, as his position will not allow him to make any admission to the prejudice of the trust fund and against the *cestui que trust*. Thomas v. Bowman, 29 Ill. 426.

The admissions of a mere trustee, the plaintiff of record, made after the suit was commenced, were properly excluded in evidence. It was said the rule was different at common law. Sargeant v. Sargeant, 18 Vt. 371.

In Davies v. Ridge, 3 Esp. N. P. 101, it was said that an admission of one of several trustee defendants, that he had trust money in his hands, would not bind the other trustees. The case does not show whether the admission was made before or in a suit.

In Bailey v. Boyce, 5 Rich. Eq. 187, it was said that an infant devisee having no guardian *ad litem* is not bound by a decree, where an answer was filed in her name by the trustee appointed by a will.

But a trustee in a deed for a married woman has the power to represent the interest of his *cestui que trust* on a foreclosure of a prior mortgage, and in the decree may waive the provisions of Md. Code, § 125, art. 16, giving a day to pay the mortgage debt. He cannot conclude her right in the decree where the *cestui que trust* is not before the court by process. Johnson v. Robertson, 31 Md. 476.

And the trustee of a railroad mortgage in a foreclosure suit had the power to stipulate and consent to a decree, where there was no bad faith, and the same was not set aside at the suit of a minority of bondholders. The fact that some of the trustees were holders of bonds secured by their trust was not of itself sufficient to make them incompetent to consent to a decree. Shaw v. Little Rock & Ft. S. R. Co. 100 U. S. 605, 25 L. ed. 757.

A trustee of a railroad mortgage authorized only to collect the mortgage by litigation, at the request of the holders of the majority of the bonds, was authorized to release the errors and waive the right of an appeal, where the majority of such holders desired the litigation to cease. Elwell v. Fosdick, 134 U. S. 500, 33 L. ed. 998.

mer, Emma Kromer, Mattie Kromer, and Alice Allen, are the owners and tenants in common of the above-described tract of land, as follows, to wit: The said plaintiff, Frank P. Friday, has an estate in said lands to the extent of an undivided one-half part or interest in fee thereof; the said minor defendant, Victor E. Kromer, has an estate of inheritance in said real estate, to the extent of an undivided one-half (½) part or interest in fee thereof; and the other minor defendants, Emma Kromer, Mattie Kromer, and Alice Allen, have a contingent interest in said real estate above described, to the extent of the right of said minor defendants Emma Kromer, Mattie Kromer, and Alice Allen to live, reside, and remain on an undivided one-half part thereof until they become of lawful age, or until they become married. (7) There are no liens or encumbrances on said lands appearing of record, and that no person other than the said plaintiff and the defendants hereinbefore named have any interest in said lands as owners or otherwise. (8) That said real estate is so situated and its condition is such that a partition thereof cannot be made without great prejudice to said owners. (9) That said defendant J. H. Plaskett, as guardian, has paid the taxes on said lands for the years 1885, 1886, 1887, 1888, and 1889. And, upon the above and foregoing findings of fact, the court finds the following conclusion of law: That said premises should be sold, and the proceeds arising from the sale thereof be divided according to the respective rights of the parties hereto, as found by the court; and that an order of sale issue therefor. It is therefore ordered, adjudged, and decreed, in accordance with the foregoing findings of facts and conclusion of law, that the said real estate be sold at public auction to the highest bidder, in the manner prescribed by law, upon the following terms, to wit: One half of the purchase price to be paid cash in hand on the day of the sale, the balance in two equal instalments, payable in nine (9) and eighteen (18) months, respectively, with interest on the deferred payments at the rate of 10 per cent per annum, and secured by mortgage on said premises; and that A. W. Hawks, Esq., be, and he is hereby, appointed referee to sell said real estate, and of his proceedings hereunder to make due return.

Notice of sale of the land was posted and published by the referee appointed to make the sale, and the same was sold to said Friday for the sum of $13,000, on August 2, 1890. A stipulation was thereafter entered into between the parties relative to certain security taken for a portion of said sum, and the sale was duly confirmed; and thereafter, on the 21st day of August, 1890, the referee, pursuant to such proceedings and sale, executed and delivered a deed of the land to Friday, which was, on the 25th day of said month, duly approved by the court. On the 28th day of November, 1890, Friday executed a deed of an undivided one half of this land to the defendants Rucker; and on the same day executed and delivered to defendant Henry Hewitt, Jr., a deed of the other un-

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IV. *By executors and administrators.*

There appears to be some conflict of authority on the question as to the power of an executor or administrator to bind others than themselves by admissions or waivers. Some of the cases are controlled by local statutes, and the powers of executors and administrators are generally defined by the statutes. Some cases affirm the right of such representative to make binding admissions, but they must have been made in good faith, and to have been within a prudent exercise of the discretion imposed on such representatives. The cases in regard to admissions, where suits were not pending, are not intended to be included in this note.

An administrator has power to bind the estate by consenting to a judgment for a just claim, under Mich. Rev. Stat. § 7396, providing that an administrator allowing a judgment against him by default establishes evidence of the debt to be paid in course of administration. If he can bind the estate by default, he may by consenting to a judgment. Shelden v. Warner's Estate, 59 Mich. 444.

And minors and distributees are bound by a decree taken by consent of an administrator representing such parties, where there is no collusion. Barclay v. Kimsey, 72 Ga. 725.

An executor may compromise a lawsuit and buy the peace of the estate he represents, and extinguish doubtful claims against it, provided he acts discreetly and in good faith. Meeker v. Vanderveer, 15 N. J. L. 392.

An administratrix in an action for wrongfully causing the death of her husband, brought for the benefit of the heirs as well as for her own use, has the power to stipulate that the case may be dismissed and compromise the suit, without procuring an order of the probate court; and Ill. Stat. (Starr & C.) chap. 3, § 83, requiring an order of the probate court for settlement, does not apply, as this is not a claim due the estate within the meaning of that section, and recovery is for the benefit of the widow and next of kin. Washington v. Louisville & N. R. Co. 136 Ill. 49.

An administratrix may release a claim after she has brought suit thereon, and the release will be binding if there is a dispute as to the validity of the claim, and the release is made in good faith. Higginson v. Second Nat. Bank, 59 Hun, 183.

Under Vt. Gen. Stat. chap. 48, § 39, providing that when there shall be a disputed claim against an executor or administrator such claim may, with the consent of the parties in writing, be referred, and the award when accepted by the court shall be final, such an award is *res judicata*. Barker v. Belknap's Estate, 39 Vt. 168.

On a reference of a claim against an estate under the Vermont statute a stipulation that all claims, whether accrued before or after the death of the intestate, might be heard and determined by the referee, was binding. McDaniels v. McDaniels, 40 Vt. 340.

An answer to the merits by executors is a waiver of the right to plead in abatement, which binds their successor. Russell v. Texas & P. R. Co. 68 Tex. 646.

And the administrator may waive the inquisition and condemnation of land levied upon under a judgment against him, as land is treated and sold as a chattel for payment of debts. Hunt v. Devling, 8 Watts, 403.

A waiver of sci. fa. by an executrix after a sale, and a ratification of the proceedings, filed *nunc pro tunc*, cured all supposed defects, although Pa. Act Feb. 24, 1834, § 33, Pamph. Laws, 79, literally construed, required a writ of sci. fa.; but under Pa. Act June 13, 1836, Pamph. Laws, 578, an amicable action of sci. fa. could be entered *nunc pro tunc*. Diese v. Fackler, 58 Pa. 109. But see Bomberger v. Raymond, *infra*.

divided one half, which interest was subsequently conveyed by Hewitt and wife to the Everett Land Company. No appeal was taken from the decrees of the superior court in any of the foregoing proceedings by any of the parties interested or at all, and the same remained unquestioned until the commencement of this action, in December, 1891.

Many points have been raised and argued in the case which we think unnecessary to pass upon, owing to the conclusion we have reached with regard to others; and, before proceeding to discuss the matters of law involved in the various proceedings, we wish to dismiss the charge of fraud as utterly unfounded, as, after an examination of the argument with reference thereto, contained in the 660 odd pages of briefs filed in this case, and the evidence upon which it is based, found in the three large volumes of the record, we are satisfied that all parties, including the courts and the guardian, acted in entire good faith in the premises. A lengthy discussion of the questions raised with reference to this feature of the case would serve no good purpose. The several proceedings must be viewed in the light which surrounded them at the time they were had; and although the land in question has now become very valuable, by reason of the fact that a prosperous city is being in part built thereon, and that several hundred thousand dollars have been expended in improvements upon the same by the purchasers and their grantees, all of which have been projected and done since the sale under the partition proceedings, it is apparent that, at the time the land was sold thereunder, it brought a high price, which was due in a measure to an unsuccessful "boom," that was independent of the matters which have since given value to the land. Even though the parties purchasing had an undisclosed purpose of platting a town site thereon, and were endeavoring to obtain the land for that purpose, it is apparent that the same would not have been carried out if the supposed title had not been procured; and, had it not been for these subsequent developments, undoubtedly the sale would have been regarded as a fortunate one, and the proceedings would not have been questioned.

Although Erskine D. Kromer, in his will, sought to provide for the retention of the land until his daughters had arrived at the age of majority, the court clearly was not deprived of power to order a sale thereof in the partition proceedings if the land was community property, as the will would only operate to convey the title to a one-half interest. The land at that time was practically in a wilderness, and was unproductive, and was, it seems, in danger of being sold for taxes, and there were no funds available for the support of the minors. It was as much the intention of the deceased parent that the children should be supported during their minority as it was to preserve the land intact. However, as to this feature of the case, it is sufficient to say that the land was not sold upon the application aforesaid of the guardian of the plaintiffs, but was sold by

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But other cases hold that admissions by such parties are not binding.

In Bomberger v. Raymond, 2 Pa. Dist. R. 280, it was held that a foreign administrator cannot consent to the issue of an execution upon a judgment against his intestate, without a previous scire facias as required by Pa. Act Feb. 24, 1834, § 53, Purdon, 529, prohibiting an execution unless the representatives have been warned by a writ of sci. fa.,—especially where an administrator has been appointed within the jurisdiction, and refuses his assent, and asks that the execution be set aside. This case seems to conflict wth Diese v. Fackler, *supra*, but the decision is on the ground that the power of a foreign administrator is questionable.

So, in an action of ejectment to recover a leasehold estate, brought by infant heirs in the name of an administrator, he had no power to release both the action and the estate, in consideration of a sum previously received by him on a compromise and surrender by him of the lease, when he had discovered before he executed the release that the estate was not forfeited, but belonged to the heirs, and his subsequent action was wilful and done in fraud. People v. Pleas, 2 Johns. Cas. 376.

And an executor or administrator cannot bind the estate by an agreement with one having a judgment against it and also a judgment against a third party, to submit the questions of liability and the amount on the demands to the circuit court in a single action. Barry v. Davis, 33 Mich. 515.

And an admission of indebtedness, made by one executor after an action has commenced, will not bind the other executor. Hammon v. Huntley, 4 Cow. 493.

So, a judgment against two executors, entered on a fraudulent agreement by one, is not binding and will be enjoined. Nason v. Smalley, 8 Vt. 118.

And an agreement by a personal representative of a decedent's estate to discharge a judgment for a sum less than its amount, not authorized by any court, is void and a note given by the debtor for the amount agreed upon, to take the place of and be a substitute for the whole judgment, is without consideration. Siddall v. Clark, 89 Cal. 321.

As to admissions by administrators, see McIlvoy v. Alsop, 45 Miss. 374, *supra*, I. a. See also *infra*, VII.

V. *By curator ad hoc.*

A curator *ad hoc* has no capacity to waive prospectively, so as not to require at a subsequent time evidence of the judicial capacity of an officer to whom the commission in the suit might be sent. It was said that upon a specific commission and to save costs and to speed justice, the counsel might have dispensed with proof of those facts in reference to particular persons known to him. Edmonson v. Mississippi & A. R. Co. 13 La. 284.

A curator *ad hoc* cannot waive the legal rights of the party he represents by omitting to except in the lower court to the want of the proper parties. Hyde v. Craddick, 10 Rob. (La.) 387.

And an attorney appointed by a court to represent nonresidents cannot prejudice their rights by consenting to an introduction of improper testimony. Collins v. Pease, 17 La. 116.

See *infra*, VII., *By confession of judgment.*

VI. *By representatives of idiots and lunatics.*

It seems that the representatives of idiots and lunatics cannot bind them by admissions that are prejudicial to their interests, in the absence of a statute authorizing such consent. There are some cases, however, in which consent was given, which appeared to affirm the power where an idiot was not prejudiced, and where the party complaining was to blame, and where the assent was under a stat-

virtue of the independent partition proceeding brought by the alleged owner of the other half interest, against which claimed interest, if well founded, the will could not in any wise operate.

There being no fraud in the premises, the claims of the plaintiffs in this case must be sustained, if at all, on the ground of the invalidity of the various proceedings above set forth, by virtue of which the land was found to be community property, and was sold to the defendants, now claiming it. Questions of estoppel against the plaintiffs, and claims that the defendants, or some of them, are bona fide purchasers without notice, have been presented, which we pass over as immaterial, and treat the case as though all of the defendants had full notice of all the foregoing proceedings.

In the proceedings brought for a partition of the land by virtue of which it was sold, the court had jurisdiction of the plaintiffs in this case, and of the subject-matter. It was there found that Friday owned a one-half interest in the land, and its sale was ordered, and had accordingly. These proceedings are attacked on the ground that the statute was not complied with in advertising the sale. The first publication of the notice of sale was made on the 3d day of July, and the decree was not signed until the 7th. As a matter of fact, however, the finding of the court had been made prior to the publication, and the point raised is nothing more than an irregularity, which would not affect the jurisdiction of the court in the premises. It could only be taken advantage of by an appeal in the proceedings, if at all, and none was taken.

Complaint is also made that the guardian and attorneys of record for the plaintiffs herein admitted in that proceeding that the land in controversy was the community property of said parents; and it is contended that they had no right to make such admission, and that the same is an evidence of bad faith and of fraud in said proceedings. It must be borne in mind that this last proceeding was in the same court which heard and disposed of the appeal from the order of sale made by the probate court on the application of said guardian to sell, and the same judge was presiding. All parties were acting in a measure in view of said former proceeding; and that proceeding, even if invalid, throws a strong light upon the good faith of all parties whose acts are now questioned. We are satisfied that such admissions were made in entire good faith, and were such as the parties had a right to make and the court was justified in acting upon; and, furthermore, that they in no wise contravene the facts as they existed, independent of such former proceedings. Witnesses were examined in this case as to what took place, what was admitted, and what testimony was introduced in such former proceedings; and the judge before whom they were had was called and testified, and said that he based his judgment on what he supposed was sufficient to justify the decree which he signed. There is no testimony in this record tending to

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ute, and where the judgment of lunacy had not been obtained.

The conservator of an insane defendant cannot waive objection to an incompetent witness against the ward. Huling v. Huling, 32 Ill. App. 519.

And a guardian of an insane widow cannot waive the homestead rights of the ward. Ratcliff v. Davis, 64 Iowa, 467.

The committee of a nonresident lunatic appointed by the laws of another state cannot appear for him in the courts of New York, or have a guardian *ad litem* appointed, without service of process. Rogers v. McLean, 10 Abb. Pr. 306.

A committee of a lunatic has no right to bring an action of covenant for him, and such judgment is not a bar to an action brought by a lunatic. Where an idiot sues or is sued he must appear in his proper person, and anyone who prays to be admitted as his friend shall be admitted to prosecute or defend. But a lunatic, or one who becomes *non compos mentis*, must appear by guardian if within age, and by attorney if of age. Cameron v. Pottinger, 3 Bibb, 11.

An agreement (between a lunatic by his next friend and the committee of the lunatic) in the form of a consent decree, not signed by the judge, discharging the committee from liability, but that he should provide for maintenance of the lunatic, does not prevent the lunatic from demanding from the committee an account of the estate. Clark v. Crout, 34 S. C. 417.

But in a partition suit where an infant idiot had not been made a party, the court directed after the sale that she be brought in by supplemental complaint, and, after the appointment of the guardian, it appearing best for the infant, and the guardian consenting, directed the judgment to stand good against her, and the purchaser was bound to comply with his purchase. Rogers v. McLean, 34 N. Y. 536.

A pleading both by guardian *ad litem* and attorney, after the defendant who was in court had become a lunatic, is not error, and the defendant's attorney cannot complain of the error where he had the guardian *ad litem* appointed. Walker v. Clay, 21 Ala. 797.

The guardian of an insane widow may file his written consent that her interest in real estate may be sold, when a petition has been filed by the executor of her deceased husband for the sale of real estate to pay debts, as Ind. Stat. 2 Gavin & Hord, p. 507, § 77, provides that adult persons may waive notice by filing their assent to the sale in writing, and that guardians may assent in like manner for their wards, and page 575, § 8, provides that this statute is applicable to guardians of the insane persons. Smock v. Reichwine, 117 Ind. 194.

A decree by consent of counsel of a party in fact a lunatic but not adjudged such, is a bar to a subsequent suit to assert in his behalf the same rights which were set up in the former suit, when there is no fraud. Royston v. Horner, 75 Md. 557.

Defendants *non compos mentis* but not idiots from nativity, and of full age, were allowed to appear, plead, and defend by attorney, in Faulkner v. M'Clure, 18 Johns. 134.

In *Re* Heller, 3 Paige, 199, where an idiot was sued for destroying a schoolhouse on land in which he had an interest, and the plaintiff offered to compromise by a conveyance from his committee of one half of the lot, and the committee acquiesced in the application, and submitted the rights of the infant to the chancellor, the matter was referred to the master to report if the partition was equitable.

In Tomlinson v. Devore, 1 Gill, 345, a lunatic

show that any person connected with the defense of that partition case was not as fully informed of every existing fact connected with the subject-matter of that litigation as this court is capable of being informed by the record before it, and there is absolutely no hint in the testimony that the plaintiff in that case, or any person in his behalf, did anything to mislead the legal representatives of those defendants, or to conceal from them any fact, or did anything in any way to prevent a fair trial. If, as claimed by appellants, the question of title was heard, in part, upon an agreed statement of facts, they were the true facts in the case. Plaintiff's counsel produced in court the deed on which plaintiff relied to prove his title. He also produced in court sufficient testimony to convince the court of the necessity of selling the premises. The sale of the property followed in accordance with the decree of the court. The plaintiff in the partition proceeding was the purchaser. The defendants, through their counsel and otherwise, employed every means to make the property bring the highest possible figure. This commendable zeal had its effect; and the testimony stands undisputed that the sale was in all respects fairly conducted, that there was a lively rivalry between the bidders, and that the land brought the highest estimate of its value.

Partition is a civil action, in contemplation of our Code, and may be used as a form of action to try title. "The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and where a defendant fails to answer, or where a sale of property is necessary, the title shall be ascertained by proof to the satisfaction of the court before the decree for partition or sale is given." Code 1881, § 558. The Code of California provides that any right, title, or interest in the land may be put in issue, tried, and determined in the action, substantially in the language above quoted from our own Code. The determination of the fact of title by the court is held to be conclusive upon all the parties to the suit. *Hancock* v. *Lopez*, 53 Cal. 362–371. "Any questions affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action. . . . If 'disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined in such action.'" *De Uprey* v. *De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Morenhout* v. *Higuera*, 32 Cal. 290; *Gates* v. *Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Nash* v. *Church*, 10 Wis. 303, 78 Am. Dec. 678. This court, in *Hill* v. *Young*, 7 Wash. 33, has held that the court has power in a partition proceeding, and is required to determine title. "Such judgment or adjudication is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have been litigating and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legiti-

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brought ejectment by his attorney instead of by trustee, and agreed to a statement of facts constituting his title, but the court did not pass on the question of the power to bind, although holding that on the statement of facts no recovery could be had.

As to admissions by representatives of persons of unsound mind, see Redmond v. Peterson, 102 Cal. 595; Collins v. Trotter, 81 Mo. 275, *supra*, I., a; *Re* Lindsley, 46 N. J. Eq. 358, *supra*, II., a. See also *infra*, VII., *By confession of judgment.*

VII. *By confession of judgment.*

As to the power of fiduciaries to bind by a confession of judgment it seems that trustees have not the power unless given by the act creating a trust, and infants cannot be bound by a confession of judgment on a warrant of attorney. As to executors and administrators there is some conflict of authority, some cases holding that they have such power and some cases denying the authority. In regard to insane persons and drunkards the cases appear to sustain the power to confess judgment where the discretion has not been abused.

So, trustees having no power to mortgage or sell the trust property cannot confess a judgment binding upon the property and creating by the voluntary act a lien upon it so that it may be sold and the *cestui que trust* deprived of the benefit. Huntt v. Townshend, 31 Md. 386, 100 Am. Dec. 63.

And the court in removing a trustee has no right to make an order directing his successor to confess a judgment in favor of the former trustee for an amount due to him for moneys paid and services rendered, and such a judgment is a nullity. Mallory v. Clark, 20 How. Pr. 418.

And a judgment cannot be confessed to one person in trust for another, the trustee and the trust being created and declared in a written statement authorizing the judgment, as, under N. Y. Code Civ. Proc. § 383, providing that a judgment by confession may be entered to secure any person against contingent liability, and that if it be for the purpose of securing a plaintiff against contingent liability a statement in writing must show concisely the facts and the amount due, this does not authorize the creation of the trust through which, by the intervention of a trustee as plaintiff, all the contingent liabilities of the debtor might be aggregated and secured. Marks v. Reynolds, 12 Abb. Pr. 403.

A mother as trustee of her minor child cannot bind the child by confession of judgment. Metcalfe v. Alter, 31 La. Ann. 389.

And a judgment on confession, taken on a warrant of attorney given by an infant, is void. Saunderson v. Marr, 1 H. Bl. 75; Bennett v. Davis, 6 Cow. 393; Motteux v. St. Aubin, 2 W. Bl. 1133; Jackson v. Mosley, C. B. Trin. 3 Geo. I., cited in 2 Strange, 1043.

An administrator may, pending a suit in equity, and prior to a decree, confess a judgment at law, so as to give priority. Mactier v. Lawrence, 7 Johns. Ch. 206.

And may confess judgment on an alias sci. fa., and waive an inquisition and agree to a sale on a sci. fa. where the judgment that was revived had been obtained in the lifetime of the decedent. Bennett v. Fulmer, 49 Pa. 155.

A sale under a judgment to a bona fide purchaser was sustained where the judgment was against a decedent and the execution returned "money made," on a sci. fa. after the death of the defendant, an attorney not employed by the administrator pleaded *plene administravit* and confessed judgment *de bonis intestati*, and the property in controversy was sold, and the attorney appearing in

mate purview of the original action both in respect to matters of claim and of defense." *Clemens* v. *Clemens*, 37 N. Y. 59; *Bloomer* v. *Sturges*, 58 N. Y. 168; *Danaher* v. *Prentiss*, 22 Wis. 311; *Tallman* v. *McCarty*, 11 Wis. 402; Wells, Res Adjudicata, §§ 248, 249; *Barrett* v. *Failing*, 8 Or. 152; *Trayhern* v. *Colburn*, 66 Md. 277; *Pray* v. *Hegeman*, 98 N. Y. 351; *Blakeley* v. *Calder*, 15 N. Y. 617; *Howell* v. *Mills*, 56 N. Y. 226; *Sayward* v. *Thayer*, 9 Wash. 22. When the plaintiff alleged the extent of his interest in the property, and the extent of the defendants' interest as he understood it, and showed on the face of his pleading that the parties plaintiff and defendant were tenants in common, he stated every fact required to give the court jurisdiction. Code 1881, § 553.

Appellants seek to avoid the effect of this proceeding by reason of the minority of the defendants in the partition suit, and by reason of the fact that the plaintiff was the purchaser. These defendants had a general guardian, on whom service was made, as well as upon themselves personally. He answered to the suit, and was represented by counsel throughout. The statute expressly provides that the action may be maintained against infant cotenants, the provisions being broad enough to reach any and all interests, and any and all parties, and expressly makes a confirmation conclusive against all parties to the suit. The guardian might consent to a partition without suit under the supervision of the court. Code 1881, chap. 48. "In America, the rule of the common law that infancy does not suspend the right of the adult cotenants to enforce a partition is believed to be of universal obligation. This rule has been held to be applicable to a sale of the property when a division was impracticable. The right of the adults to have the possession of their property, and to have their wishes in the premises gratified, is to be respected equally with the interests of the infants. It would be monstrous to hold that adult part owners should be kept out of the enjoyment of their property merely because the other part owners were infants, and the interests of such infants did not require the property to be sold." Freem. Cotenancy, 2d ed. § 467; *Albright* v. *Flowers*, 52 Miss. 346.

In the absence of fraud or collusion, minors properly represented are bound as fully as if they had been majors and personally cited. "Representation in courts of justice is a necessity of civilized society, and the acts or neglects of the representative must in some degree be binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians or agents." 1 Herman, Estoppel, p. 178, § 164; 1 Dan. Ch. Pr. 5th Am. ed. 163, 164; *English* v. *Savage*, 5 Or. 518.

In considering the character of the title as to whether it was community land as a matter of fact, a question is raised as to when the title vested in Erskine D. Kromer. Final proof was made by him before the marriage ceremony aforesaid was performed, but the

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the case had died. Fetterman v. Murphy, 4 Watts, 424, 28 Am. Dec. 729.

A decree *quod computet* concludes in the same manner and does not vary at all as to an executor, for before a final decree he may confess a judgment, and does not at all alter the nature of the demand, notwithstanding the words are inserted in the decree "that each party do pay," for these words are only a direction to the master to insert what shall appear to be due upon the balance to either party. Smith v. Eyles, 2 Atk. 385.

Although an executor cannot bind the estate by a note or judgment for a new indebtedness created by himself, he may legally confess a judgment for a debt which he knows was contracted by the decedent. *Re* Schmidt's Estate, 5 Pa. Dist. R. 17.

The executor may confess a judgment in favor of a creditor, so as to give him priority. Waring v. Danvers, 1 P. Wms. 295.

In Hunt v. Devling, 8 Watts, 403, it was said that an administrator may confess a judgment so as to affect the estate.

In Darston v. Earl Oxford, Prec. in Ch. 188, it was said that it seemed to be admitted that if an executor had confessed judgment at law, a payment on the claim by him would have been good.

But other cases deny the power of such persons to confess judgment.

So, an administrator cannot conclude the estate by a confession of judgment. Finch v. Ragland, 2 Dev. Eq. 137.

And cannot confess a judgment against his coadministrator. Heisler v. Knipe, 1 Browne (Pa.) 319.

And an executor cannot bind his coexecutor by confession of judgment for a debt barred by limitation, although the executors have power to sell and pay the debt. Hall v. Boyd, 6 Pa. 267.

A judgment confessed by an administrator does not bind persons not a party to that suit, and the administrator may show that the assets are exhausted by prior claims. Ruggles v. Sherman, 14 Johns. 446.

Judgment confessed by executors upon debts incurred by them in carrying on the testator's business without authority of the will are their personal debts, and can be collected only from their individual property, and not from any property belonging to the estate. Witmer v. Miller, 9 Lanc. L. Rev. 307.

As to persons of unsound mind, and drunkards, judgments by confession have been sustained.

A guardian of an insane person may confess judgment so as to bind the insane party, as a guardian may allow a judgment *nil dicit*. McAden v. Hooker, 74 N. C. 24.

And a judgment on confession on a warrant of attorney of a person subsequently found to be of unsound mind will not be set aside where there was no notice of unsoundness of mind, fraud, or want of good faith. But it may be set aside on terms in the discretion of the court. Person v. Warren, 14 Barb. 488.

It is discretionary with a chancellor whether he will set aside a judgment rendered on confession by attorneys of an habitual drunkard after commission found, but the same will not be set aside after the motion was refused in the trial court, unless a showing is made of the injustice of the same. *Re* McLaughlin, 1 Clarke, Ch. 113.

Matters of arbitration and award, and matters of admissions affecting the party making the same, are not included in this note. This note is not intended to include matters of arbitration or award, or cases involving the question of right of representatives of incompetent persons to maintain actions in their behalf. L. T.

patent was issued thereafter. Although, for certain purposes, the title—at least the equitable title—was earned and accrued upon the making of final proof and receipt of the certificate, the full or legal title did not pass until the patent was issued. The plaintiffs claim that the patent should relate back to the time of making final proof, and that, therefore, the land vested in Erskine D. Kromer as his separate property, if in fact he was not then a married man. Undoubtedly, for certain purposes this would be true, but the doctrine of relation is a fiction of law adopted by courts solely for the purposes of justice. *Gibson* v. *Chouteau*, 80 U. S. 13 Wall. 92, 20 L. ed. 534. We are of the opinion that it should not be invoked in this case to defeat the claims of the widow. Her equities were as great as those of Erskine D. Kromer or the children. It may fairly be inferred from all that transpired that there was no intentional wrongdoing upon the part of either of said parties, and that they were living together and regarded each other as husband and wife is apparent prior to the marriage ceremony aforesaid; and, if necessary to save her rights in the premises, we are satisfied that we would be justified in holding, and should hold, that, the legal title having passed subsequent to the marriage of the parties, it vested in the community.

A further question is raised to the effect that the title to the land under the homestead laws is taken by gift, and, consequently, that it would become the separate property of the husband under the laws of the territory. There seems to be some conflict in the authorities upon this proposition. As the matters hereinbefore discussed decide this case in favor of the defendants, we will not undertake to enter into any consideration of the cases bearing upon this question, but content ourselves with saying we are satisfied that, within the intent of our laws relating to community property, such land is, in effect, taken by purchase, by reason of the settlement and improvements thereon, in which the wife participates as well as the husband; and, consequently, that this land was the community property of Erskine D. Kromer and his said wife. We adopted this view in the case of *Philbrick* v. *Andrews*, 8 Wash. 7; and, although the point was not contested there, we desire to announce our adherence thereto. A contrary holding would be productive of the grossest injustice under the community property laws of this state and territory.

Judgment affirmed.

Dunbar, Ch. J., and **Hoyt**, J., concur.

Stiles, J., dissenting:

I think the view which the court takes of the actions of the principal respondents in this case is entirely too charitable. The opinion makes it appear as though Friday and the Ruckers had been mere passive movers in the transactions which led up to the practical annulment of the will of Erskine D. Kromer, and the despoiling of his children of the property which their father had devoted, first, to their residence and maintenance, and, lastly, to the use of the son, Victor. Kromer, Sr., died in 1885, and his widow accepted the bequest made to her, and suggested no claim of interest in her for more than four years. Meanwhile the will was proven, administration had, and distribution made in accordance with the terms of the will. In 1889 the Ruckers appeared, and, by their urgency and offers succeeded in moving the guardian to apply for an order of sale. They had already bought up all of the surrounding lands, and were exceedingly anxious to acquire the Kromer tract, which was the key to the situation, commanding, as it did, the principal water front in the present city of Everett. To bring about the application of the guardian to sell, they put $150 into the hands of his attorney, to cover the costs of the proceedings, and agreed to bid $2,000 for the land. The bait took, and the application was made. At this time there was no occasion for selling, as the family had the land to live on, and the guardian had money enough in his hands to last nearly two years. Moreover, there was no legal warrant whatever for selling the land under any circumstances, since its condition was fixed by the will.

The interference of the late Mrs. Kromer had the effect to postpone the proceedings, but her attempt to secure recognition from the probate court was a proceeding without color of legality, since that court had long since lost jurisdiction of the matter of distribution by its final decree of distribution, which was unappealed from. Any order which that court might have made in the matter would have been wholly void. So, also, the appeal to the superior court could and did determine nothing, since on appeal the latter court had no power to determine a matter not within the jurisdiction of the probate court. All that the superior court could do was to dismiss the appeal for want of jurisdiction in the probate court over the subject-matter. The net result of these judicial performances was to leave the entire estate where the will and the decree of distribution placed it, without a valid pen scratch either for or against it. The next operation was the conveyance by Mrs. Kromer to Friday. Now, a great endeavor was made in the course of this voluminous case to show that Friday and the Ruckers were independent individuals, but I am convinced that they were simply shadows of one substance. The Ruckers put up every dollar from first to last, Friday being their instrument and factotum. Next came the partition. Friday presented his petition, the exact language of which will be found in the so-called "finding of facts" quoted in the foregoing opinion. Now, let it be remembered that there had never been any sort of an adjudication that Mrs. Kromer was the owner of one half, or any other interest, in this land. On the contrary, the decree of distribution, which was binding upon her and unappealed from, was squarely against any such proposition. And yet the petition for partition did not mention the will or the decree of distribution, but falsely alleged the ownership of the land and the interests of the children to be as stated in paragraph 6. And, to crown everything,

the guardian of these infant children came in and assisted the fraud that was being perpetrated upon the court and his wards, by admitting in the answer every one of these false allegations, without mentioning the actual condition of the title or the will. He did set out some pitiful allegations about payment of taxes, and denied that a sale was necessary; and upon these, as the sole issues, the matter came on for hearing. And of what did this hearing consist? The guardian was there, of course, with his attorney, but there was no hostility in the proceeding. Counsel for the petitioner was there with a witness or two, and findings and a decree already drawn in the exact language of the petition. No question was asked of any witness about any matter other than whether the land could be divided or ought to be sold. The judge who made the decree so testifies, and the findings declare that the alleged facts are found "from the pleadings and evidence submitted." And thus, upon the admissions of the guardian, without trial, and without knowledge on the part of the court that there could be any issue over the title to the land, the decree was rendered, finding that 147 acres of wild land could not be divided into two fairly equal parts, but must be sold. Of course it must be sold! That was the entire object of the scheme from A to Z. And, of course Friday was the purchaser, on time; and he at once conveyed half of his purchase to the Ruckers, and pocketed $6,000 profit within sixty days by a sale to the Everett Land Company. It only remained to carry out this judicial proceeding by allowing the attorney for the guardian $500 out of the proceeds of the sale of these infants' lands, and giving the Ruckers an execution against them for the $150 advanced to start the guardian's application to sell. If these be fair dealings between fair men and infants, then Heaven help the children of the state when they fall into the hands of rogues!

The following legal propositions, I maintain, should have all been decided in favor of the appellants: (1) The full equitable title to the land having been acquired by Kromer before his marriage, it was his separate property. (2) Mrs. Kromer was bound by the decree of distribution, unless in some direct proceeding she asserted her interest. (3) The probate proceedings and appeal were void. (4) It was beyond the power of a guardian to admit away the title of his ward by answer in a partition proceeding. A guardian in such a case is not called upon to answer further than to put his opponent upon proof of every allegation. It has been held always and everywhere that while, upon the trial of a case, a guardian or his attorney may admit probative facts, neither of them can admit ultimate facts, and to do so is a fraud upon the ward. Formerly, and even now, in some of the states, an infant might, after coming of age, set aside a decree for error even; and fraud, either in fact or law, is a just ground for such relief. *Bank of United States* v. *Ritchie*, 33 U. S. 8 Pet. 128, 8 L. ed. 890; *Daingerfield* v. *Smith*, 83 Va. 81; *McIlvoy* v. *Alsop*, 45 Miss. 365; *Curtis* v. *Ballagh*, 4 Edw. Ch. 635; *Loomer* v. *Wheelwright*, 3 Sandf. Ch. 135; *James* v. *James*, 4 Paige, 115, *Price* v. *Crone*, 44 Miss. 571; *Tucker* v. *Bean*, 65 Me. 352; *Fischer* v. *Fischer*, 54 Ill. 231, *Eaton* v. *Tillinghast*, 4 R. I. 276; *Chaffin* v. *Kimball*, 23 Ill. 36; *Ingersoll* v. *Ingersoll*, 42 Miss. 155, *Claxton* v. *Claxton*, 56 Mich. 557; *Ralston* v. *Lahee*, 8 Iowa, 17, 74 Am. Dec. 291. In *Joyce* v. *McAvoy*, 31 Cal. 274, 89 Am. Dec. 172, Judge Sawyer learnedly reviewed the origin and principle of the parol demurrer, and showed it to have no application to the state of California, because there was no statute, and he also found the doctrine not pertinent to the case, because the attack was collateral, and not by appeal or review. But we have a modified statute of parol demurrer in Code Civ. Proc. § 1393, which in subdivision 8 expressly provides for the vacation of a judgment against a minor for error within one year of his coming of age. Under this provision, the question of the title not having been in issue or considered by the court, I maintain that the partition decree should have been set aside, and that matter determined. At bottom, the only point we have to consider here is, Was there error? If there was, the statute regulates the matter by requiring a new hearing. As it is, this court has taken up the original case, and decided it upon equitable grounds which were in no proper way before it. The opinion of the court quotes the partition statute, which authorizes title to be put in issue in such proceedings; but the trouble is that in this case it was not put in issue, the petition of Friday fraudulently concealing from the court the fact that there was any question of title, and the answer of the guardian assisting the fraud by its admissions. Authorities are cited to show that whatever might have been decided in a litigated case will be taken as actually decided; but in partition, unless the defendant answers, title must be shown. Code 1881, § 558. In substance, there was no answer in this case, for what was answered was merely illegal admission. Guardians may consent to partition without suit, as pointed out, under supervision of the court; but in such cases the court is the counsel of the guardian, and must be satisfied that the proposition is fair, the title certain, and the division just. But here the proceeding ought to have been hostile, whereas it was, in fact, collusive. Moreover, the statute does not permit a guardian to consent to partition by sale.

I have not had to pass upon a case which so profoundly impressed me with a conviction of legal wrong as this. Not, perhaps, that a sufficient price was not obtained for this land; but that the door has been opened whereby speculators, casting their covetous eyes upon the property of infants, may be enabled, by seemingly fair propositions, and by holding out tempting offers to guardians, who would rather handle money than be bothered with land, to evade the solemn provisions made by a deceased father for his children. If the courts sit passively and let guardians confess away the estates of their wards in this way, no estate is safe, and a

man who makes a will might as well save himself the trouble. Above all, in this case there was absolutely no occasion for causing this land to be sold; for I undertake to say that there is not a tract of land of that size in the state of Washington which cannot be fairly divided into two parts of equal value. The partition proceeding was a sham, initiated by the first approach of Rucker to the guardian with his offer of $2,000, and $150 for expenses; and, if its consummation is ratified, it crowns with success an effort, at a slightly advanced cost, it is true, to evade the law and the last will of Erskine D. Kromer. From all appearances, Hewitt and the Everett Land Company seem to have been innocent purchasers, except that they could not take title save through Kromer's will, and therefore with knowledge of the whole record pertaining to the property. I advise a reversal, and therefore dissent.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.
Obed SILBERWOOD.

(.....Mich.....)

1. **The fee of land** under the waters of Lake Erie does not belong to riparian proprietors, but to the state subject to the right of navigation.
2. **The dedication of a portion of the Great Lakes** as a public hunting ground, made by Pub. Acts 1895, act No. 112, prohibiting the cutting or destruction of rushes or other submarine vegetation on the submerged lands, is valid.

(July 8, 1896.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Monroe County made during the trial of a prosecution against him for cutting rushes in Lake Erie in front of private premises, which resulted in his conviction. *Affirmed.*

The facts are stated in the opinion.

Mr. **George M. Landon,** for appellant:

Under this act the rushes must grow and spread turning the shore into marsh in which fishing with seins, drag nets, etc., the only way in which the shore owner has an exclusive right or privilege, must become a "lost art."

If this right could be considered a privilege or license it is a fair question whether it is revocable; for it would be a license granted to an owner of lands to facilitate the use of those lands in a particular manner and for an indefinite period.

Morrill v. *Mackman*, 24 Mich. 279.

But it is not a privilege and a license.

Lincoln v. *Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Grand Rapids* v. *Powers*, 89 Mich. 115, 14 L. R. A. 498.

Mr. Sterling has valuable rights of property in the water and the lands thereunder in front of his lands. As riparian owner he is entitled to any and every use he can make of the land under the water and next to his "surveyed lands" not inconsistent with the public right of navigation.

Lorman v. *Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice* v. *Ruddiman*, 10 Mich. 125.

The grant of a fractional section does not stop with the meandered line but carries with it a sand bar or place of shallow water in front of the premises.

Watson v. *Peters*, 26 Mich. 508; *Maxwell* v. *Bay City Bridge Co.* 41 Mich. 453; *Pere Marquette Boom Co.* v. *Adams*, 44 Mich. 404; *Richardson* v. *Prentiss*, 48 Mich. 88.

The side lines of the riparian proprietor extend from the margin of the stream at right angles with the thread of the stream.

Bay City Gas Light Co. v. *Industrial Works*, 28 Mich. 182; *Clark* v. *Campau*, 19 Mich. 328; *Blodgett & D. Lumber Co.* v. *Peters*, 87 Mich. 498; *Lincoln* v. *Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Clute* v. *Fisher*, 65 Mich. 48; *Grand Rapids Ice & C. Co.* v. *South Grand Rapids Ice & C. Co.* 102 Mich. 227, 25 L. R. A. 815.

Private ownership of land bounded on navigable fresh waters is not restricted to the meander line.

Maxwell v. *Bay City Bridge Co.*, *Pere Marquette Boom Co.* v. *Adams*, *Rice* v. *Ruddiman*, and *Clute* v. *Fisher*, *supra*; *Palmer* v. *Dodge*, 64 Mich. 474.

The rule applies to grants by the Federal government.

Butler v. *Grand Rapids & I. R. Co.* 85 Mich. 246.

A current is not essential to the existence of such a right.

Turner v. *Holland*, 65 Mich. 453; *Blodgett & D. Lumber Co.* v. *Peters*, 87 Mich. 498; *Grand Rapids Ice & C. Co.* v. *South Grand Rapids Ice & C. Co.* 102 Mich. 236.

When the title of the riparian owners extends *usque ad filum aquæ*, such proprietors are at liberty as against the public to erect any structure or do any act with respect to the water or the portion of the river bed owned by each provided they do not interfere with navigation, and the public have no other right than that of free and unmolested passage.

Gould, Waters, § 93; *Walker* v. *Board of Public Works*, 16 Ohio, 544; *Ewing* v. *Colquhoun*, L. R. 2 App. Cas. 839; *Atty. Gen.* v. *Evart Booming Co.* 34 Mich. 462; *Bay City Gaslight Co.* v. *Industrial Works*, and *Richardson* v. *Prentiss*, *supra*; *Harrington* v. *Port Huron*, 86 Mich. 46, 13 L. R. A. 664; *Blodgett & D. Lumber Co.* v. *Peters*, *supra*.

The right of navigation is the only public right.

Lorman v. *Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice* v. *Ruddiman*, 10 Mich. 125.

The right of the riparian owner is property and valuable.

Grand Rapids v. *Powers*, 89 Mich. 115, 14

NOTE.—As to private ownership of lakes, see *note* to Gouverneur v. National Ice Co. (N. Y.) 18 L. R. A. 695; also Noyes v. Collins (Iowa) 26 L. R. A. 609; and Axline v. Shaw (Fla.) 28 L. R. A. 391.

See also 33 L. R. A. 569; 38 L. R. A. 205.

L. R. A. 498; *Webber* v. *Pere Marquette Boom Co.* 62 Mich. 636.

This public right of navigation is paramount but not exclusive, and cannot be exercised so as to deprive the shore owner of his private rights.

People's Ice Co. v. *The Steamer "Excelsior,"* 44 Mich. 229, 38 Am. Rep. 246.

The rights of the public and private owner are concurrent.

White River Log & B. Co. v. *Nelson,* 45 Mich. 578.

These private rights of riparian owners are property, and cannot be taken from them without first making compensation.

Thunder Bay River Boom Co. v. *Speechly,* 31 Mich. 344, 18 Am. Rep. 184; *Grand Rapids* v. *Powers, supra; Backus* v. *Detroit,* 49 Mich. 110, 43 Am. Rep. 447; *Davenport & N. W. R. Co.* v. *Renwick,* 102 U. S. 180, 26 L. ed. 51; *Webber* v. *Pere Marquette Boom Co. supra.*

Mr. **Willis Baldwin,** for appellee:

The state is the owner of the fee of the land beneath the waters of the Great Lakes.

8 Am. & Eng. Enc. Law, p. 31; *Lincoln* v. *Davis,* 53 Mich. 375, 51 Am. Rep. 116; *Illinois* v. *Illinois C. R. Co.* 146 U. S. 387, 36 L. ed. 1018.

The ordinance of 1787 made navigability in fact the sole test of navigability in law irrespective of the ownership of the soil thereunder.

Lorman v. *Benson,* 8 Mich. 18, 77 Am. Dec. 435.

From this modification of the common-law rule of navigable waters there necessarily followed a modification of the common-law rule of riparian rights.

Ibid.

The rule here may be summarized as follows: (1) The fee of the soil under the Great Lakes is in the several states; (2) the fee of the soil under inland lakes and rivers is in the state when such waters have been held navigable by the reason of the common law applied to our changed conditions, and in the riparian owner when such waters have been held to be navigable by reason of legislation; (3) the right of fishing is public in the Great Lakes and in general in such waters where the state owns the fee thereunder, and private in rivers and waters where the fee is in the riparian owner.

Jones v. *Lee,* 77 Mich. 35; *La Plaisance Bay Harbor Co.* v. *Monroe,* Walk. Ch. (Mich.) 155; *Diedrich* v. *Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *De la Plaine* v. *Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Indiana* v. *Milk,* 11 Biss. 197; *Champlain & St. L. R. Co.* v. *Valentine,* 19 Barb. 484; 12 Am. & Eng. Enc. Law, p. 616; *Sloan* v. *Biemiller,* 34 Ohio St. 492; *Miller* v. *Mendenhall,* 43 Minn. 95, 8 L. R. A. 89; *Fulmer* v. *Williams,* 122 Pa. 191, 1 L. R. A. 603; *Flanagan* v. *Philadelphia,* 42 Pa. 228; *Illinois C. R. Co.* v. *Illinois,* 146 U. S. 387, 36 L. ed. 1018.

The vested right of the riparian owner on the Great Lakes is that of navigation to and from his premises with the right of wharfage.

Diedrich v. *Northwestern U. R. Co.* 42 Wis. 261, 24 Am. Rep. 399; *Illinois C. R. Co.* v. *Illinois, supra.*

The dedication of these waters of Lake Erie for a public shooting park was a valid dedication.

12 Am. & Eng. Enc. Law, p. 635; *Atty. Gen.* v. *Burrell,* 31 Mich. 25; *Sterling* v. *Jackson,* 69 Mich. 488.

Moore, J., delivered the opinion of the court:

This is an action to test the validity of Act No. 112, Pub. Acts 1895, which was intended to set aside certain submerged lands in Lake Erie and Detroit river, lying east of and adjacent to the surveyed lands in Monroe and Wayne counties, for a distance extending 1 mile into Lake Erie, for public shooting grounds, to make it unlawful to cut and destroy the rushes and other submarine vegetation on such submerged lands, and to provide a penalty therefor, which act provided that such reservation or dedication should not interfere with or detract from any right or privilege of any person or the public to fishing, and that such water should be free for purposes of navigation, provided, also, that said lands were owned by the state. Defendant was arrested in September, 1895, for cutting rushes on submerged lands adjacent to the property of the Monroe Marsh Company. He admitted these rushes were cut, not for the purposes of navigation, or of fishing, or in the enjoyment of fishing privileges. Defendant was working by direction of one Sterling, trustee of the marsh company.

The case of the people is based upon the following contentions: That the state is the owner of the fee of the land beneath the waters of the Great Lakes; that the vested right of the riparian owner on the Great Lakes is that of ingress and egress, by navigation, to and from his premises, with the rights of wharfage, etc.; that a dedication of a portion of the Great Lakes as a public hunting ground (subject, always, to the rights of navigation) is a valid dedication. The defendant contends that Mr. Sterling, as trustee of the marsh company, has valuable rights of property in the water, and the lands thereunder, in front of his lands; that, as riparian owner, he is entitled to any and every use he can make of the land under the water, and next to his surveyed lands, not inconsistent with the public right of navigation; that the right of fishing is a right of property, and not of privilege, and that this right of property cannot be summarily taken from him; that he had the right to cut the rushes to protect his shore or his fishing interest, or to prevent the flight of wild ducks being diverted from his marsh lands; or for any reason satisfactory to himself in the lawful enjoyment of his property; that the state owned none of these surveyed lands, and that the marsh company is the owner of the portion of the land under the water to the center of Lake Erie; that the act in question, arbitrarily, without notice or compensation, seeks to deprive him of the enjoyment of his property rights, and is therefore unconstitutional and void. The case comes here on error.

The defendant insists that the owners of land lying adjacent to Lake Erie in the county of Monroe, as such riparian proprietors, own the land to the center of that Great Lake, subject to the rights of navigation. If he is right in this contention, he was improperly convicted; otherwise, his conviction should stand. In

support of his view of the law he cites a great many Michigan cases, and especially *Richardson* v. *Prentiss*, 48 Mich. 88; *Harrington* v. *Port Huron*, 86 Mich. 46, 13 L. R. A. 664; *Blodgett & D. Lumber Co.* v. *Peters*, 87 Mich. 498. At the common law, all tide waters were navigable, and nontidal waters were non navigable. The right to fish in navigable waters was public, but in non navigable waters it was private; the right depending, not upon the ownership of the shore, but upon the ownership of the soil under the water. *Lincoln* v. *Davis*, 53 Mich. 375, 51 Am. Rep. 116. The English common law made the ebb and flow of the tide the legal test of its navigability, for it was in fact the practical test. The conditions in this country, however, are very different. We have hundreds of miles of great rivers, and vast inland seas, wholly uninfluenced by the tides, upon which float vast fleets of vessels; so that the common-law doctrine in relation to tide waters is not accepted in this country, because not applicable to our circumstances. One of the earliest decisions in this state in which the principles involved in this case are discussed is *La Plaisance Bay Harbor Co.* v. *Monroe*, Walk. Ch. (Mich.) 155. In that case the court held: "The bed of the stream is public property, and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey; and the common-law doctrine of *usque ad filum aquæ* is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement, or right of way only. So, with regard to our large lakes, or such parts of them as lie within the limits of the state. The proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake." It is claimed by counsel for respondent that this decision had been overruled by later decisions of this court. It is conceded that, so far as the decision relates to the rights of shore owners on rivers and inland lakes, it is not now the law in Michigan (*Lorman* v. *Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Clute* v. *Fisher*, 65 Mich. 48; *Butler* v. *Grand Rapids & I. R. Co.* 85 Mich. 246); but it is insisted that it is still the law so far as the Great Lakes are concerned. An examination of all the cases decided by this court which have been called to our attention fails to disclose that the question of the title to the bed of the Great Lakes was directly at issue in any of them. There is language used in some of the cases that would tend to support the claim of the respondent that the shore owner upon the Great Lakes had the same right to the land (subject to the right of fishing and navigation) which is possessed by the shore owner on rivers. *Lincoln* v. *Davis*, and *Blodgett & D. Lumber Co.* v. *Peters, supra.* On the other hand, there are expressions used in other cases tending to show that, so far as the Great Lakes are concerned, the law is as stated in the *La Plaisance Case. Sterling* v. *Jackson*, 69 Mich. 488. Other states having like interests to our own state in the waters of these great inland seas have had the precise question involved here before them, and have passed upon it. In *Diedrich* v. *Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 399, it was held that the vested right of the riparian owner on the Great Lakes is that of navigation to and from his premises, with the right of wharfage. The decisions in New York (*Champlain & St. L. R. Co.* v. *Valentine*, 19 Barb. 484), in Pennsylvania (*Fulmer* v. *Williams*, 122 Pa. 191, 1 L. R. A. 603), and in Ohio (*Sloan* v. *Biemiller*, 34 Ohio St. 492), all hold that the fee of the riparian owner ceases at the low-water mark.

In the case of *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, Judge Field, in delivering a very learned and exhaustive opinion, stated the law to be: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. . . . The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. . . . The Great Lakes are not in any appreciable respect affected by the tides, and yet on their waters . . . a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So, also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realms under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, "tide waters" and "navigable waters" . . . being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use, so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,—a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands

under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." It seems to me the reasoning of this case is without flaw, and that the law enunciated therein ought to stand as the law of this state. It commends itself to one's reason and judgment, and avoids many difficulties incident to a different construction of the law. It is in harmony with the doctrine laid down in the early *Case of La Plaisance*, which I do not think has ever been overruled in this state so far as it affects the rights of shore owners on the borders of the Great Lakes. This doctrine, too, is in harmony with the decisions in all of the states bordering on these great seas. It logically follows that, if this view is to be regarded as the law, the legislature possessed authority to pass Act No. 112 of the Public Acts of 1895.

The judgment of the court below is affirmed.

Long, Ch. J., did not sit. The other Justices concurred.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* C. J. MILSTED, *Respt.*,
v.
BUTTE CITY WATER COMPANY, *Appt.*

(--- -- -Mont.-----)

1. **An answer that defendant has no knowledge or information** upon which to form a belief as to a certain allegation, and therefore denies the same, is not such a specific denial as is required by Comp. Stat. 1887 (Code Civ. Proc. § 89).
2. **The refusal of a water company to supply water to a tenant** in the possession and occupancy of a house, when he is ready to pay for it in advance and the company is supplying a city and its inhabitants under a franchise, cannot be justified by a by-law declining to contract for water with any persons except owners of property or their authorized agents.

(May 4, 1896.)

APPEAL by defendant from a judgment of the District Court for Silver Bow County in favor of relator in a mandamus proceeding to compel defendant to furnish relator with water. *Affirmed.*

Statement by **Hunt, J.**:

Mandamus to compel the respondent, defendant, to turn on the water for general use at a certain house in Butte. The petitioner avers that he is a citizen and inhabitant of Butte; that the defendant water company is a corporation existing under the laws of Montana, engaged in supplying the inhabitants of Butte with water, under a certain franchise granted to the predecessor in interest of said corporation by the city of Butte; that by the terms of said franchise the corporation is granted the right to lay its mains in the streets and alleys of Butte, and is required to supply the inhabitants of Butte with water for general use, at specified prices; that the defendant corporation is in full use and enjoyment of the franchise; that one Murray is the owner of the premises involved; that on June 12, 1894, the said Murray gave to relator a written order to the defendant company, requesting it to turn on the water at the premises, and to charge the same to the relator; that the relator is the tenant in possession of said premises; that, on presenting said order, relator tendered to the water company $4.50, the amount allowed by the said franchise as water rents for the said premises for three months in advance, and demanded that the company turn the water on at said premises; that the premises are supplied with water pipes connected with the mains, and in proper condition to use water supplied by the said company; that the mains are supplied with water, but that the said premises are without water, because the company refused to accept the tender, or turn the water on at said premises; that there are no other means by which relator can secure water for said premises, unless his petition for a writ of mandamus is granted. The respondent company answered, admitting that it is a corporation engaged in supplying the city of Butte and the inhabitants thereof with water, under a franchise, as set forth in relator's petition. The answer admits the ownership of Murray, but pleads "that, as whether your relator is now a tenant in possession of the said premises, respondent has no knowledge or information upon which to found a belief, and therefore denies the same." It admits the presentation of the order and the demand for water, but alleges that it refused to turn on the water by virtue of its rules and regulations, by which it can deal only with the owners of property requiring water to be turned on, or the agents of such owners. The rule invoked by respondent is as follows: "The water company contracts with owners of property, or their authorized agents only, and the property is invariably held for water rent. When water is turned off for any cause, it will not be turned on again until all back rent due on that building is paid in full. Money paid by tenants will be credited to the owner, but in so doing the company does not in any way release the owner from liability under this rule." Respondent further pleads that, when the premises involved were connected with the mains, the owner, Murray, signed an application, requesting a supply of water for the property, subject to the rules and regulations of the respondent company, and that, when the said application was filed, the rule heretofore set

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NOTE.—For compulsory service by water company or other party whose business it is to serve the public, see *note* to Rushville v. Rushville Nat. Gas Co. (Ind.) 15 L. R. A. 321; also Portland Nat. Gas Co. v. State, Keen (Ind.) 21 L. R. A. 639; Wood v. Auburn (Me.) 29 L. R. A. 376, and American Waterworks Co. v. State, Walker (Neb.) 30 L. R. A. 447.

forth was in force, and the said Murray knew it was in force. Respondent says that, when the relator made his demand that the water be turned on for said premises, he was notified that the company would deal only with the owner, or his agent, and would not contract with the tenants to supply water to rented premises, except on the personal responsibility of the owner, and informed relator of the contents of the rule hereinbefore set forth. That the owner, Murray, at the time of relator's request that the water be turned on, refused to become personally responsible, or to allow his property to become responsible, for the payment of water rent; but that the respondent informed the relator that the money he tendered would be accepted, and the water turned on, but that the money so paid would be credited to the account of Murray, the owner of said premises. It is alleged then that the rule, as set forth, is reasonable and just, and without it the company cannot safely conduct its business; that, by virtue of its franchise, it supplies many of the inhabitants of Butte with water by meter measurement, and that, until the determination of the period for which a contract is made, and at which time the meters are read, it cannot determine what has been used, or to what amount the consumer is indebted to the company; that much property in Butte is occupied by tenants, and that, if respondent is obliged to deal with tenants, and look to them for pay of water, it would be subject to great loss and hardship; that it cannot, for reasons given, collect from the consumer in advance, and therefore is obliged to hold owners desiring water personally responsible.

Upon these pleadings the relator moved the court to make the alternative writ peremptory, notwithstanding the respondent's answer, for the reason that the matters set forth in said answer do not constitute a defense to relator's cause of action, or set forth any reason why said writ such not be made peremptory. The court granted this motion, and made the writ peremptory. The respondent appeals from the order sustaining the relator's motion to make the alternative writ peremptory.

Messrs. **Corbett & Welcome** for appellant.

Messrs. **George Heldorn** and **Oliver M. Hall,** for respondent:

A water company acting under a franchise permitting it to use the streets and alleys of a city for the purpose of laying its mains to supply the city and its inhabitants with water may be compelled to do so by mandamus.

Haugen v. *Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 424; *Portland Nat. Gas & O. Co.* v. *State, Keen,* 135 Ind. 54, 21 L. R. A. 639; *People, Kennedy,* v. *Manhattan Gaslight Co.* 45 Barb. 137; *Shepard* v. *Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479.

The owner of the property is under no legal obligation to the occupant of the premises to become responsible for his water supply, but the water company by the very terms of its franchise is bound to supply with water every inhabitant of the city who offers to pay therefor the amount prescribed by the franchise.

The fact that the company may be required to furnish water by meter measurement does not prove that the rule in question is either reasonable or necessary.

Williams v. *Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266.

Under the provisions of the franchise in the case at bar the requirement is not to furnish water to or for real estate but to the inhabitants of the city of Butte. A gas company cannot refuse to furnish gas to a person because he refuses to pay a former bill or a bill contracted on different premises.

Gaslight Co. v. *Colliday,* 25 Md. 1; *Lloyd* v. *Washington Gaslight Co.* 1 Mackey, 331.

Nor can it shut off the gas on the ground that there are arrears due from a former occupant of the premises.

Morey v. *Metropolitan Gaslight Co.* 6 Jones & S. 185.

A denial based on a want of information or belief has invariably been held to raise no issue.

Claflin v. *Reese,* 54 Iowa, 544; *Manny* v. *French,* 23 Iowa, 250; *Elton* v. *Markham,* 20 Barb. 343; *Lloyd* v. *Burns,* 62 N. Y. 651; *Greer* v. *Covington,* 83 Ky. 410; *Hastings* v. *Gwynn,* 12 Wis. 672; *Mead* v. *Day,* 54 Miss. 58; *Heye* v. *Bolles,* 33 How. Pr. 266; *Sayre* v. *Cushing,* 7 Abb. Pr. 371; *Terrill* v. *Jennings,* 1 Met. (Ky.) 450; *Curtis* v. *Richards,* 9 Cal. 34.

The rule in itself is not a reasonable one and the assent to it by Murray was without a valuable consideration, and would not be binding as a contract even on him.

A promise to pay a person for doing what he is already bound to do is without consideration.

Vanderbilt v. *Schreyer,* 91 N. Y. 392; *Withers* v. *Ewing,* 40 Ohio St. 400; *Bartlett* v. *Wyman,* 14 Johns. 260; *McCann* v. *Lewis,* 9 Cal. 246; *Hale* v. *Forbis,* 3 Mont. 395; 3 Am. & Eng. Enc. Law, p. 834, and cases cited in note 4.

A gas company cannot refuse gas to a person on the sole ground that he refused to sign an agreement to accept gas subject to certain rules that were held to be unreasonable.

Shepard v. *Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Shepard* v. *Milwaukee Gaslight Co.* 15 Wis. 318, 82 Am. Dec. 679.

Hunt, J., delivered the opinion of the court:

The appellant contends that there was an issue of fact tendered by the answer of respondent upon the question whether relator was or was not a tenant in possession of the premises involved. But we think that the denial of respondent that "as to whether relator is a tenant in possession of the said premises, it had no knowledge or information upon which to found a belief, and therefore denies the same," was not good under Comp. Stat. 1887 (Code Civ. Proc. § 89). The Code required a specific denial of the material allegations of the complaint controverted by the defendant. "If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant." While there are cases and authors holding a denial such as respondent's good under codes quite similar to the Montana Code of 1887, in California this exact question was long since decided by Justice Field, for the supreme court

of that state, in *Curtis* v. *Richards*, 9 Cal. 34, where it was said of a denial like appellant's: "There are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue: first, positively, when the facts are within his own personal knowledge; and, second, upon information and belief, when the facts are not within his own personal knowledge. Practice Act, § 46. These forms cannot be indiscriminately used. It the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively; and a denial upon information and belief will be treated as an invasion. Thus, for example, in reference to instruments of writing alleged in a complaint to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description or copy in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. Practice Act, § 446. If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information and belief. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. By the 46th section of the practice act, as originally passed in 1851, it was provided that an allegation of the complaint might be controverted by a denial 'of any knowledge thereof sufficient to form a belief.' In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854, the 46th section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case." See also *San Francisco Gas Co.* v. *San Francisco*, 9 Cal. 467, where, on rehearing, the court adhere to the rule established in *Curtis* v. *Richards*.

The Montana practice act, as it appears in the Laws of 1887, having been principally taken from California, and having been modified in its requirements of what a denial must contain, and how it must be made, after the decision of the Supreme Court of the United States in *Maclay* v. *Sands*, 94 U. S. 586, 24 L. ed. 211, Reversing *Sands* v. *Maclay*, 2 Mont. 35, the construction of the California Code should have great weight in the construction of similar provisions of our practice act. Bliss, Code Pl. § 326, says: "The pleader is not permitted to evade the statute. He must deny directly and positively, or must deny in the language of the statute, 'according to his information and belief.' To say that 'he has not sufficient knowledge to form a belief,' and therefore denies, will not do; nor will it be permitted to 'deny for want of information to enable them to admit.'" Pom. Code Rem. § 640; Estee, Pl. & Pr. § 3224.

The supreme court of South Dakota, in *Cumins* v. *Lawrence County*, 1 S. D. 158, held that a denial, such as appellant has made in the case at bar, is not a denial of any fact averred, "but is a mere denial of any knowledge or information as to the alleged facts sufficient to form a belief in respect to their existence or nonexistence," and, of itself, is no defense. By statute of that state, however, such a denial is expressly authorized, and, by virtue of the statutory permission, that form of denial is held good. Maxwell, Code Pl. p. 386, holds such denials good, but he does not refer to the California cases, and relies upon the single case of *State, Treadwell*, v. *Hancock County Comrs.* 11 Ohio St. 183, to sustain his text. But it is evident, from an inspection of the Ohio case, that the statute in force was different from that of California and Montana.

It is observed that the new Codes of 1895 extend the method and form of denials, giving far more latitude, apparently, than under the former practice. Code Civ. Proc. 1895, § 690. We shall follow the California cases, and hold that the statutory form of denial was the only one to be sustained. The denial, therefore, being insufficient, and no issues of fact being presented, the question for determination is: Can the appellant water company refuse to supply relator with water for general purposes at the premises involved? The appellant is a water company, engaged in supplying the inhabitants of the city of Butte with water, under its franchise. The city gave the corporation the right to lay its mains in its streets and alleys. The company, on the other hand, is required to supply the inhabitants of the city of Butte with water for general use, at prices specified in the franchise granted. The relator is an inhabitant of Butte, occupying premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water upon the ground that, "by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners?" We say not. The performance of the duty the company undertook when it accepted the franchise granted was to supply the inhabitants of the city with water. "A waterworks company is also a quasi-public corporation. It must supply water to all who apply therefor and offer to pay the rates." Cook, Stock, Stockh. & Corp. Law, § 932. The account of which the grant was given was a public purpose. *Lumbard* v. *Stearns*, 4 Cush. 61. Therefore, "the grant is subject to an implied condition that the company shall assume an obligation to fulfil the public purpose on account of which the grant was made." Morawetz, Priv. Corp. § 1129.

The view that supplying a city and its inhabitants with water for general purposes is a business of a public nature, and meets a general necessity, is sustained by the great weight of authority, reviewed in a learned opinion of Lord, Ch. J., in *Haugen* v. *Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 424. It was there said: "The defendant by incorporating, under the statute for the purpose of supplying water to the city and its inhabitants, under-

took a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise, belonging to the public and not enjoyed of common right, for the accomplishment of public objects and the promotion of public convenience and comfort. Its business was not of a private, but of a public nature, and designed, under the conditions of the grant, as well for the benefit of the public as the company." Certainly, the company may make reasonable rules and regulations. Doubtless it may require payments in advance for a reasonable length of time. It may, within certain reasonable limitations, cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times, or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations, as assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house, in need of water for general purposes. Whether the owner has made a contract with the corporation to hold himself personally liable or not, or whether he has signed any paper agreeing to subject his property to a lien for water rents, we will not discuss in this case. The water company in no case, however, can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and if it has adopted a by-law that is in conflict with their franchise, which may be termed its constitution, or is unreasonable or oppressive, the subordinate rule or by-law will be set aside. Thomp. Corp. §§ 1010 *et seq.* This relator was entitled to water, and to a receipt for his payment issued directly to him, and to have the amount of his payment credited to him alone, and the by-law pleaded by the company is, as to him, clearly unreasonable; and it is immaterial to his rights whether the owner had any agreement with the company or not, or whether, as tenant, he knew of the existence of any such agreement. The duty of the company under its franchise, and undertaken to be fulfilled, must be performed.

The order appealed from is affirmed.

Pemberton, Ch. J., concurs; **De Witt,** J., not sitting.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SUBURBAN ELECTRIC COMPANY, *Plff. in Err.*,
v.
Edward NUGENT, Admr., etc., of Christian Otto, Deceased.

(.....N. J.....)

* **1. In an action for personal injury,** the plaintiff, in order to recover damages, must do more than show the possible responsibility of the defendant for the injury. In the absence of direct evidence, he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected.

2. A person using a public street has a right to presume that it is free from dangerous obstacles; and the mere fact that he receives injury by coming in contact with such an obstacle does not warrant the conclusion that he contributed to the injury by his own negligence.

(June 16, 1896.)

ERROR to the Circuit Court for Union County to review a judgment in favor of plaintiff in an action to recover damages for the alleged negligent killing by defendant of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Foster M. Voorhees** and **Frank Bergen,** for plaintiff in error:

The mere fact that the plaintiff's intestate was found dead under the circumstances disclosed by the testimony does not warrant the inference that the defendant was responsible for his death.

Wakelin v. *London & S. W. R. Co.* L. R. 12 App. Cas. 41; *Bond* v. *Smith,* 113 N. Y. 378; *New Jersey Exp. Co.* v. *Nichols,* 33 N. J. L. 434; *Pennsylvania R. Co.* v. *Righter,* 42 N. J. L 180; *Chicago & A. R. Co* v. *Crowder,* 49 Ill. App. 154; *Searles* v. *Manhattan R. Co.* 101 N. Y. 661.

It can make no difference whether the wire was within easy reach or difficult of access. A trespasser, or even a licensee, on the property of another takes his chances of injury unless a trap is purposely laid to injure him.

Hector v. *Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554; *Redigan* v. *Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276; *Reardon* v. *Thompson,* 149 Mass. 267; *Sullivan* v. *Boston & A. R. Co.* 156 Mass 378.

Mr. **Richard V. Lindabury** for defendant in error.

Gummere, J., delivered the opinion of the court:

Christian Otto, the intestate of the defendant in error, was a member of the police force of the city of Elizabeth; and, at the time of his death, was engaged in patrolling Washington avenue and other streets in that city. His

* Headnotes by GUMMERE, J.

NOTE.—For some cases as to contributory negligence of traveler on highway, see Woodman v. Metropolitan R. Co. (Mass.) 4 L. R. A. 213, and *note;* also *note* to Thompson v. Quincy (Mich.) 10 L. R. A. 740.

For contributory negligence in deviating from usual thoroughfare, see *note* to Ely v. Des Moines (Iowa) 17 L. R. A. 124.

See also 40 L. R. A. 364; 43 L. R. A. 487.

dead body was found lying upon the corner of Washington avenue and Pearl street, about 3 feet from the base of one of the electric light poles of the plaintiff in error, which was standing there. This suit was thereupon brought by the defendant in error against the Electric Light Company to recover from it the pecuniary loss sustained by the widow and children of the intestate by reason of his death; the plaintiff's claim being that decedent's death was caused by an electric shock, received from an exposed wire upon the said electric light pole, and due to the improper construction and maintenance of the defendant company's electric light plant at that point.

On the trial, at the close of the plaintiff's case, there was a motion to nonsuit, which was refused by the trial court, and, upon this refusal, error is assigned. The grounds upon which, it is claimed, the motion to nonsuit shou'd have prevailed, are: First, that the evidence failed to show anything more than that the defendant was possibly responsible for the death of Otto; and, second, that, if it be considered that the evidence warrants the conclusion that his death was attributable to the defendant, the facts also demonstrate that he contributed by his own negligence to the accident which caused his death. It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict. It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. *Bond* v. *Smith*, 113 N. Y. 378; *Houston* v. *Traphagen*, 47 N. J. L. 23. And this, it seems to me, he has done. No one was present when the decedent came to his death, and therefore there was no direct evidence to show how it was caused; but it appeared, from the plaintiff's proofs, that there was fastened upon the pole, at the foot of which decedent's body was found, a reel, around which was wound a wire rope used for the purpose of raising and lowering one of the defendant's arc lamps; that the reel was about on a level with the top of a man's head; and that the wire rope around it was practically uninsulated, and was heavily charged with electricity. It also appeared that the *post mortem* examination of decedent showed all his organs to have been in a normal condition; that his death was not caused by disease of any kind; that there was upon his left hand, and running all the way across it, a freshly made burn, about one sixth of an inch in width; and that the blood was in an abnormal state, its condition being such as is found in the bodies of persons who have died from electric shock. These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole, and thereby received a fatal shock, but exclude any other inference. For such a death, the defendant was plainly responsible. It was using, in the public streets of Elizabeth, an agency dangerous to human life; and it was bound to take every reasonable precaution to protect the public, while using those streets, against injury from that agency. The maintaining upon a reel, which was fastened to an electric light pole so near to the ground as to be within easy reach, of an uninsulated wire heavily charged with electricity, was, in my judgment, a gross neglect of the duty which it owed to the public. The first ground upon which the refusal to nonsuit is attacked is without force, and cannot prevail.

Nor is the objection that the decedent's own carelessness contributed to the injury which caused his death more tenable. There was nothing in the plaintiff's case to show under what circumstances he received the shock which killed him, and nothing, therefore, upon which his negligence could be predicated. It did not appear that he had knowledge that the wire was not properly insulated, or that it was charged with electricity, and he, as well as every other member of the public, was justified in presuming that this company had so constructed its electric light line, and was so maintaining it, that it would not be a source of danger to persons using the street. *Durant* v. *Palmer*, 29 N. J. L. 544; *Houston* v. *Traphagen*, *supra*. Whether the decedent was guilty of negligence in coming into contact with this live wire depended entirely upon the circumstances under which it was done. Such negligence cannot be presumed from the mere fact of his having done so, and, as there was nothing else in the plaintiff's case to indicate carelessness on the part of his intestate, the motion for nonsuit was without support on this ground also.

The judgment of the Circuit Court should be affirmed.

William FULPER, *Appt.*,
v.
James B. FULPER *et al.*, *Respts.*

(.....N. J.....)

***Where lands are granted to a husband and wife,** and it appears from the words of the grant that the intent was to create a tenancy in common, they will take and hold the lands granted as tenants in common, and not as tenants of the entirety.

(June 19, 1896.)

APPEAL by complainant from a decree of the Chancery Court in favor of defendants in a proceeding brought to obtain partition of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. **George H. Large,** for appellant:

Husband and wife during coverture can take and hold land conveyed to them in fee as tenants in common when the habendum in their deed expressly so states.

McDermott v. *French*, 15 N. J. Eq. 78;

*Headnote by GUMMERE, J.

NOTE.—For tenancy by entireties, see *note* to Hiles v. Fisher (N. Y.) 30 L. R. A. 305.

Moody v. *Moody*, Ambl. 649; 4 Kent, Com. 363; 1 Preston, Estates, 132; 2 Bl. Com. 182; 2 Preston, Abstracts, 41; 1 Reed's Bl. 470.

To constitute a tenancy in common between husband and wife there must in the conveyance be an expression of an intention so to do. *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52.

The latest decisions in many states hold that "estates by entireties depend upon the unity of husband and wife, and that the separate property acts have destroyed this unity as far as property is concerned, and that with the existence of this unity estates by entireties have ceased to exist.

9 Am. & Eng. Enc. Law, 851; *Hoffman* v. *Stigers*, 28 Iowa, 302; *Hunt* v. *Blackburn*, 128 U. S. 464, 32 L. ed. 488; 1 Washb. Real Prop. 4th ed. 674.

Mr. **Henry A. Fluck** for respondents.

Gummere, J., delivered the opinion of the court:

The complainant in this case filed his bill for the partition of certain lands in the county of Hunterdon, which were conveyed on May 9, 1834, to his parents, Asher and Jane Fulper, "as tenants in common." Both grantees are now dead, Asher Fulper having survived his wife, who died intestate. The husband, however, left a will, by which he devised the whole of his real estate to five of his children, disinheriting the remaining one, the complainant, who, the will declared, "shall take nothing under this will." The complainant bases his right to a partition of the lands in question upon the fact that he is one of the heirs at law of his mother, and, as such, the owner of an undivided interest therein. His ownership is challenged by his brothers and sisters, the ground of their contention being that, notwithstanding the fact that the lands were conveyed to their parents as tenants in common, they, by force of law, held them as tenants of the entirety, and that, therefore, upon the death of their mother, the whole estate became vested in their father, by right of survivorship, as tenant in fee simple.

The learned advisory master who heard the case adopted the view advanced by the defendants, and held that the complainant had no interest in the lands which he sought to have partitioned, following the decision of the supreme court of Pennsylvania in *Stuckey* v. *Keefe*, 26 Pa. 397, which holds that, in consequence of the theoretic unity, and entirety of the ownership of the husband and wife with respect to their interest in lands, they cannot hold by moieties, and that, where land is conveyed to them in common, they take an entirety of estate, without regard to the intent appearing in the conveyance. The decision in *Stuckey* v. *Keefe* rests upon the ground that there are certain incidents to a tenancy in common which cannot exist in an estate held by husband and wife. Those incidents are said to be that tenants in common may sell their respective shares; that they are compellable to make partition; that they are liable to reciprocal actions of waste and account; that, if one turns the other out of possession, an action of ejectment will lie. And it is said that, where lands are held by a husband and wife jointly, he cannot sell his moiety free from her dower, nor can she sell hers at all without his consent, and that no action of partition or account or waste or ejectment can be maintained by one against the other. The fact that a husband cannot sell his moiety of lands held jointly with his wife, free from her dower, and that she cannot sell hers at all without his consent, does not seem to afford a substantial reason for concluding that they cannot therefore hold lands as tenants in common. The same fact is equally true of lands held by either the husband or wife in severalty, and yet it has never been suggested that this fact would operate to prevent lands from being so held by a married person.

Nor does it seem to me that the fact of the inability of the husband or wife to maintain an action of partition or of waste or of ejectment or of account against the other (admitting that such inability exists) justifies the conclusion that they cannot hold as tenants in common. The reason why, at common law, an action could not be maintained by the wife against the husband for an accounting of the rents and profits of an estate held by him and her, or for the joint possession thereof, was not because of anything characteristic of the estate so held, but because the husband, by the *jus mariti*, was entitled to the exclusive possession of his wife's land during her life, and to the rents and profits thereof, whether held by her jointly with him or in severalty. *Hiles* v. *Fisher*, 144 N. Y. 306, 30 L. R. A. 305. So far as the husband is concerned, while it is true that he could not maintain an action at law against his wife for an accounting of the rents and profits of their joint estate, or for the joint possession thereof, or for waste committed, I see no reason why he could not have proceeded against her by a bill in equity, which has always been resorted to for the enforcement of rights and the redress of wrongs as between husband and wife. So, too, it seems to me that a court of equity would, at the instance of the wife, restrain waste of the joint estate by the husband, whether they held as tenants of the entirety or as tenants in common. Nor can I concede that an action of partition of the joint estate cannot be maintained by the husband against the wife, or *vice versa*, unless, of course, there is a survivorship. Equity will decree a partition between husband and wife, if they hold as tenants in common, to the same extent which it would if they were strangers. It is reasoning in a circle to say that a partition of land cannot be made between husband and wife because their estate is by entireties, and that the proof that their estate is by entireties is the fact that there can be no partition between them.

It is a mistake to suppose that there is anything in the theoretic unity of husband and wife which prevents them from being able to hold moieties of the same estate. It has always been held that if a man and woman become possessed of an estate as joint tenants or as tenants in common, and afterwards marry, they still retain their moieties after marriage, and continue to hold as joint tenants or tenants in common. Co. Litt. 187*b*; 1 Preston Estates, 434; 3 Washb. Real Prop. 425, and cases cited. There being nothing in the

marriage relation which prevents those who were tenants in common before marriage from remaining such after marriage, it would seem to follow, necessarily, that there is nothing in that relationship which would prevent a husband and wife from taking such an estate after marriage, provided it clearly appeared from the deed or devise under which they took that such was the intention. This was the view taken by Chancellor Green in *McDermott* v. *French*, 15 N. J. Eq. 78. In that case a bill was filed for a partition of land, brought by a grantee of a husband against the wife. The bill alleged that the husband and wife were seised in fee of the land, as tenants in common, by virtue of a conveyance made to them, and that the husband had conveyed to the complainant all his interest therein. There was a demurrer filed to the bill on behalf of the wife, upon the ground, among others, that, by the conveyance to them, she and her husband took an estate by entireties. Discussing this point, the chancellor says: "The bill alleges that the husband and wife were seised as tenants in common by virtue of a conveyance made to them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common. As there is a direct averment that the conveyance created a tenancy in common, it must be assumed that apt words were used in the deed for that purpose." In the case of *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, which involved the effect of our married woman's act upon estates by entireties, Mr. Justice Van Syckel states that a tenancy in common between husband and wife may be created by deed, provided there be, in the conveyance, an expression of an intention to do so. The same view has been taken by the courts of other states as well as by the United States Supreme Court. In the case of *Miner* v. *Brown*, 133 N. Y. 308, it is said that whether a husband and wife take as tenants in common, or as tenants of the entirety, is to be gathered from the instrument which passes the estate to them, and, that where it appears from the instrument that it was the intention that they should take as tenants in common, that intention must prevail; and it is said that such has been the rule from an early period in the history of the English law. In *Knapp* v. *Windsor*, 6 Cush. 157, and *Brown* v. *Baraboo*, 90 Wis. 151, 30 L. R. A. 320, it is held that where lands descend to a husband and wife, as heirs at law, they take and hold as tenants in common, and not as tenants by entireties. In the case of *Hunt* v. *Blackburn*, 128 U. S. 464, 32 L. ed. 488, it is declared that, at common law, where lands are granted to husband and wife as tenants in common, they will hold by moieties, as other distinct and individual persons would do. It seems clear, both on principle and authority, that the rule laid down in *McDermott* v. *French*, that a husband and wife may be made tenants in common by express words contained in the grant, is the correct one, but, even if it was otherwise, we ought to adhere to the rule as stated in the opinion in that case. Since its promulgation in 1862, it has been accepted by the bar of this state as a correct enunciation of the law on this subject, and has become a rule of property, upon which many titles, undoubtedly, are founded. It should not now be altered unless by legislative enactment.

The decree of the Court of Chancery should be reversed.

NEW YORK COURT OF APPEALS.

Charles PICKSLAY, *Respt.*,
v.
Theodore B. STARR, *Appt.*

(149 N. Y. 432.)

A Christmas gift by a check to an employee according to habit of previous years, although it is made in forgetfulness of the fact that his salary had been increased during the year, and is charged to his account a few days later, but without giving him notice of that fact for several months, cannot be avoided by the donor on the ground of mistake.

(May 26, 1896.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment entered in the office of the clerk of Kings County upon the report of a referee in favor of plaintiff in an action brought to recover salary alleged to be due and unpaid. *Affirmed.*

Statement by **Gray, J.**:

The action was brought to recover a balance alleged by the plaintiff to be due to him from the defendant, pursuant to an agreement between them relating to his compensation while in the latter's employment. For a number of years, prior to the year 1889, the defendant had been in the habit of giving to the plaintiff at Christmas a present of $2,500. In April, 1889, an arrangement was made between them, by which the plaintiff's salary was increased to $9,000, from and after May 1, 1889; and from and after May 1, 1890, in addition to to the sum of $9,000, plaintiff was to receive a commission for the year of 1½ per cent upon the amount of the defendant's sales in excess of $600,000. In the evening of December 24, 1889, at an interview between the plaintiff and the defendant, the latter handed to the former a check for $2,500, with an expression of his wishes for a merry Christmas. On the day after Christmas another interview occurred between the parties, after which the plaintiff was departing for his home, but, remembering that he had not spoken to the defendant about the present, he returned, saw the defendant and said to him: "I came back to thank you for your present to me, and also, on behalf of

NOTE.—As to the gift of checks, see *note* to *Re* Taylor's Estate (Pa.) 18 L. R. A. 855.

Mrs. Pickslay to return her thanks to you for the present you gave her." The defendant replied that he "was very glad they were pleased." A few days later the defendant's attention was called to the check by his bookkeeper, and, being asked what should be done with it he directed him to charge it to the plaintiff's account. The defendant did not, however, then speak to the plaintiff upon the subject, nor was the plaintiff informed with respect to the entry in the books until the May following, when it appeared in an account rendered to him by the bookkeeper. At that time the defendant was absent in Europe. In September of that year, and again in the winter or spring following, the plaintiff says he spoke to the defendant about the bookkeeper having charged the $2,500 against him, and that there was discussion between them, the plaintiff insisting that he had every reason to suppose it was a gift, and the defendant insisting that it was a mistake. In April, 1891, the plaintiff entered into business for himself. According to the defendant's evidence, the new arrangement, with respect to the compensation of the plaintiff, was made upon the basis of increasing his previous salary by adding to it the usual Christmas gift of $2,500 and a still further sum. He had forgotten about the new arrangement between them at the time when he made the Christmas gift in question, and in making it he had followed the habit of previous years. He testified that the whole thing was a mistake, and that he had not intended to give the $2,500 to the plaintiff in addition to his salary and commissions under the new arrangement. The finding of the referee before whom the trial was had is "that the sum of $2,500, paid by the defendant on or about the 24th day of December, 1889, to plaintiff, was not a payment on account of salary, but was a gift from defendant to plaintiff."

The dispute between the parties turns upon whether there was a valid gift of the $2,500 to the plaintiff, as he claims; or whether, the gift having been made under a mistake, as the defendant claims, it was invalid and could be now offset against the demand of the plaintiff for the balance due to him in account, at the time when he left the defendant's employment, in April, 1891. The judgment entered upon the direction of the referee in the plaintiff's favor, for the amount as claimed by him, has been affirmed by the general term, and the defendant has appealed to this court from the judgment of affirmance.

Mr. **Delos McCurdy,** with *Messrs.* **Vanderpoel, Cuming, & Goodwin,** for appellant:

A gift will not be presumed. Neither will an intention to make a gift be presumed. All the facts necessary to prove such intention, and all the facts necessary to prove a gift made in pursuance of such intent, must be clearly established.

Devlin v. *Greenwich Sav. Bank*, 125 N. Y. 756; *Lewis* v. *Merritt*, 113 N. Y. 386; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Grey* v. *Grey*, 47 N. Y. 552; *Beaver* v. *Beaver*, 117 N. Y. 428, 6 L. R. A. 403; *Jackson* v. *Twenty-third Street R. Co.* 88 N. Y. 526; *Smith* v. *State*, 2 Lea, 619.

There is no known rule of law or equity by which a mistake can be converted into an intentional act.

Mistakes and intentional acts are in exact opposition to each other in the rights created, the responsibility incurred, and the remedies applied in consequence thereof.

Bispham, Eq. § 190; Kerr, Fr. 406; Haynes, Outlines of Eq. pp. 80, 132; Pom. Eq. Jur. § 839; Pollock, Cont. 4th ed. p. 411.

The maxim *Ignorantia juris non excusat* applies only to the general law of the land—the common *jus*—and not to mistakes as to private individual legal rights and liabilities.

Cooper v. *Phibbs*, L. R. 2 H. L. 149; *Eaglesfield* v. *Marquis Londonderry*, L. R. 4 Ch. Div. 693; *Bingham* v. *Bingham*, 1 Ves. Sr. 126; *Cocking* v. *Pratt*, Id. 400; *Marquis Townshend* v. *Stangroom*, 6 Ves. Jr. 328; *Broughton* v. *Hutt*, 3 De G. & J. 501; *Re Saxon L. Assur. Co.* 1 De G. J. & S. 29; *Reynell* v. *Sprye*, 8 Hare, 222; *Blakeman* v. *Blakeman*, 39 Conn. 320; Pom. Eq. Jur. §§ 841–849; Bispham, Eq. § 187.

The mere delivery of the check did not make a valid gift of $2,500.

Lunt v. *Bank of North America*, 49 Barb. 221; *Cowperthwaite* v. *Sheffield*, 3 N. Y. 243; *Winter* v. *Drury*, 5 N. Y. 525; *Chapman* v. *White*, 6 N. Y. 412, 57 Am. Dec. 464; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 83, 7 Am. Rep. 314; *Tyler* v. *Gould*, 48 N. Y. 682; *Duncan* v. *Berlin*, 60 N. Y. 153; *Atty. Gen.* v. *Continental L. Ins. Co.* 71 N. Y. 325, 27 Am. Rep. 55; *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897.

The delivery of the check did not carry with it the complete control of and dominion over the money, nor did it at the same time devest Mr. Starr of his control and dominion over the money itself.

Jackson v. *Twenty-third Street R. Co.* 88 N. Y. 520; 2 Kent, Com. 439; *Brink* v. *Gould*, 7 Lans. 425; *Irish* v. *Nutting*, 47 Barb. 370; *Noble* v. *Smith*, 2 Johns. 52, 3 Am. Dec. 399; *Bedell* v. *Carll*, 33 N. Y. 584; *Curry* v. *Powers*, 70 N. Y. 212, 26 Am. Rep. 577; *Beaver* v. *Beaver*, 117 N. Y. 421, 6 L. R. A. 403; *Williams* v. *Guile*, 117 N. Y. 343, 6 L. R. A. 366; *Ridden* v. *Thrall*, 125 N. Y. 572, 11 L. R. A. 684; *Young* v. *Young*, 89 N. Y. 424, 36 Am. Rep. 634; *Re Crawford*, 113 N. Y. 560, 5 L. R. A. 71; *Kirk* v. *McCusker*, 3 Misc. 277.

A check drawn in the ordinary form is a mere inland bill of exchange and cannot constitute the subject-matter of a valid gift *inter vivos* or *causa mortis* unless presented and accepted.

Chapman v. *White*, 6 N. Y. 417, 57 Am. Dec. 464; *Atty. Gen.* v. *Continental L. Ins. Co.* 71 N. Y. 330, 27 Am. Rep. 55; *Harker* v. *Anderson*, 21 Wend. 373; *Coates* v. *First Nat. Bank*, 91 N. Y. 26; *Harris* v. *Clark*, 3 N. Y. 93, 51 Am. Dec. 352; *Re Smither*, 30 Hun, 632; *Re James*, 146 N. Y. 94; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Re Beak's Estate*, L. R. 13 Eq. 489; *Second Nat. Bank* v. *Williams*, 13 Mich. 282; *Cloyes* v. *Cloyes*, 36 Hun, 145; *Basket* v. *Hassell*, 107 U. S. 602, 27 L. ed. 500; Byles, Bills, 13th ed. 126; *Bedell* v. *Carll*, 33 N. Y. 581.

An incomplete voluntary gift creates no right which can be enforced.

Warriner v. *Rogers*, L. R. 16 Eq. 340; *Richards* v. *Delbridge*, 18 Eq. 11; *Moore* v. *Moore*,

Id. 474; *Heartley* v. *Nicholson*, L. R. 19 Eq. 233

Mr. **William H. Ford,** for respondent:

The intent in the defendant's mind to give the plaintiff a Christmas present of $2,500 was clearly proved.

Bedell v. *Carll*, 33 N. Y. 581; *Beaver* v. *Beaver*, 117 N. Y. 421, 6 L. R. A. 403.

Mr. Starr cannot recover in an action for money paid by mistake.

Upon discovery of his mistake Mr. Starr should have at once notified Mr. Pickslay of it.

Haviland v. *Willets*, 141 N. Y. 52; *Erie County Sav. Bank* v. *Roop*, 48 N. Y. 292; *Thomas* v. *Bartow*, 48 N. Y. 193; *Grymes* v. *Sanders*, 93 U. S. 55, 23 L. ed. 798; *Mayer* v. *New York*, 133 N. Y. 455.

The burden of proof is on the party alleging the mistake.

Mayer v. *New York*, *supra*.

The delivery of the $2,500 was complete and amply proved.

Harris v. *Clark*, 3 N. Y. 113, 51 Am. Dec. 352; *Mandeville* v. *Welch*, 18 U. S. 5 Wheat. 277, 5 L. ed. 87; *Re Allison*, 35 N. Y. S. R. 323.

Gray, J., delivered the opinion of the court:

This is a peculiar case. It is perfectly clear that the defendant intended, at the time, to give to the plaintiff the Christmas present of $2,500, and it is also equally clear that subsequently he bethought himself of the new arrangement which he had made with respect to his clerk's compensation, and became conscious of the mistake he had committed. Of course, notwithstanding the new arrangement between them, which, according to the defendant, was upon a basis which would make the usual annual Christmas gift no longer a thing to be expected, there was nothing to prevent his continuing to recognize the peculiar value to him of the plaintiff's services by way of gifts of money. When, upon the occasion of their interview on Christmas eve, he handed the envelope containing the check to the plaintiff, with the expression of his good wishes, there can be no doubt that there were present the two elements necessary to constitute a perfect gift, *viz.*, the intention to give, followed by a delivery of the thing given. The argument that the defendant could not have intended to give the $2,500, because that sum would then have been given twice, in view of its having been included by the defendant in the new arrangement with respect to compensation, is not quite sound. All that is necessary to constitute intention, and all that we understand, legally or otherwise, by intention, is the design or determination of the mind, and that mental condition may exist when an act is done irrespective of the fact that, were something else then recalled, it might not have acted in the same manner. This is not like the case where parties come to some agreement, in the belief that a certain state of facts exists, and money is paid by the one to the other in consequence thereof, and it subsequently appears that there was a mistake with regard to the facts. Money when so paid is deemed to have been received by the one to whom it is paid to the use of the one paying it. The mutual error, which affected the agreement between the parties, requires that they should be remitted to their original rights. In such a case, in equity and in justice, the money does not belong to the party receiving it. So, too, if there is an equitable basis for redress, by reason of some mistake of fact in the contract, due to the ignorance or forgetfulness of the party, equity will not infrequently intervene. The principle is, in such cases, that there is not that consent of the minds which is essential to the perfect agreement. A gift, however, requires no consideration and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the subject of the gift.

The defendant's silence towards the plaintiff for months afterwards, until the latter, becoming acquainted with the fact of the bookkeeper having charged the sum to his account in the books, had the opportunity of speaking with him upon the subject, is a very remarkable fact and one which militates against the defendant's case in every way. The finding of the referee, that there was a gift from the defendant to the plaintiff, is not only supported by the affirmative evidence in the case given by the plaintiff, but it would have support in the inferences which might be drawn from the strange silence of the defendant towards the plaintiff subsequently. Indeed, it is difficult to see, giving all faith to the defendant's testimony about the matter, how the referee could have come to a different conclusion than he did upon the facts. If the defendant's position was tenable, that a gift under a mistake invalidates it and the giver is at any time justified in setting up the mistake in order to defeat the gift, it might, in instances, result in great injustice, if not hardship. The party receiving an important gift might be so misled by the silence of the other into believing, not only that the giver had meant to give, but that he had not repented him of his act, as, in that belief, to have spent the money, or to have changed his mode of life in consequence. How was the plaintiff to know, after the gift of this money to him accompanied with the friendly expressions of the giver, in the time that followed, that he had incurred an obligation to return the money? It would be a very harsh rule to lay down, that a party, receiving a gift under the circumstances of the present case might incur, to quote the language in *Haviland* v. *Willets*, 141 N. Y. at p. 52, "an unknown and unsuspected obligation, if required to return the fund."

In answer to the argument of the appellant, that the delivery of the donor's check did not make a valid gift of the sum of $2,500, it is sufficient to say that it is not like the making of a promise, such as would be the donor's promissory note, where the gift is not consummated until the delivery of the thing promised and remains revocable until such delivery. The delivery of a check is the delivery of something which represents a certain sum of money which the drawer of the check intends that the payee shall, in fact, have. What the defendant gave to the plaintiff, while in form his own check, in fact was an order upon the bank to pay to him the sum of money represented by it. That the transaction was complete, by the payment of the check to the plaintiff, is amply evidenced; if by nothing else, by the very direction of the

defendant to his bookkeeper to charge its amount to the account of the plaintiff in his books. The reasoning of the referee with respect to this point made by the appellant is perfectly satisfactory.

The judgment appealed from should be affirmed with costs.

All concur, except **O'Brien, J.**, not voting.

NORTH CAROLINA SUPREME COURT.

J. W. HUTCHINS
v.
Town of DURHAM.

(.....N. C.....)

1. **The occupant of a stall in a market** under a provision in town laws that his license may be revoked for any cause which the board may deem sufficient is a mere licensee, and not a lessee.
2. **A tenancy from year to year is not created** by holding over as occupant of a stall in a market under a license revocable at the pleasure and discretion of the licensor, after the time fixed for the annual renting of the stalls.
3. **A person may be expelled as a trespasser** from a stall in a market which he has held under a revocable license, when he refuses to vacate it after revocation of his license and notice to leave.

(May 19, 1896.)

CROSS-APPEALS from a judgment of the Superior Court for Durham County in favor of plaintiff in an action brought to recover damages for the alleged unlawful ejection of plaintiff from a market stall which he had leased from defendant. The plaintiff appealed from so much of the decree as refused to award him punitive damages, and the defendant appealed from so much as permitted any recovery. *Affirmed on plaintiff's appeal. Reversed on defendant's appeal.*

The town of Durham has an ordinance declaring that the clerk of the market under the supervision of the market committee shall annually rent out publicly the fish and meat stalls and vegetable benches in the market house for one year from the first of May ensuing. Plaintiff on or about the last week in April, 1887, rented stall No. 2 at the price of $13 per month. This was the last annual renting under the ordinance. He subsequently purchased an adjoining stall of another renter, and with the assent of the governing authorities of the town took possession of it. He continued to hold these stalls under the renting of 1887 until the town commissioners in July, 1894, directed the clerk of the market to advertise a new renting on the 1st day of August, 1894, for the remainder of the unexpired year. This proposed renting was advertised and held and the stalls rented to a third person, plaintiff refusing to bid on the ground that he already held a lease of the stalls, and at the time of the renting he tendered the rent for the ensuing month, which was refused. He was then notified to vacate the stalls, and upon his refusal to do so the police officers of the town removed his property from them and carried him bodily out of them when he protested against their action and refused to voluntarily leave.

The further facts appear in the opinion.

Messrs. **J.W. Graham** and **Boone, Merritt, & Bryant,** for plaintiff, relied upon Dillon's Municipal Corporations, 4th ed. 985; *Suffolk* v. *Parker*, 79 Va. 670; *Moffitt* v. *Asheville*, 103 N. C. 237; *Rose* v. *Baltimore*, 51 Md. 256, 34 Am. Rep. 309; *San Antonio* v. *Royal* (Tex.) 16 S. W. 1101; *Dubuque* v. *Miller*, 11 Iowa, 583; *Mosseller* v. *Deaver*, 106 N. C. 494, 8 L. R. A. 537.

Messrs. **F. A. Green** and **Fuller, Winston, & Fuller** for defendant.

Avery, J., delivered the opinion of the court:

Upon offering the required testimony as to character and capacity, the plaintiff, at the regular time provided in the ordinances of the town for renting (during the last week in April, 1887), rented stall No. 2 in the defendant's market house, at a rental of $13 per month; and there being no further public rentings in pursuance of the ordinance until April, 1894, the plaintiff, though still retaining stall No. 2, added stall No. 3, by purchasing the business of one M. Oppenheimer, who had, at the first letting, leased and occupied it. Since the plaintiff took possession under the license, in 1887, there has been continuously a provision in the town laws that "such license [as that granted him] may be revoked" for any cause which the board may deem sufficient. Where parties contract in contemplation of a statute then in force, its provisions are deemed to constitute a part of the agreement, just as though they had been incorporated in it. *Koonce* v. *Russell*, 103 N. C. 181; Cooley, Const. Lim. p. 285; *McCless* v. *Meekins*, 117 N. C. 34; *Strickland* v. *Pennsylvania R. Co.* 154 Pa. 348, 21 L. R. A. 224. A licensed occupant of a stall in a market house has no such interest in the soil as he acquires by virtue of a contract of lease for a store or dwelling house. He cannot recover possession of it by an action in the nature of ejectment if wrongfully evicted from it, but, as a mere licensee, can at most, maintain an action for damages. *Strickland* v. *Pennsylvania R. Co. supra.* When the plaintiff entered, and while remaining as an occupant of the stall, the by-law made his license revocable at the discretion of the authorities of the town, for any reason they deemed sufficient. That he paid his money for a license held by any such precarious tenure was his

NOTE.—As to the distinction between a lease and a license, see *note* to Heywood v. Fulmer (Ind.) 18 L R. A. 491.

For market regulations restricting sales, see *note* to State v. Sarradat (La.) 24 L. R. A. 584.

own fault, if fault it was. He was under no compulsion to submit to any such terms if he felt averse to doing so. He and all other persons were presumed to know the law, and to conduct such business with an eye to its provisions. It is not material that the town had the power to repeal its ordinance, when it had never in fact annulled or altered it in the least particular. Where a legislative committee is authorized to enter into a contract for the public printing, the act empowering them to do so may either simply create them agents of the state to enter into an agreement, in which case they are left subject to any existing law relating to the manner of entering into such contract, or the law-making power may define their duties in the statute, constituting the agency, in such a way as, by implication or directly, to repeal pre-existing laws on the sub ject. This illustration is used because it is one familiar to those who have observed legislative proceedings. In the same way, succeeding boards of commissioners are deemed to act sub ject to the provisions of ordinances passed by their predecessors in authority, until they see fit to repeal them directly, or to substitute others inconsistent with the older enactments.

It was insisted for the plaintiff on the argument that, by holding over after the time fixed in the ordinance for an annual meeting, the plaintiff became a tenant from year to year. It is true that when land is leased for a year, and the tenant is suffered to hold over without any new contract, the law implies a promise on the part of the lessee to pay the same rent, and on the part of the lessor to agree to the same terms, and the tenancy becomes one from year to year. But no such implication can arise while a law stands upon the statute books of the town declaring in express terms that a meat stall is held under a license revocable at the pleasure and discretion of the licensor,—not under a lease,—if, from the nature of this police power, another relation could be created in its exercise in any case, except by express contract. *Hatch* v. *Pendergast*, 15 Md. 252. One who occupies a stall under a license granted in pursuance of the provisions of an ordinance defining the rights and duties of the town (such as that under which plaintiff entered) is not a lessee, but a mere licensee. He acquires no right in the soil, but is an occupant at the absolute pleasure and discretion of the licensor. *Hughes* v. *Recorder's Court* (Mich.) 27 Am. & Eng. Corp. Cas. 631, note, 75 Mich. 574, 4 L. R. A. 863; *Barry* v. *Kennedy*, 11 Abb. Pr. N. S. 421; 14 Am. & Eng. Enc. Law, p. 463; *Hatch* v. *Pendergast*, *supra*; *Charleston* v. *Goldsmith*, 2 Speers, L. 428; *Strickland* v. *Pennsylvania R. Co. supra*; *Rose* v. *Baltimore*, 51 Md. 256, 34 Am. Rep. 308.

The fact that the town prescribes, in its ordinances, a day on which there shall be an annual renting of the stalls, confers no right on one who has voluntarily become an occupant of one of them upon the terms set forth in the ordinances. If he and all other occupants were subject to removal at discretion, the town could either advertise and offer all stalls in April, or evict all the tenants at any other time, and substitute others, by a public or private letting, in their places. On July 10, in pursuance of an order of July 3, 1894, a notice that the stalls would be offered publicly for rent on August 1, 1894, was posted at the market house, and seen by the plaintiff, who was present also when his own stall was rented, and was notified on August 9 to vacate on August 10, 1894. He paid no attention to the notice, and persisted in his refusal to remove his property or leave himself, when the policemen appeared upon the scene at the appointed hour on that day. He suffered them to remove a heavy safe, and to place his fresh beef, after removal, on marble slabs, without assistance, and without a request in relation to the matter, He then placed himself upon his block, which it was necessary to move, and thereby forced the policemen to lift the block up with him on top of it, and carry both out of the way. About the time they reached the place selected for depositing the block, the plaintiff fell off, and caught "upon his all fours." In no aspect of the evidence is this either an unlawful expulsion or a lawful expulsion conducted in a manner so unnecessarily violent as to entitle the expelled party to damages, either compensatory or vindictive. Where a guest in an hotel, a passenger on a railway train, or a ticket holder at a theater, creates a disturbance, though either has a right under his contract to remain so long as he acts with due regard to the rights of others, the proprietor, conductor, or manager, or their agents, may use the amount of force necessary to expel. *State* v. *Steele*, 106 N. C. 766, 8 L. R. A. 516. But markets are necessary to the life of the residents of a municipality, and for that reason it has been held that the right to establish and regulate them was implied in the very creation of such corporations. Having the right to regulate these places for the public good, they would be powerless to carry out that duty if, after the license of an occupant of a s all is revoked or expires, they do not have the same power, through their lawful officers, to expel him, which an innkeeper or a conductor has to protect the guests or passengers, representing the public, who place themselves under his care. The plaintiff had become a trespasser, not by holding over under any contract which gave him the least interest in the premises, but like one who enters an hotel under an implied license, but forfeits his right to remain by misconduct.

The testimony does not show that the officers used more force than was necessary to eject the plaintiff, and therefore, even though they acted under the orders of the commissioners, the plaintiff can recover neither exemplary nor punitive damages. The plaintiff had no right to recover in any aspect of the evidence, and it follows that there was error in refusing the prayer of the defendant for instructions to that effect, while there was no error in refusing to tell the jury that the plaintiff could recover punitive, or any other kind of damage. There was error in the ruling from which the defendant appealed, for which a new trial must be granted; and there was no error in that excepted to by the plaintiff.

Affirmed on plaintiff's appeal. New trial on defendant's appeal.

N. T. RIDLEY
v.
SEABOARD & ROANOKE RAILROAD COMPANY, *Appt.*

(.....N. C.....)

1. **A railroad embankment** without sufficient provision for the passage of the water of running streams, if built under lawful authority, is neither an abatable public nuisance nor a continuing private nuisance.
2. **Both present and prospective damages** can be recovered in a single action for failure to make a sufficient passageway for water through a railroad embankment, provided either party to the action demands that permanent damages be assessed.
3. **Judgment for accrued damages only** in an action for obstruction of water by a railroad embankment lawfully built, if neither party demanded the assessment of permanent damages, will not be a bar to a future action for permanent damages.
4. **The measure of damages for the obstruction of water** by a railroad embankment lawfully built is the difference in the value of land as it is and as it would have been with the road properly built.
5. **The statute of limitations against an action for obstruction of water** by a railroad embankment runs from the time when the first injury was sustained, and not necessarily from the construction of the road.

(May 19, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Northampton County in favor of plaintiff in an action brought to recover damages for the alleged maintenance of a nuisance in the form of a railroad embankment which obstructed the flow of water and threw it back upon plaintiff's land to his injury. *Reversed.*

The facts are stated in the opinion.

Messrs. **L. R. Watts** and **MacRae & Day**, for appellant:

Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action.

Wood, Nuisances, § 869; *Troy* v. *Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Fowle* v. *New Haven & N. Co.* 107 Mass. 352, 112 Mass. 334, 17 Am. Rep. 106.

Defendant, acting in pursuance of law, having obtained the right of way over plaintiff's land, in the execution of its chartered purpose erected this bridge over the Meherrin river. The structure is a permanent one, placed there for the public use under authority of law, on the defendant's right of way; and if this is the case, the damages for injury caused by its unskilful construction, the depreciation in the value of the land, ought to be recoverable in one action.

Lafayette v. *Nagle*, 113 Ind. 425; *Chicago & N. W. R. Co.* v. *Houg*, 90 Ill. 339, *Elizabethtown, L. & B. S. R. Co.* v. *Combs*, 10 Bush, 393; *Van Orsdol* v. *Burlington, C. R. & N. R. Co.* 56 Iowa, 470; *Hempstead* v. *Des Moines*, 63 Iowa, 36; *Ortwine* v. *Baltimore*, 16 Md. 387; *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389; *Heard* v. *Proprietors of Middlesex Canal*, 5 Met. 81; *Seely* v. *Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Decatur Gaslight & C. Co.* v. *Howell*, 92 Ill. 19; *Adams* v. *Durham & N. R. Co.* 110 N. C. 325.

A massive bridge with stone piers and high embankments would be held to be a permanent one; and if the land has deteriorated in value by reason of its construction, compensation may be awarded once for all.

Pierce, Railroads, 230; Lewis, Em. Dom. 675; Mayne, Damages, 611; 1 Sutherland, Damages, 175; *Lafayette* v. *Nagle*, *supra*.

It is not necessary, in order to constitute permanent injury, that there should be a total destruction of the land for agricultural purposes.

Powers v. *Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *National Copper Co.* v. *Minnesota Min. Co.* 57 Mich. 83, 58 Am. Rep. 333; *North Vernon* v. *Voegler*, 103 Ind. 314; *Chicago & A. R. Co.* v. *Maher*, 91 Ill. 312; *Autenrieth* v. *St. Louis & S. F. R. Co.* 36 Mo. App. 254; *Chicago & N. W. R. Co.* v. *Houg*, *supra*; *Chicago, R. I. & P. R. Co.* v. *Carey*, 90 Ill. 516; *Central Branch U. P. R. Co.* v. *Twine*, 23 Kan. 585, 33 Am. Rep. 203.

An entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits.

Herman, Estoppel, § 222; Freem. Judgm. § 249.

A suit for flowing part of a tract of land precludes the plaintiff from maintaining another suit for flowing another part of the same tract, if nothing prevented including this in the first suit.

Herman, Estoppel, § 77; Gould, Waters, 2d ed. § 210; *Wichita & W. R. Co.* v. *Beebe*, 39 Kan. 465.

If a railroad embankment is so constructed as to divert water of a stream from its natural channel, the injury to a riparian proprietor is a permanent one, and if he recovers judgment it is a bar to future actions for the same cause.

Gould, Waters, 2d ed. § 259, and cases cited; *Stodghill* v. *Chicago, B. & Q. R. Co.* 53 Iowa, 341; *Powers* v. *Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *East St. Louis & C. R. Co.* v. *Eisentraut*, 134 Ill. 96; *Bird* v. *Hannibal & St. J. R. Co.* 30 Mo. App. 365.

Mr. **R. B. Peebles** for appellee.

Avery, J., delivered the opinion of the court:

Ordinarily, where a trespass results in a nuisance, not only is the original wrong actionable, but successive suits may be brought for its continuance, in each of which the damages, if apportionable, can be estimated only up to the time when it was brought, in some of the states, but in this state up to the time of trial. 5 Am. & Eng. Enc. Law, p. 17; *Blunt* v. *McCormick*, 3 Denio, 283; *Bare* v. *Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Russell* v. *Brown*, 63 Me. 203. In ordinary transactions between individuals, where the trespass consists in the erection of mere temporary structures that prove to be nuisances, the law

NOTE.—In connection with the review of the authorities in the above case as to successive actions for damages caused by a permanent structure, see also Aldworth v. Lynn (Mass.) 10 L. R. A. 210, and Watts v. Norfolk & W. R. Co. (W. Va.) 23 L. R. A. 674.

presumes that the tortfeasor will desist from keeping it up after being once mulcted in damages, but, where he persists in the wrong, permits continued actions to be maintained against him, as an inducement to its removal. *Battishill* v. *Reed*, 18 C. B. 696; *Bare* v. *Hoffman*, *supra*; 5 Am. & Eng. Enc. Law, p. 17, note 1. Where the building of a railroad is authorized by law, and is done with reasonable care and skill, it is not a nuisance, and the company is not answerable, after paying the sum assessed or agreed upon by the owner for taking the land occupied for the public use, in any additional damage resulting from the original construction. *Adams* v. *Durham & N. R. Co.* 110 N. C. 325; 5 Am. & Eng. Enc. Law, p. 20. But even where the injury complained of, either by the servient owner or an adjacent proprietor, is due to the negligent construction of such public works as railways, which it is the policy of the law to encourage, if the injury is permanent, and affects the value of the estate, a recovery may be had at law of the entire damages in one action. *Smith* v. *Point Pleasant & O. R. R. Co.* 23 W. Va. 453; *Troy* v. *Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Chicago & A. R. Co.* v. *Maher*, 91 Ill. 312; *Bizer* v. *Ottumwa Hydraulic Power Co.* 70 Iowa, 146; *Fowle* v. *New Haven & N. Co.* 112 Mass. 334, 338, 17 Am. Rep. 106, 107 Mass. 352; *Jeffersonville, M. & I. R. Co.* v. *Esterle*, 13 Bush, 667; *Elizabethtown, L. & B. R. Co.* v. *Combs*, 10 Bush, 382, 393, 19 Am. Rep. 67; *Stodghill* v. *Chicago, B. & Q. R. Co.* 53 Iowa, 341; *Cadle* v. *Muscatine R. Co.* 44 Iowa, 11.

The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question whether the whole injury results from the original tortious act, or "from the wrongful continuance of the state of facts produced by those acts." *Troy* v. *Cheshire R. Co. supra.* In this case, which has been cited as authority by text-writers and many of the courts of the states, the action was brought for damages for the occupation of a street and town bridge by a railway company, and it was conceded that in the sense that the highway was obstructed the company had created a nuisance. The court said: "The railroad is in its nature and design and use a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is therefore a permanent appropriation; the use of the land set apart to be used as a highway, by the railroad company for the use of their track, is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it, as the place on which to maintain the highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages." "Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, permanent dams and permanent pollutions of water," says Gould in his work on Waters (§ 416), fall within the class where "the plaintiff is required to recover his entire damage, present and prospective." Id. § 582; *Duncan* v. *Sylvester*, 24 Me. 482, 41 Am. Dec. 400. In *Van Orsdol* v. *Burlington, C. R. & N. R. Co.* 56 Iowa, 470, the supreme court of that state held that the negligent failure to construct a railroad skillfully subjected the company to a liability distinct from that arising out of the appropriation of the right of way, and that when the want of care consisted in the omission to build a culvert to carry off the water of a slough, and the diversion of it into another slough, whereby the land of plaintiff was wrongfully injured, the plaintiff could recover damages for the permanent injury done to the land. In the subsequent case of *Bizer* v. *Ottumwa Hydraulic Power Co.* 70 Iowa, 147, the court, citing *Van Orsdol's Case*, said: "Where an injury is permanent, it is such as is spoken of in the books as original,—that is, as accruing wholly when the wrongful acts were done; and is distinguished from an injury which is to be regarded as continuing,—that is, an injury that could and should be terminated, and is to be compensated for strictly with reference to the past, and upon the theory that it would be terminated." Where a railroad company duly authorized by law to construct a railway built an embankment partly on the bed of a river, and thereby changed the current of the stream from its proper course, and caused it to wash away adjacent land, it was held by the supreme court of Massachusetts in *Fowle* v. *New Haven & N. Co.* 107 Mass. 354, that a second action, brought to recover damage for the wrongful washing away of more of plaintiff's land, due to the same diversion of the watercourse, was barred by the judgment in the former action instituted for the same purpose, though several acres of land had been washed away after the judgment in the first and before the bringing of the last action. Gray, J., for the court, said: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ; and the judgment in one such action is a bar to another like action between the parties for subsequent injuries for the same cause. *Troy* v. *Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Warner* v. *Bacon*, 8 Gray, 397, 402, 405, 69 Am. Dec. 253. This case is not like one of illegally flowing land by means of a milldam, where the change is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it. . . . Nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor." When the same case came up on appeal again (112 Mass. 338, 17 Am. Rep. 106), the court said: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no

exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties it is proper that entire damages should be assessed with reference to past and probable future injury."

In *Smith* v. *Point Pleasant & O. R. R. Co.* 23 W. Va., at page 453, the court said: "Where the damages are of a permanent character and affect the value of the estate, a recovery may be had in a suit at law of the entire damage in one action." The action in that case was brought by an abutting owner against a railway company whose road was constructed along the street in his front, and asking an injunction on the ground that he would otherwise be driven to repeated actions at law. High, in his work on Injunctions (vol. 1, § 602), says: "The construction of a railway in a city is not regarded as a nuisance *per se*, and the laying of its track along a public street will not be enjoined on that ground." Nor can a private property owner, abutting upon and owning the fee to the center of a street, enjoin the construction of an ordinary surface railway in the street on the ground of nuisance. The same principle was recognized by this court in *Brown* v. *Carolina C. R. Co.* 83 N. C. 128, where the court refused an injunction and order of abatement on the ground that the structure complained of (a railway trestle) was being used for the benefit of the public. This was an explicit recognition of the doctrine that no structure erected by a chartered railway company, and constantly used by it in serving the public, is to be considered and dealt with as a continuing nuisance because its unskilful and defective construction has injured the land of a neighboring proprietor. Yet it is familiar learning that there is no elementary principle upon which continued actions have been held to lie for the wrongful erection of a structure, except in cases where its erection was a trespass resulting in a nuisance, and then for the purpose of bringing about a removal. It must be conceded, then, that unless a railway embankment or culvert, which obstructs the passage of the water of a non-navigable stream in ordinary freshets so as to pond it back upon and injure a landowner, is a nuisance, the damage, present and prospective, must be assessed in one action. If this is not true, the authorities that we have already cited, and those that we purpose presently to add, embracing cases from the leading courts of the country, and opinions of eminent text-writers, are founded upon a misconception of the law.

In England, where the act of Parliament authorizes the bringing of an action, in such cases as that before us, by a land owner who can show any special injury done to his land by the construction of the road, it was held that a proprietor, whose premises abutted on a highway 50 feet wide, could recover only permanent damages for injury to his land caused by the building of an embankment by a railway covering 20 feet of the highway in his front. *Beckett* v. *Midland R. Co.* (1867) L. R. 3 C. P. 82. In *Jeffersonville, M. & I. R. Co.* v. *Esterle, supra*, the supreme court of Kentucky rested the ruling in part upon the proposition that an abutting owner upon a street dedicated to the use of the public, having no possession or right of possession in such highway, could not at common law have maintained an action for trespass *quare clausum fregit*, but must have brought an action on the case. Where the easement of such abutting owner was interfered with by the construction of a railroad, the court held that he could recover a sum representing the diminution in value of his land or lot by the location and use of the railway track in his front. In *Cadle* v. *Muscatine R. Co. supra*, which was more nearly in point, the court held that, where an injury to land was due to the unskilful construction of a railroad, the measure of damage was the difference between the value of his property with the road as constructed, and its estimated value with the line properly constructed. In *North Vernon* v. *Voegler*, 103 Ind. 314, the court held that, while the municipality was liable for an injury due to the negligent and unskilful manner of making an improvement by grading its streets, such public work was not a nuisance, and, being of a permanent character, so that no fresh injury could result from it, the damage, present and prospective, should be assessed in one action. In *Meares* v. *Wilmington Comrs.* 9 Ired. L. 73, 49 Am. Dec. 412, the plaintiff brought an action on the case to recover damage for the unskilful and negligent grading of a street in his front. The court there affirmed a judgment for permanent damage, and sustained the view that a corporation, authorized by law to do such work, could incur no liability in having it done, except for injuries due to careless construction. The same principle was applied, as we have seen, in *Brown* v. *Carolina C. R. Co. supra*, to quasi public corporations. After having given its sanction to the proposition that, though the unskilful construction of a track or bridge by a railroad company may cause special damage to a neighboring land owner, the structure is not a nuisance, it would seem that authority as well as reason would lead to the adoption by this court of the rule that permanent damage can be recovered for such injuries, as well as for the same kind of wrong on the part of such public agencies as cities and towns. In *White* v. *Northwestern N. C. R. Co.* 113 N. C. 610, 622, 22 L. R. A. 627, where it was found that a railway company, regularly chartered, had built its track upon a street by a license from the city, Chief Justice Shepherd, speaking for the court, said: "If this be so, the plaintiff may maintain a common-law action for damages, to be assessed up to the time of the trial or

it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street." Here we find the doctrine laid down that in a case where the railroad is not proceeding strictly under its statutory authority to condemn the plaintiff can at his election bring an action for the trespass or for the permanent damage. It must be acknowledged that the ruling in that case is in conflict with some other *obiter* expressions, but is more nearly in harmony with the current of authority elsewhere. The question whether the damages should be assessed for the permanent injury, or whether repeated actions should be brought, was not directly raised, either in *Knight* v. *Albemarle & R. R. Co.* 111 N. C. 80; *Adams* v. *Durham & N. R. Co. supra*, nor in *Spilman* v. *Roanoke Nav. Co.* 74 N. C. 675. The two first opinions were, in so far as they referred to that subject, *obiter*. While there is some conflict of authority, it seems manifest that it is contrary to public policy to have every embankment abutting on a stream, and every trestle and culvert under which a natural watercourse flows, made subject to the uncertainty of being declared a nuisance upon the finding of a jury that it is not properly constructed. No such mischief as a wilful omission to provide suffcient waterways is to be apprehended where it entails a liability for any diminution in the value of land consequent upon such negligence. Such a remedy affords adequate protection for all injury, without interfering with the discharge by the corporation of its duties to the public. The injury inflicted by a railway company occupying land, held in the exercise of the right of eminent domain, by reason of unskilful construction of embankments, culverts, or bridges, is to be distinguished from the obstruction by it of a navigable river without lawful authority. Such streams being public highways, an obstruction to the navigation of them is a public nuisance which may be abated by anyone "who is annoyed thereby." *State* v. *Parrott*, 71 N. C. 312, 17 Am. Rep. 5; *State* v. *Dibble*, 4 Jones, L. 107; Wood, Nuisances, § 730. The railway company is in the lawful occupation of every foot of its way that it is authorized by law to take, and where, by neglect in constructing its road, injury is done that is not covered by the compensation made for taking, public policy requires that the additional damage should be compensated for in one action, rather than that a quasi public servant should be subjected to continual annoyance by suits allowed by law only upon the theory that they will lead to the removal of the structure, or some portion of it. The law does not contemplate that such petty annoyances as being compelled to tear down embankments abutting on every little stream, trestle, and culvert shall impair the efficiency of railways as safe and expeditious carriers of freight and passengers. When we attempt to evolve a consistent and reasonable rule for assessing damage for injuries due to the careless building of bridges, embankments, and trestles, we are confronted not only with the *obiter* expression referred to, but with the fact that the rule laid down *obiter* in *Knight* v. *Albemarle & R. R. Co.* is not easily reconcilable with that followed on the first appeal in *Emery* v. *Raleigh & G. R. Co.* 102 N. C. 228, 229, though it appears that the question raised on both appeals was whether the plaintiff was guilty of contributory negligence. When the same case was again before the court on appeal (109 N. C. 589, 15 L. R. A. 332), the discussion was confined to contributory negligence and to the doctrine of the ideal prudent man, as to which it has been overruled in *Hinshaw* v. *Raleigh & A. A. L. R. Co.* (at this term) 118 N. C. ——.

The legislature may empower a steam-railway company, which already has the license of a city to occupy a public street with its track, to take in the exercise of the right of eminent domain whatever interest abutting proprietors have therein, or to make compensation for whatever injury they may sustain, as holders of rights or easements in the street, by reason of the construction and operating of the road. It has been decided in *White* v. *Northwestern N. C. R. Co. supra*, that where no such steps had been taken, but the streets were occupied under a license from the municipality, the abutting owner might elect to waive the want of authority to condemn, and to demand damages, present and prospective, or to ask compensation only up to the time of trial.

In some of the states, and, it seems, in England, where suit is brought for an injury to land in the nature of a private nuisance created by an individual, the judgment in the first suit of this nature may be pleaded in bar of recovery in any subsequent action for the same nuisance. The court of Illinois drew a very nice distinction in such actions between cases where the nuisance is alleged as the cause of action and where it is brought for diminution in the value of the land by reason of the nuisance. In that case (*Illinois C. R. Co.* v. *Grabill*, 50 Ill. 241) the injury complained of by the owner of a lot grew out of the erecting and maintaining cattle pens near his premises. The court held that he might elect to bring an action solely for the nuisance of rendering the air unwholesome, and in that event a similar recovery might be had in a suit brought to any succeeding term while the nuisance should be kept up. But it was also held that where the plaintiff declared for the depreciation of his land, as well as for the annoyance of the nuisance to him while occupying the premises, permanent damages would be allowed, and the judgment would operate as a bar to any subsequent suit for injury due to the erection of the pens. An intimation that such an election may be made in all cases where a nuisance presents the two aspects of constant annoyance and of diminishing the value of land in the vicinity is made in a recent case decided by the court of West Virginia. *Watts* v. *Norfolk & W. R. Co.* 39 W. Va. 196, 23 L. R. A. 674. In *Fowle* v. *New Haven & N. Co. supra*, the supreme court of Massachusetts

laid stress upon the fact that the plaintiff in the first action had declared, not only for the injury in washing away about 30,000 cubic feet of earth, but in that "the residue of said parcel by reason of the premises has been greatly lessened in value," and the fact that the assessment had been made upon such a complaint and the damages accepted was assigned as a reason for holding that the new action was barred by the record and judgment in the former suit. The better opinion is that in all such cases prospective damages may be recovered if demanded by the plaintiff, and that the defendant railway may also, at its option, elect to have a permanent assessment made. Successive actions being permitted as an inducement to remove the nuisance, no such reason exists where the structure, on account of its public nature, is not in law a nuisance. Upon this principle, where a plaintiff elects to annoy a corporation which owes duties to the public, and there is danger that its efficiency as a public servant may be thereby impaired, the defendant has an equity to compel the assessment of the entire damages in a single action. This equitable right was enforceable under the former practice by a bill in chancery, but under the Code may be asserted by demand in an answer. Where the law declares the damage in its essential character permanent, the defendant is entitled to the benefit of the fundamental principle that it is in the interest of the public that there should be an end of litigation. Even where the trespass results in a continuing nuisance for which repeated actions lie, it is a well-established principle that the plaintiff can file his bill to prevent multiplicity of actions, and have his entire damages assessed at once, or, to state it more accurately, may obtain an order that upon the payment of permanent damages no injunction shall issue. 1 Pom. Eq. Jur. § 271; 2 Beach, Mod. Eq. Jur. 727. On the other hand, the right to appeal to a court of equity for protection against vexatious litigation must be extended also to a defendant where it appears that the plaintiff has elected to annoy him with a succession of suits, the subject-matter of all of which may be settled in a single action. 1 Pom. Eq. Jur. § 254. It being once conceded that present and prospective damages are recoverable, a quasi public corporation not only has the clear equity of all other defendants to be protected against vexation, but to appeal to the courts upon the additional ground that the public may be subjected to annoyance by any proceeding which is calculated to impair its capacity to serve its patrons. The Code of Civil Procedure is founded upon the principles and practice of courts of equity, rather than courts of law, and the provision for consolidating actions that may be disposed of by a single trial is but an affirmance of the equitable doctrine of preventing a multiplicity of suits.

Upon a careful consideration of the authorities already cited and those that will be added, and the reasons on which they rest, we deduce the following principles as decisive of the questions involved in this appeal:

1. A railway company that has constructed its road under lawful authority creates neither an abatable public nuisance nor a continuing private nuisance by failing to leave sufficient space between embankments, or by means of culverts, for the passage of the water of running streams, in case of any rise in the streams that might reasonably be expected; and the injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action.

2. It is the legal right of either plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which it relies, as well as to prove the averment on the trial. But where a plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage.

3. The measure of damage is the difference in the value of the plaintiff's land with the railway constructed as it is and what would have been its value had the road been skilfully constructed. *Cadle* v. *Muscatine R. Co. supra.*

4. The statute of limitations begins to run in such cases, not necessarily from the construction of the road, but from the time when the first injury was sustained. *Van Orsdol's Case, supra,* at page 473, 56 Iowa.

Having set up in its answer that the damage was permanent, and excepted on the trial to the refusal of the court to submit an issue involving that question, the defendant is entitled to a new trial. It is not necessary to pass upon all other questions discussed. Indeed, we did not understand counsel to seriously insist that the suit in Virginia could be pleaded in bar here, or that any injury done to land in another state could be considered in this action.

New trial.

COMMERCIAL NATIONAL BANK OF CHARLOTTE

v.

FIRST NATIONAL BANK OF GASTONIA *et al., Appts.*

(.....N. C.....)

A stipulation stamped on the face of a check that it will not be paid if presented through a specified agency may be upheld to prevent any right of action on the check by the prohibited agency.

(April 21, 1896.)

NOTE.—The question in the above case is believed to be substantially a new one. On the general subject of the negotiability of checks, see *note* to Famous Shoe & C. Co. v. Crosswhite (Mo.) 26 L. R. A. 568.

As to the effect of sending a check directly to the drawee bank, see *note* to Anderson v. Rodgers (Kan.) 27 L. R. A. 248.

APPEAL by defendants from a judgment of the Superior Court for Gaston County in favor of plaintiff in an action upon a check. *Reversed.*

The facts are stated in the opinion.

Messrs. **Jones & Tillett,** for appellants:

The holder of a check can in no case maintain an action against the bank upon which the check is drawn until after the acceptance of the check by the bank.

Hawes v. *Blackwell*, 107 N. C. 196; *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 153, 19 L. ed. 897; *Marriner* v. *John L. Roper Lumber Co.* 113 N. C. 53.

The stamp placed upon the check to the effect that the check would not be paid to the Gastonia Banking Company or its agent, constitutes a part of the check.

Tiedeman, Com. Paper, §§ 41, 42; *Benedict* v. *Cowden*, 49 N. Y. 396.

If a bank employs a notary public to present a promissory note for payment and to give the proper notice to charge the parties, the notary is the agent of the bank and not of the depositor or owner of the note.

Ayrault v. *Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; 16 Am. & Eng. Enc. Law, p. 772, note 1.

If this was a conspiracy and an attempt to boycott, and the plaintiff was a party to the conspiracy and the attempt to boycott, then the whole check is void, and not merely the unlawful condition.

Saratoga County Bank v. *King*, 44 N. Y. 87.

Contracts in limited restriction of trade have everywhere been held to be valid, and the fact that the contract debarred one of two persons engaged in a business, and tends to give one of them monopoly, has never been held sufficient to render the contract void.

Baumgarten v. *Broadway*, 77 N. C. 8; *Cowan* v. *Fairbrother*, 118 N. C. —, decided at this term of our court; *Palmer* v. *Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *California Steam Nav. Co.* v. *Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Chappel* v. *Brockway*, 21 Wend. 157; *Hodge* v. *Sloan*, 107 N. Y. 244.

The maker of a note or the drawer of a check has a perfect right to limit the assignability of the instrument absolutely and make it so that it would be payable only to the payee or drawee.

Smith v. *St. Lawrence*, 1 Hayw. N. C. 174, 50 Am. Dec. 556.

If the condition be such that the feoffee shall not alien to such a one (naming his name) or to any of his heirs or of the issue of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good.

Litt. § 361; Doct. & Stud. Dial, II., chap. 35; Shep. Touch. 120; *Cowell* v. *Colorado Springs Co.* 100 U. S. 57, 25 L. ed. 548; *Gray* v. *Blanchard*, 8 Pick. 288; *Jackson, Lewis,* v. *Schutz*, 18 Johns. 184, 9 Am. Dec. 195; *Doe, Mitchinson,* v. *Carter*, 8 T. R. 60.

We have the very highest authority sustaining the validity of stamps placed upon checks similar to the one in question.

Smith v. *Union Bank*, L. R. 10 Q. B. 295; *Richardson* v. *Melish*, 2 Bing. 229; *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462.

Messrs. **Burwell, Walker, & Cansler,** for appellees:

If a bank unlawfully refuses to pay a check drawn on a fund deposited with it and subject to check, the payee or holder of such check has an independent cause of action against such bank to recover the amount thereof.

N. C. Code, § 177, makes all choses in action assignable, and provides that every action must be prosecuted by the real party in interest.

A chose in action or a part of it may be assigned, and this once conceded, the argument of want of privity between the assignee and the debtor or holder of the funds is disposed of under the equitable and statutory rules. If by the assignment the assignee acquires a legal right, it is by force of the statute without regard to the assent of the debtor or holder of the fund.

2 Morse, Banks & Banking, 3d ed. § 506.

According to the universal custom and usage prevailing in the commercial world, checks are drawn, received, and paid upon the accepted theory that the holder of such paper has the absolute right to demand their payment by the bank upon which they are drawn; and that the banks recognize a corresponding and imperative duty on their part to pay the same upon presentation.

2 Morse, Banks & Banking, 3d ed. §§ 496, 499, 500–507; 2 Dan. Neg. Inst. 4th ed. § 1638; Tiedeman, Com. Paper, § 452, pp. 738, 739.

Defendant's attempt to limit or restrict the negotiability or assignability of the check by the stamped indorsement thereon was void in so far as it attempted to thereby deprive the plaintiff (or other holder of such check) of the right to employ the Gastonia Banking Company to collect the same from the defendant bank.

The assignees of choses in action are the real parties in interest who must sue for recovery thereon.

Kiff v. *Weaver*, 94 N. C. 278, 55 Am. Rep. 601; *Wilcoxon* v. *Logan*, 91 N. C. 452.

The Gastonia Banking Company was the regular correspondent of plaintiff at Gastonia, and the only firm or corporation to whom plaintiff could have sent the check for collection unless it had been sent direct to the defendant bank upon which it was drawn. To have done this would have been negligence.

1 Morse, Banks & Banking, § 236.

All confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law.

1 Hawk. P. C. chap. 72, § 2; 4 Am. & Eng. Enc. Law, p. 609, note 2; *King* v. *Eccles*, 3 Dougl. 337; *State* v. *Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649.

The defendant bank and its co-conspirators have attempted to dictate to the plaintiff and all the other customers of the Gastonia Banking Company and to tell them they shall not employ the banking company to manage a certain branch of their business.

State v. *Stewart*, 59 Vt. 273, 59 Am. Rep. 710; 4 Am. & Eng. Enc. Law, p. 609, note 2; *People* v. *Fisher*, 14 Wend. 9, 28 Am. Dec. 501.

A boycott is a conspiracy in restraint of trade.

People v. *Wilzig*, 4 N. Y. Crim. Rep. 403; *People* v. *Kostka*, Id. 429; *Casey* v. *Cincinnati*

Typographical Union No. 3, 45 Fed. Rep. 135, 12 L. R. A. 193; *Jackson* v. *Stanfield*, 137 Ind. 592, 23 L. R. A. 588.

By no form of words can property be given to a man or to another in trust for him so that he shall not have the right to dispose of his estate in it unless there be in the instrument of gift a provision that upon an attempted alienation it shall go over to some third person.

Pace v. *Pace*, 73 N. C. 124.

The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful exercise of property.

Dick v. *Pitchford*, 1 Dev. & B. Eq. 484; Womack, Dig. No. 2244.

Whatever tends to injustice or oppression, restraint or liberty, commerce, and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute; and whatever is against good morals, when made the subject of contract,—is against public policy and therefore void.

9 Am. & Eng. Enc. Law, p. 880; Bishop, Cont. §§ 473, 474, 476; *Crawford* v. *Wick*, 18 Ohio St. 190, 98 Am. Dec. 103; *Wilcoxon* v. *Logan*, 91 N. C. 449; *Simmons* v. *Taylor*, 2 C. B. N. S. 528.

This custom of crossing checks sprang up in England as a matter of convenience and precaution—to facilitate collections on the one hand and prevent mistakes and forgeries on the other. But upon investigation we find that it took two statutes of England to make such "crossed" indorsements binding on the subsequent holder of such checks.

Bellamy v. *Marjoribanks*, 7 Exch. 389; *Simmons* v. *Taylor, supra; Smith* v. *Union Bank*, L. R. 1 Q. B. Div. 31.

Clark, J., delivered the opinion of the court:

The holder of a check cannot maintain an action against the bank upon which the check is drawn until after the acceptance of the check by the bank. *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 153, 19 L. ed. 897; *Hawes* v. *Blackwell*, 107 N. C. 196; *Marriner* v. *John L. Roper Lumber Co.* 113 N. C. 53. This is the uniform line of decisions in the Federal courts and our own, and it is sustained by the overwhelming weight of authority in other courts, though there are a few decisions in other states to the contrary. The bank is the agent of the drawer. Till acceptance of the check, it has assumed no liability to the payee. Its liability, if any, is to the drawer whose checks it has agreed to pay if it has the drawer's funds in hand; and for breach of that contract it is liable to the drawer, not to the payee. "To its own master, it must stand or fall." A check is simply an order given by the principal upon his agent, and it is always open to the principal to countermand an order to its agent before it is executed; and there are occasions, when it is important to prevent imposition, that the drawer should have power to stop the payment of his check without casting any liability upon the drawee. If the principal, the drawer, die before a check is presented, it becomes invalid, which could not be the case if the mere drawing of the check created any liability in the drawee. But the more important point—since it is now presented to us for the first time—is the validity of the stipulation stamped on the face of the check: "This check will positively not be paid to the Gastonia Banking Company or its agents." It appears that the check has never been presented to the drawee, the defendant bank, except by an agent of the Gastonia Banking Company. Consequently, if this restriction is valid, the holder cannot maintain this action against the drawer till the check has been presented to the drawee by some other agency, and payment refused. In England the system of "crossed checks" has long been recognized as valid. 2 Dan. Neg. Inst. § 1585*a*; *Smith* v. *Union Bank*, L. R. 10 Q. B. 295, which was affirmed on appeal, and is reported in L. R. 1 Q. B. Div. 31. By that system there is stamped across the face of the check the name of a certain banker through whom it must be presented for payment, and if presented by anyone else it will not be honored. This does not destroy its negotiability in any wise. The present case does not go that far, but merely stipulates that the check will not be honored if presented through one agency named. This cannot be deemed an unreasonable restriction of trade. Nor is it a boycott. There is no evidence of a conspiracy to injure the agency named, but it is agreed as a fact that it was an effort on the part of the drawer firm to prevent its transactions and the nature and extent of its business becoming known to a rival house by its checks passing through that channel. Besides, if it were a boycott, the parties to it are the drawer and the payee, who accepted the check with that restriction stamped on it. And, if it was an illegal transaction, the check itself, and not merely the stipulation which is part of it, would be void. *Ex mala causa non oritur actio.* The restriction is a part of the check (Tiedeman, Com. Paper, §§ 41, 42; *Benedict* v. *Cowden*, 49 N. Y. 396); and, if it is invalid, the court could not separate the good from the bad (*Saratoga County Bank* v. *King*, 44 N. Y. 87), but it would all be bad, and the holder could not recover. In analogy, a conveyance of property, real or personal, with a condition not to alien to a certain person or class of persons, or for a certain time, is valid. *Cowell* v. *Colorado Springs Co.* 100 U. S. 57, 25 L. ed. 548; *Gray* v. *Blanchard*, 8 Pick. 288; Shep. Touch. 129, 131; Co. Litt. 223. In *Smith* v. *St. Lawrence*, 1 Hayw. (N. C.) 175, 50 Am. Dec. 556, this court held that a note could be limited so as to be payable to the payee only. But it is not necessary to consider here the principle maintained in that case,—that the drawee can, by stipulation therein, make the check not assignable; for this is not attempted here, but there is simply a stipulation that it shall not be paid if presented through the agency named. *Wilcoxon* v. *Logan*, 91 N. C. 452, holds merely that where a note is made payable to A. B., without the addition of the words "or order" or "bearer," the holder thereof can maintain an action thereon, being

the party in interest. There was no question raised as to the validity of an express stipulation that the note could not be assigned at all, or would not be honored if presented by a particular party, as in this case; nor by any party except one named, as in the case of the English "cross checks." These questions could not arise, for there was in that case no stipulation to either effect. On the facts agreed, judgment should have been entered for the defendants.

Reversed.

TENNESSEE SUPREME COURT.

Phebe SAYLES, *Appt.*,
v.
John I. COX, Receiver of Johnson City First National Bank, *et al.*

(95 Tenn. 579.)

The fraud of a bank in receiving a note for collection when insolvent will not alter the rule that collections made under directions to remit "by draft" will not be impressed with a trust giving a preferential claim against the bank's assets.

(November 12, 1895.)

APPEAL by plaintiff from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Washington County in favor of defendants in an action

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NOTE.—*Trust in proceeds of collection made by bank when insolvent.*

I. *As against claims of bank's representative.*

II. *As against claims of subagent.*

When the attempt is made to enforce the trust against assets in possession of a receiver of the bank the decisions on some branches of the question are harmonious while upon other branches directly opposite rules have been adopted.

Where title has passed to bank.

The rule is general that if the title to the paper from any cause has passed to the bank, the former owner loses all interest in the paper as such, and in its proceeds, and becomes simply a general creditor of the bank with no greater rights than those possessed by other general creditors.

If a customer of a bank deposits a note for collection which is immediately credited to his overdrawn account, the note becomes the property of the bank, so that in case of its insolvency the depositor cannot recover the proceeds, although they do not reach the bank until after the insolvency and in the meantime he has made good the overdraft. *Re* Bank of Madison, 5 Biss. 515, 9 Nat. Bankr. Reg. 184.

If the bank receiving the drafts has an immediate right to credit them to the sender and does so, by which act the sender is given a right to draw against them, the fact that the bank closes its doors before it actually receives the proceeds will not give the sender a right to the proceeds in the hands of the receiver. First Nat. Bank v. Armstrong, 39 Fed. Rep. 231.

Where the course of dealing between two banks was that all checks sent for collection were credited when received and all notes and drafts when paid, but the amounts of checks not finally paid were charged back and the amounts collected were not kept separate but were mingled with the other funds of the bank, if a check was received in payment of a note and the amount credited, but the bank failed before the check was collected, the check passed into the hands of a receiver as an asset of the bank because in view of the course of dealing the collecting bank had become the debtor of the transmitting bank had made the check its own. Franklin County Nat. Bank v. Beal, 49 Fed. Rep. 606.

But if the property in a note without purchase or advance is to vest in an agent or correspondent for collection, he must become absolutely responsible to his principal for the amount. Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455; Scott v. Ocean Bank, 23 N. Y. 289.

If a check is deposited for collection no title passes to the bank where the custom of the bank is to treat it as a bailment until collected, although it is marked for deposit; and if the bank becomes insolvent before the collection is made it will acquire no title to the proceeds. Beal v. Somerville, 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14.

In Fifth Nat. Bank v. Armstrong, 40 Fed. Rep. 46, it is held that if the paper is indorsed "For collection" the title does not pass to the collecting bank so as to cut off the trust, although it is under a course of dealing by which the paper is credited upon receipt, and becomes immediately subject to draft and interest on daily balances. And the transmitting bank will be the owner of the paper until its collection or the credit is drawn on. The true criterion for determining the question of title is whether or not the depositor intended to part with the title and the receiving bank intended to purchase the paper and assume the risk of payment and give an absolute credit for it. Under such circumstances, if the paper is received subject to payment so that it may be charged back if not paid, the depositor may intercept the proceeds before they have actually reached the collecting bank. And that decision was followed in First Nat. Bank v. Armstrong, 42 Fed. Rep. 193.

Effect of insolvency at time of receiving paper.

Upon the question whether or not the title has passed to the bank, the fact that at the time of receiving the paper the bank was insolvent has in some cases had a material bearing.

It has been held that if the checks are marked for deposit and credited immediately in the pass book of the depositor as cash, the title will pass to the bank, although it is the custom of the bank to charge back checks not paid and the depositor has never drawn against checks, but if, at the time of the receipt of the checks, the bank is insolvent to the knowledge of its officers, and the checks are not collected before the bank closes its doors, the depositor may recover them from the receiver because on account of the bank's fraud no title passed to it. Somerville v. Beal, 49 Fed. Rep. 790.

If the bank is so far insolvent that its drafts have gone to protest at the time it receives drafts on deposit, the contract may be rescinded and the drafts recovered by the depositor, although they were credited to him as cash. Cragie v. Hadley, 99 N. Y. 131.

If at the time of receiving the paper the collecting agent is, to the knowledge of its officers, hopelessly insolvent, the holder of the paper may, although his indorsement was in blank recover it

See also 33 L. R. A. 739.

brought to establish a preferential claim upon assets of the Johnson City First National Bank. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Kirkpatrick, Williams, & Bowman,** for appellant:

It was a fraud in the bank to do business in a state of hopeless insolvency, known to its officials. This fraud preceded the attaching of the relationship of debtor and creditor,—in fact brought that relationship into existence,—and, in contemplation of law, made the depositor a *cestui* to the bank as trustee.

St. Louis & S. F. R. Co. v. *Johnston,* 133 U. S. 566, 33 L. ed. 683; *Belding* v. *Frankland,* 8 Lea, 67, 41 Am. Rep. 630; *Fechheimer* v. *Baum,* 37 Fed. Rep. 167, 2 L. R. A. 153; *Beal* v. *Somerville,* 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14; Morse, Banks & Banking, § 589.

The trust relation established, it will be presumed that the bank paid out of its own funds and not those of the *cestui.* Of the funds that came to the hands of the receiver exceeding this trust fund, a recovery will be permitted.

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from the possession of the subagent to which it was sent for collection, but which has not actually received the proceeds. First Nat. Bank v. Strauss, 66 Miss. 479.

If checks are received on deposit when the bank is hopelessly insolvent and within a few moments before it closes its doors, and are collected afterward by an agent of the bank, the proceeds are held by the receiver in trust for the depositor because of the fraud of the bank in receiving the deposit under such circumstances. Wasson v. Hawkins, 59 Fed. Rep. 237.

In one case it was held that if the draft is deposited for collection with a bank with which the depositor keeps an account, and the value of it is immediately credited to his account, the depositor cannot recover the amount of the draft from the bank's receiver, although it was insolvent at the time the deposit was received and it closed its doors before the proceeds of the draft were received by it. St. Louis & S. F. R. Co. v. Johnston, 23 Blatchf. 489, 27 Fed. Rep. 243. But in that case the court expressly states that the question of fraud was not raised by the pleadings.

The supreme court, however, held that there was enough in the pleadings to raise the question of fraud, and that it was a fraud on the part of the bank to take the paper when insolvent, and that the course of dealing did not show that it had made it its own, and therefore since the paper was not collected until after it closed its doors the paper was a trust fund in the hands of the receiver. St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683.

In Peck v. First Nat. Bank, 43 Fed. Rep. 357, where the collecting agent was insolvent to the knowledge of its managing officer when it received the paper for collection, the court held that its fraud in taking the paper without disclosing its condition prevented its getting title to the paper, and since the paper was indorsed for collection and the bank closed its doors before the collection was actually made, the subagent was not permitted to hold the proceeds as against the true owner. But the same result would have been reached without the intervention of the fraud doctrine, so that the case is not necessarily an authority on that question.

If, when checks are deposited with a blank indorsement, the bank is not thought to be irretrievably insolvent, there is no such fraud that the owner can impress a trust on the general funds of the bank for their proceeds in preference to other creditors of the bank. Terhune v. Bank of Bergen County, 34 N. J. Eq. 367.

And it has been held that knowledge of insolvency on the part of the bank officers is not sufficient to avoid its transaction on the ground of fraud unless the directors of the bank have such knowledge. Balbach v. Frelinghuysen, 15 Fed. Rep. 675, 15 Rep. 518.

So another case has held, that a bank is known by its officers to be insolvent when it receives from its correspondent a draft for collection does make the proceeds a trust fund recoverable by the correspondent bank from its receiver if the funds are collected and mingled with its own funds before any proceedings are instituted to put it into liquidation. Illinois Trust & S. Bank v. Smith, 21 Blatchf. 275 S. C. sub nom. Illinois Trust & S. Bank v. First Nat. Bank, 15 Fed. Rep. 858.

The ground of that ruling was that the fund could not be traced into the hands of the receiver.

Where title has not passed, and the paper or its proceeds are in hands of receiver.

When at the time the bank closes its doors the paper is still in its possession uncollected, the owner may reclaim it from the receiver.

If the draft remains in the possession of the bank at the time of its insolvency the proceeds of it will be a trust fund in the hands of the receiver of the bank for the benefit of the owner. Jones v. Kilbreth, 49 Ohio St. 401.

Collections made after suspension are held in trust for the owner. Jockusch v. Towsey, 51 Tex. 129.

Money collected by the assignee after the assignment may be recovered by the owner of the paper. *Re* Commercial Bank, 2 Ohio N. P. 170.

Collection of paper deposited with a bank indorsed for collection after it has closed its doors will not vest the title to the paper in the bank, nor prevent the owner from recovering the proceeds from its receiver. Tyson v. Western Nat. Bank, 77 Md. 412, 23 L. R. A. 161.

Checks deposited by a customer with his banker for collection do not become the property of the banker unless they are necessary to make good an overdraft or are immediately drawn against. And if they are not collected until after the bank closes its doors the depositor is entitled to the proceeds. Balbach v. Frelinghuysen, 15 Fed. Rep. 675, 15 Rep. 518.

If the business of the bank is stopped before the collection is made, and the proceeds come into the hands of the bank's representative, the owner may recover them from him and they cannot be applied to the uses of the bank. *Re* Havens, 8 Ben. 309.

If bills not due are paid in to a banker and placed to the credit of the customer, but not drawn against, they may be recovered from the assignee in case the banker becomes insolvent before they become due and are collected. Giles v. Perkins, 9 East, 21.

Proceeds capable of distinct identification.

If the proceeds of the paper are in such form that they can be readily identified in the receiver's hands, the owner may still reclaim them although the paper itself has been surrendered up for cancelation.

The proceeds may be collected from the receiver if they are traceable in his possession. Mad River Nat. Bank v. Melhorn, 8 Ohio C. C. 191.

If the bank takes from the debtor a certified check in lieu of money, and credits the account of the owner of the draft with the amount, but does not actually receive the money until after it closes

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696; *Van Alen* v. *American Nat. Bank*, 52 N. Y. 1; *Morgan* v. *Brocchus* (Tenn.) MS. (1875); *Continental Nat. Bank* v. *Weems*, 69 Tex. 489; *Boone County Nat. Bank* v. *Latimer*, 67 Fed. Rep. 27; *Massey* v. *Fisher*, 62 Fed. Rep. 958; *Sherwood* v. *Central Mich. Sav. Bank*, 103 Mich. 109.

It suffices to show that the estate of the bank was increased by the trust fund.

People v. *City Bank*, 96 N. Y. 32; *McLeod* v. *Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Harrison* v. *Smith*, 83 Mo. 210, 53 Am. Rep. 574; *Thompson* v. *Gloucester City Sav. Inst.* (N. J.) 6 Cent. Rep. 328; *Peak* v. *Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Francis* v. *Evans*, 69 Wis. 115; *First Nat. Bank* v. *Hummel*, 14 Colo. 259, 8 L. R. A. 788; *Davenport Plow Co.* v. *Lamp*, 80 Iowa, 722.

Messrs. **Faw & Cox**, for appellee:

The direction to "forward draft to me for balance less your fees" must mean that the First National Bank was to forward its own draft.

1 Morse, Banks & Banking, 3d ed. § 305.

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its doors, the owner may recover the proceeds from the possession of the receiver. Levi v. National Bank, 5 Dill. 104.

If foreign paper is deposited for collection, and a collection receipt taken, and a New York draft received for the amount, after which a credit is entered to the depositor and the draft deposited in a third bank to the credit of the collecting agent, and then the collecting agent closes its doors with more than the amount of the draft on deposit with the third bank, the owner of the paper may recover his demand out of the funds in possession of the third bank. Nurse v. Satterlee, 81 Iowa, 491.

If the fund in payment of the draft is kept separate and distinct from the other cash on the books of the collecting agent, with a memorandum in the cash drawer at the time of failure that the excess of cash belongs to the owner of the draft, the receiver cannot hold the funds as against the owner of the draft. First Nat. Bank v. Armstrong, 36 Fed. Rep. 59.

If the proceeds of the collection are allowed to remain on general deposit with the subagent, the owner may recover them from his possession. Lafort v. Carpenter, 91 Hun, 76.

Although the collecting agent has a right to mingle funds collected with its own funds, such right terminates when it has closed its doors, and if at that time paper received for collection is uncollected in the hands of its correspondent when the collection is made the proceeds may be reached by the principal. Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 2 L. R. A. 699.

The fact that a bank which received a draft for collection and credit, and in turn transmitted it to a correspondent to have the collection made, credited its owner with the proceeds upon being notified that it had been paid, will not, in case the bank becomes insolvent before receiving such proceeds, give its receiver any right, as against the owner of the draft, to demand them from the subagent. And the rights of the parties are not changed by the fact that the indorsement was in blank and a usage between the banks was that proceeds of collections should be credited on account instead of being immediately remitted. Armstrong v. National Bank, 90 Ky. 431, 9 L. R. A. 553.

If when receiving the draft the collecting agent refuses to credit the amount to the owner but forwards the draft for collection and fails while the proceeds are in the hands of its subagent, its receiver upon receiving the fund from the subagent will take it charged with a trust, although upon learning that the draft was collected the collecting agent had credited the owner with the amount. Henderson v. O'Connor, 106 Cal. 385.

If the collecting agent transmits the paper to a correspondent with whom it has no account, but who remits the proceeds of collections at stated intervals, the latter, although the subagent of the former, may, in case of the principal's failure before it credits the proceeds of the draft, be compelled to turn them over to the true owner, and in case they come into the hands of the receiver of the collecting agent he may be compelled to turn them over. National Exch. Bank v. Beal, 50 Fed. Rep. 355.

If the proceeds are not credited by the intermediate agent while it is a going concern, the fund cannot be held by its receiver, and if it contained a restrictive indorsement the bank actually making the collection cannot hold the proceeds as a credit on the account of the intermediate bank. The collecting agent cannot terminate his responsibility as agent until he has fully discharged his duty and has substituted in its place his unqualified obligation as debtor. First Nat. Bank v. Bank of Monroe, 33 Fed. Rep. 408.

But if, after the collection by the subagent, various sums are collected by it on other drafts, and, various sums are remitted to the collecting agent, the owner of the draft has no lien on the funds transmitted by the subagent to the receiver of the collecting agent after his appointment. Reeves v. State Bank, 8 Ohio St. 465.

In Hyde v. First Nat. Bank, 7 Biss. 156, where the bank making the collection had forwarded the money to its principal before the latter closed its doors, it was held that the owner of the paper had no right of action against the bank making a collection on the ground that there was no privity of contract between them. But there is no discussion of the question of trust fund, and in fact the court says that the money was passed to the credit of the collecting agent before its failure, which takes the case out of the line of authorities holding the trust-fund doctrine.

Where a check is an absolute assignment of the fund called for by it, if the subagent after making the collection and mailing its check for the amount closes its doors, the owner of the paper may collect the check out of a fund upon which it was drawn. Farmers' Bank & T. Co. v. Newland, 17 Ky. L. Rep. 329.

The authority to credit the amount of the collection ceases with the closing of the doors of the collecting agent, and if before that time it has received from the debtor only a check the proceeds of which are not realized until after its doors are closed, the fund will be a trust fund in the hands of a receiver. German American Bank v. Third Nat. Bank (U. S. C. C. Mo.) 6 Rep. 484.

Where the paper was sent for collection under an agreement that the collecting agent should remit on the 1st, 11th, and 21st of each month, and there was no intention of opening a deposit account with the collecting agent, the relation between the owner and the bank remains that of principal and agent, and does not become that of debtor and creditor, and upon the insolvency of the collecting bank the sender may recover the proceeds of all which he can identify in the hands of the receiver. Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684.

Where bank has received no fund.

If the collection has been made simply by a transfer of credits so that no fund came into pos-

It was equivalent to an agreement that the bank might use the money collected and pay appellant by its own draft. The bank thereby became an ordinary contract debtor of appellant, and she stands upon no higher ground than the other general creditors of the bank. *Akin* v. *Jones*, 93 Tenn. 361, 25 L. R. A. 523.

If the collection is made and credit given before insolvency, the owner cannot recover in preference to other creditors.

1 Morse, Banks & Banking, § 348, p. 447; *Akin* v. *Jones*, 93 Tenn. 355, 25 L. R. A. 523; *Commercial Nat. Bank* v. *Armstrong*, 148 U. S. 58, 37 L. ed. 367.

The chief object of the "National Bank Act," in its provisions relative to failing banks, is to secure an equal distribution of the assets without preference.

National Bank Act, §§ 5234–5236, 5242; *Stephens* v. *Schuchmann*, 3 Browne, Nat. Bank. Cas. 542; *Spokane County* v. *Clark*, 61 Fed. Rep. 539; *Multnomah County* v. *Oregon Nat. Bank*, Id. 914.

The decision in the case of *National Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54,

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session of the bank, or if the bank used the paper or the money realized on it for purposes of its own, the rule seems to be that there will be no fund to which the trust can attach, and therefore it is not enforceable.

If the collection is made by the collecting bank by receiving a check upon itself and charging the amount against the account of the drawer of the check and crediting it upon the collection account, after which New York exchange is sent in satisfaction of the amount, which cannot be collected because of the failure of the collecting agent, the claim is not a preferred one against the funds in the hands of the receiver, since the funds cannot be specifically identified. Anheuser-Busch Brewing Asso. v. Clayton, 56 Fed. Rep. 759, 13 U. S. App. 295.

If a draft is sent for collection to the bank in which the drawee is a depositor, and upon his acceptance of the draft the amount is simply charged against his account without the receipt of any money by the bank, there will be no fund to which the trust can attach in the hands of the receiver. Freiberg v. Stoddart, 7 Kulp, 157.

The court says this is not the case of a trustee mingling trust money with his own, and therefore the decisions relating to a charge or lien on the whole fund in such case did not apply.

If the bank receiving the note for collection accepts a check upon itself in payment, and merely debits and credits the amount upon its books without setting apart any fund as the proceeds of the check, and after continuing business for several days closes its doors, there will be no trust funds in the hands of the receiver for the benefit of the owner of the note. Sherwood v. Milford State Bank, 94 Mich. 78.

Where the holder of a check sent it by mail to the bank upon which it was drawn and requested that bank to remit by a certain time or return the check, which it failed to do, but did remit a day or two later by a draft which was not paid, and in the meantime charged the check to the depositor as paid, the account being good for the amount, the court says: "It is impossible out of these facts to construct an appropriation or trust which would attach to the general assets of the bank afterwards passing to a receiver, and requiring their application to the payment of the check in preference to all other indebtedness of the bank." People v. Merchants & M. Bank, 78 N. Y. 269, 34 Am. Rep. 532.

But in Arnot v. Bingham, 55 Hun, 553, under facts very similar to the above except that the paper forwarded was a note instead of a check, the bank was held to have been possessed of a trust fund which went into the hands of a receiver and to which plaintiff was entitled. But that case does not consider People v. Merchants & M. Bank, and decides the case upon the question whether or not the title to the paper passed so the collecting agent became the debtor of the owner of the paper, rather than upon the question whether or not there was a fund to which the trust could attach, although it is stated that the transaction between the maker of the note and the bank, by which it received his check upon itself in payment of the note, canceled the note, and charged the check to his account, was in fact a collection of the amount from the general fund in its hands and a special appropriation of that amount to the payment of the note, and that that fund belonged to the owner of the note although mingled with other moneys of the bank. But that case is disproved in Frank v. Bingham, 58 Hun, 580, which was a claim upon the same fund reached in the former case; and the court says that the two cases curiously illustrate the necessity of requiring the actual identity of some portion of the funds which passes to the receiver with a particular trust fund sought to be recovered in the action. Both claims could not attach themselves to the same fund which was not large enough to pay both, and in case the first decision was correct the second claimant would loose his claim although equally meritorious with the former. But Arnot v. Bingham, 55 Hun, 553, was followed in People v. Merchants' Bank, 92 Hun, 159.

Two Mississippi cases have made an exception to that rule.

A bank which receives the check of its customer who has no funds in bank, in satisfaction of paper forwarded to it for collection, and immediately mails its own draft on New York to the owner of the paper to cover the amount, which draft is not paid because of the failure of the drawer, holds the customers' debt on the overdraft in trust so that it may be recovered from the assets which pass into the hands of the receiver. Ryan v. Paine, 66 Miss. 678.

If a person sends paper to a bank for collection, and the bank accepts a check by its customer who has overdrawn his account in payment, and transmits its draft on New York for the proceeds, which is not paid because of its failure, the owner of the paper may impress the fund due from the creditor on his overdrawn account with a trust for the payment of his claim. Kinney v. Paine, 68 Miss. 258.

But a later case holds that if the maker of the check has funds on deposit, and the check is charged against his account, and then the bank forwards its draft in payment of the proceeds, which is not paid because of the bank's failure, the owner of the paper cannot impress its funds with a trust for the payment of the draft. Billingsley v. Pollock, 69 Miss. 759.

And a Tennessee case refuses to recognize the exception, holding that if the bank receiving the draft for collection receives in payment an overdraft upon itself and forwards exchange to the owner of the draft, which is not collected because of the insolvency of the collecting agent, the owner of the draft has no lien on any fund in the hands of the receiver, although the overdraft is subsequently paid to him. Akin v. Jones, 93 Tenn. 361, 25 L. R. A. 523. In that case the instructions accompanying the paper were to remit in New York exchange, and the court held that this was equivalent to an agreement that the money collected might be used by the collecting bank, and precluded any claim of trust funds.

25 L. ed. 693, has no application to a case like the one at bar.

Philadelphia Nat. Bank v. *Dowd*, 38 Fed. Rep. 172, 2 L. R. A. 480; *Spokane County* v. *Clark*, *supra*; *Merchants' & F. Bank* v. *Austin*, 48 Fed. Rep. 29.

Constructive trusts are not trusts at all in the strict and proper signification of the term; but as courts of equity grant the same relief in certain classes of frauds as in fraudulent breaches of trust, the courts have concurred in denominating the relation thus created between the parties as a "constructive trust."

2 Pom. Eq. Jur. 2d ed. §§ 1030, 1044; 1 Perry, Tr. § 166.

"In applying this principle (constructive trusts), care should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor."

2 Pom. Eq. Jur. 2d ed. § 1044, and note 2.

The mere fact that appellant became a creditor of the insolvent bank through the fraud of its president, and that the bank thereby became a trustee *ex maleficio*, would give her no right to preference over other creditors, unless she can at least trace and identify her money

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If a bank receiving paper for collection uses it in balancing its account at the clearing house, there will be no funds in its possession which the owner of the paper can reach in the hands of the assignee. *Re* Seven Corners Bank, 58 Minn. 5.

If the proceeds of the paper are appropriated by the bank before its assignment the owner cannot recover them. *Re* Commercial Bank, 2 Ohio N. P. 170.

If the paper is indorsed for collection, the subagent acquires no title to it prior to the collection of the paper, although it is credited to the transmitting bank at the time of its receipt. But as to proceeds which have been collected before the subagent closes its doors, and paid out in the usual course of its business, the transmitting bank is merely a general creditor. National Butchers & D. Bank v. Hubbell, 117 N. Y. 384, 7 L. R. A. 852.

Where proceeds have been mixed by bank with its own funds.

The general rule where the bank has completed the collection and mixed the funds with its own is that the bank is no longer a trustee but simply a debtor, and that the owner of the paper cannot claim a preference out of its assets. Some recent cases, however, following the doctrine of Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, hold that the court may separate the trust fund from the general assets of the bank although they reached the hands of the assignee in an indistinguishable mass.

A bank receiving a note for collection and remittance, upon making the collection becomes the debtor of the owner of the paper, and is not a trustee. Bowman v. First Nat. Bank, 9 Wash. 614.

If two banks act as collecting agents for each other, and keep a running account of the collections, remitting balances each week, one is simply the debtor of the other, and upon its failure the other cannot impress its assets with a lien. People v. City Bank, 93 N. Y. 582.

If the agreement between two banks is that one shall collect paper for the other and remit daily for the proceeds the relation of debtor and creditor is established as soon as the paper is collected, so that in case of a failure thereafter the funds will not pass into the hands of a receiver charged with a trust. First Nat. Bank v. Davis, 114 N. C. 343; Commercial & F. Nat. Bank v. Davis, 115 N. C. 226; Merchants' Nat. Bank v. Davis, Id. 233.

Where the collecting agent is to make collections and remit once each month its relation to the principal is that of debtor not of agent, after money is once in its possession. *Re* Kingland's Assignment (Minn.) 28 Chicago Legal News, 14.

When the collection is made the bank immediately holds the funds as debtor of the owner of the paper. Tinkham v. Heyworth, 31 Ill. 519.

If the business of the bank is carried on for several days after the collection is made the proceeds become so mixed with the funds of the bank that they cannot be identified in the hands of the receiver so as to be recoverable from him. Merchants' & F. Bank v. Austin, 48 Fed. Rep. 31.

If the paper is sent for collection and immediate returns, but the collecting agent, instead of obeying orders, mingles the proceeds with its own funds before it closes its doors, the fund cannot be followed, but the collecting agent is merely a general debtor of the owner of the paper. Philadelphia Nat. Bank v. Dowd, 2 L. R. A. 480, 38 Fed. Rep. 172.

A collecting bank which after collecting the money fails to pay it over and is placed in the hands of a receiver is not a trustee of the fund after it has been mingled with the funds of the bank so that it cannot be placed into the receiver's hands. Bank of Commerce v. Russell, 2 Dill. 215.

If, after collecting the proceeds of the paper, the agent fails to remit and becomes insolvent with the proceeds mingled among its general assets, equity will not take the amount out of the general fund, but there will remain a simple contract debt which must be collected at law. Bank of Florence v. United States Sav. & L. Co. 104 Ala. 297.

In case a collecting agent fails to remit according to agreement, and becomes insolvent, the owner of the paper must distinctly trace his funds into the hands of the receiver in order to recover them. It is not sufficient for him to show that they went into the general fund, because equity will not separate it from the other items making up that fund. *Re* Kingland's Assignment (Minn.) 28 Chicago Legal News, 14.

If bankers employed to collect and remit receive the cash and notify their employer that the money has been remitted, but instead of remitting, place to the customers' credit and go into liquidation, the customers are not entitled to a priority out of the general assets of the bank. *Ex parte* Dale, L. R. 11 Ch. Div. 772.

But that case was overruled in Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.

Taking trust money out of general fund.

Some of the cases have attempted to apply the doctrine of Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, to funds mixed with bank funds.

In Thompson v. Gloucester City Sav. Inst. (N. J.) 6 Cent. Rep. 328, the court says, in effect: I can see nothing in the argument respecting the impossibility of keeping the money separate when collected. The collecting bank could place such money in an envelope and preserve its identity. Nor can I see any force in the insistment that the entry by the collecting bank upon its books of the sums collected, changed the rights or relations of the parties. It would hardly be safe to say that an agent could make itself a debtor simply as distinguished from an agent, by a confusion of the moneys or goods of his principal, and by then giving the principal credit for the value. Any such doctrine would inevitably compel the abandonment of commercial transactions by means of agents. But no difficulty arises from the confusion of money any more than in every other case where the rightful owner is in pursuit of trust funds. In such cases the owner need not point out the very goods or bills or coins; he does all the law requires of him if he shows that the money came to

as a part of the common mass in the receiver's hands.

Philadelphia Nat. Bank v. *Dowd*, 38 Fed. Rep. 172, 2 L. R. A. 480; *Merchants' & F. Bank* v. *Austin*, 48 Fed. Rep. 31; *Spokane County* v. *Clark*, 61 Fed. Rep. 539; *Wasson* v. *Hawkins*, 59 Fed. Rep. 237; *Slater* v. *Oriental Mills*, 18 R. I. 352; *Shields* v. *Thomas*, 71 Miss. 260; *Multnomah County* v. *Oregon Nat. Bank*, 61 Fed. Rep. 913; *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Illinois Trust & S. Bank* v. *First Nat. Bank*, 15 Fed. Rep. 858; *Union Nat. Bank* v. *Goetz*, 138 Ill. 127; 2 Morse, Banks & Banking, 3d ed. §§ 589*b*, 590; High, Receivers, 3d ed. § 274*a*; Gluck & B. Receivers, pp. 431 *et seq.*; 1 Perry, Tr. § 345; Wait, Insolvent Corp. § 659; 2 Pom. Eq. Jur. 2d ed. 1058; 2 Story, Eq. Jur. § 1259; *Peters* v. *Bain*, 133 U. S. 670, 33 L. ed. 696; *Wetherell* v. *O'Brien*, 140 Ill. 146; *Mutual Acci. Asso.* v. *Jacobs*, 141 Ill. 261, 16 L. R. A. 516; *Lathrop* v. *Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Lotze* v. *Hoerner*, 25 Ohio L. J. 31. See VI. U. S. Gen. Dig. p.

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the hands of defendant impressed with a trust to his knowledge. In every such case the holder must respond either with the article taken or its value.

Where a bank makes a collection it holds the money as trustee for the owner, and in the making of an assignment by the bank for the benefit of creditors the trust character still adheres to the funds in the hands of the assignee. Anheuser-Busch Brewing Asso. v. Morris, 36 Neb. 31; Griffin v. Chase, Id. 328.

If the paper is forwarded under an agreement to collect and return, bearing an indorsement to that effect, the collecting agent will receive the funds as trustee, and in case it mingles the money with its own and becomes insolvent the trust may be enforced upon the money which it turns over to the receiver. Continental Nat. Bank v. Weems, 69 Tex. 489. The court says it may be when the entire mass is once paid away the right to claim a trust in any money or property is forever lost. But if throughout all the trustee's dealings with the funds so mingled together he keeps on hand a sufficient sum to cover the amount of the trust money, the trust should attach to the balance that is found to remain in his hands. But if the proceeds of the notes are directly applied to the payment of the debts of the bank no enforceable trust will attach to the general estate of the bank which comes into the hands of the assignee.

And that case was followed in Hunt v. Townsend (Tex.) 26 S. W. 310.

If, after collecting paper, the bank becomes insolvent, the owner of the paper may claim a trust against the funds which reach the hands of the assignee, although the identical proceeds of the paper never reach his hands and the funds coming to them are less in amount than the face of the paper. First Nat. Bank v. Sanford, 62 Mo. App. 394.

The court says: "We concede that this reasoning proceeds on advanced lines and is seemingly opposed to the weight of authority in other states."

If mortgages are left for collection and not for credit, and the proceeds when received are not credited but carried in a fictitious account until the bank becomes insolvent, the owner may recover them as a trust fund if at no time after their receipt the cash balance was less than the amount of the collections. *Re* Johnson, 103 Mich. 109.

If the collecting agent does not remit the proceeds, which it has no right to credit to the owner, until after it closes its doors, equity will impress a trust upon its assets for the benefit of the owner, under the rule that if money is mingled in an indistinguishable mass the whole mass will be treated as a trust fund. Windstanley v. Second Nat. Bank, 13 Ind. App. 544.

If instead of remitting as directed the collecting bank credits the proceeds and then fails having cash on hand less than the amount of the collection, the presumption will be that such cash is the residue of the trust money, and will go to the owner of the paper. Boone County Bank v. Latimer, 67 Fed. Rep. 27.

If a draft left for collection is forwarded to and collected by a subagent, who gives credit to the collecting agent and honors his draft to the full amount, the proceeds of which are used in the business of the collecting agent either to pay debts or to increase assets, it goes to the benefit of his estate, and the assets in the hands of his receiver will be subject to the trust. McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287; Francis v. Evans, 69 Wis. 115.

But those cases were directly overruled in Nonotuck Silk Co. v. Flanders, 87 Wis. 237, where it was held that if the proceeds of the collection had been disposed of before the assignment the owner of the draft could not claim them from the possession of the assignee.

If paper is sent to a bank for collection and remittance, and it collects the proceeds but sends its own draft in payment, it has not discharged its obligation, and in case it fails before the draft is paid the funds may be reclaimed from possession of the receiver. It makes no difference that the identical money did not pass into the receiver's hands, for in some form it went to swell the assets which fell into his hands. People v. Bank of Dansville, 39 Hun, 187.

It will be observed that the above case, while comparatively recent, is not a decision by the court of last resort, and is not fully in harmony with expressions found in earlier cases of the higher court. The court of appeals has made the following application of the doctrine: If at the time of receiving a draft for collection the bank is hopelessly insolvent and closes its doors before notice of the collection is received, the owner of the draft may follow the fund into the hands of the subagent as against general creditors of the bank, upon the principle that when money held by a person in a fiduciary capacity has been deposited by him in his general account at a bank, the person for whom the money is held can follow it and has a charge on the balance in the banker's hands, and if the trustee mingles the deposit with his own money and draws out some of it on checks generally and in the ordinary manner, the drawer of the checks must be taken to have drawn out his own in preference to the trust money. Importers & T. Nat. Bank v. Peters, 123 N. Y. 272.

II. *As against claims of subagent.*

In many cases the paper is forwarded to a subagent to have the collection made, and before the proceeds are returned to the collecting agent the latter becomes insolvent and then arises a conflict of interest between the owner of the paper and the subagent, who claims to retain the proceeds upon account of the collecting agent.

When title in collecting agent.

If the title has been transferred to the collecting agent the owner has lost his right to claim the proceeds from the hands of the subagent.

If the check is credited to the owner as cash, the title passes to the bank, and it can confer a good title on its correspondent, which, in case of the insolvency of the former, will prevail over the claim of the owner to the proceeds of the check. Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530.

1887; 27 Am. & Eng. Enc. Law, pp. 252 *et seq; Cavin* v. *Gleason*, 105 N. Y. 256, cited in 27 Am. & Eng. Enc. Law, 257.

Wilkes, J., delivered the opinion of the court:

Complainant's bill is filed to have a debt due her declared a preferential claim, to be paid in full out of the funds in the hands of defendant as receiver. There was a demurrer to the bill raising the question of the right of complainant to any priority or preference; and it was sustained, and decree rendered in the court below fixing the amount of complainant's debt, and directing that it share *pro rata* in the funds in the receiver's hands, but denying it any preference or priority, and dividing the costs equally between the parties. Complainant, by leave of the court, appealed, and assigned errors. The cause was heard by the court of chancery appeals, and the facts were found and decree of the chancellor was affirmed, and complainant has appealed to this court.

If the paper is indorsed in blank, and the owner immediately draws against it, the title passes to the collecting agent, so that in case it is placed with a subagent for collection he may hold the proceeds to apply upon general indebtedness of the collecting agent to him. Clark v. Merchants' Bank, 2 N. Y. 380.

If the transaction by which the bank receives the check is equivalent to a discount by a bank and a deposit of the proceeds by the customer and a credit for the amount in the bank book, the bank owns the check, and the depositor cannot reach it or its proceeds in the hands of a correspondent of the bank. Metropolitan Nat. Bank v. Loyd, 25 Hun, 101.

If the owner of the paper indorses it in blank and has a right to draw against it as soon as it is deposited, the title passes to the bank, and the owner cannot recover it from a subagent to whom it was sent for collection, although the bank fails before the owner checks out the amount which was passed to his credit. Ayres v. Farmers' & M. Bank, 79 Mo. 421, 49 Am. Rep. 235; Bullene v. Coates, 79 Mo. 426.

In case of restrictive indorsement.

If the paper is restrictively indorsed the subagent acquires no title which he can assert against the true owner of the paper.

An indorsement for collection not being an actual transfer of a note may be recalled at pleasure. 1 Dan. Neg. Inst. § 699.

An indorsement for collection is subject to recall at pleasure. Dougherty v. Eastburn, 74 Tex. 69.

If the paper is indorsed for collection the subagent cannot withhold it from the true owner if applied on his claim against the collecting agent. City Bank v. Weiss, 67 Tex. 331, 60 Am. Rep. 29.

If there is a restrictive indorsement on the paper the subagent cannot hold it as a credit on an account of the collecting agent. Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429.

If the paper is indorsed for collection the subagent cannot retain the proceeds on general account against the collecting agent. Cecil Bank v. Farmers' Bank, 22 Md. 148; Central Railroad v. First Nat. Bank, 73 Ga. 384.

If the paper is indorsed for collection and the subagent, has notice, at the time it makes the collection, of the failure of the collecting agent, its authority to credit the proceeds is revoked, and it will hold the proceeds for the benefit of the true owner. First Nat. Bank v. First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

If the paper is indorsed for collection, and is transmitted to a subagent for that purpose under an agreement to remit at certain dates, the fact that the money has been collected and the proceeds debited and credited on the books of the subagent, and the intermediate agent, and of the owner of the paper, will not prevent the owner from recovering the proceeds from the subgent, if, before the proceeds are actually turned over, the intermediate agent fails, although before that time a letter has been posted by the subagent to a third person directing him to credit the account of the intermediate agent with the amount of the proceeds according to a course of business between them, if knowledge of the insolvency was received in time to have intercepted such letter. Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. Rep. 880.

If the note is indorsed for collection, and is transmitted by the collecting agent to its correspondent, which collects it and credits the amount to the account of the collecting agent, but does not notify it of the collection before its doors are closed, the proceeds will belong to the owner of the draft, and not to the bank holding the proceeds, although its account with the collecting agent shows a balance against the latter. *Re* Armstrong, 33 Fed. Rep. 405.

The ground of the ruling is that the restrictive indorsement prevented the passing of title.

If the paper contains a restrictive indorsement the proceeds may be intercepted in the hands of the subagent. First Nat. Bank v. Reno County Bank, 3 Fed. Rep. 257.

If there is a restrictive indorsement on the paper, the bank actually making the collection cannot hold the proceeds in satisfaction of a claim against the correspondent as against the true owner of the paper. Bank of the Metropolis v. First Nat. Bank, 22 Blatchf. 58, 19 Fed. Rep. 302.

If the bills are restrictively indorsed, and are deposited by the collecting agent with his banker as security for past advances, the owner of the bills may maintain trover against the holder for their possession in case of the insolvency of the collecting agent. Treuttel v. Barandon, 8 Taunt. 100.

In one case it was held that the owner who has indorsed in blank may take advantage of a restrictive indorsement placed upon the paper by the bank in sending it forward for collection. Freeman's Nat. Bank v. National Tube Works Co. 151 Mass. 415, 8 L. R. A. 42.

But in another case it was held that if the paper is indorsed in blank the first subagent may resist an action of trover against it by the owner to recover the paper in case the collecting agent becomes insolvent, although the paper was indorsed to it for collection. Cody v. City Nat. Bank, 55 Mich. 379.

Effect of knowledge by subagent of true condition of title.

The subagent is not entitled to retain the proceeds if it knew that the paper did not belong to its correspondent. Bank of the Metropolis v. New England Bank, 47 U. S. 6 How. 212, 12 L. ed. 409.

Rule where the indorsement is in blank.

The difference in opinion as to whether or not past indebtedness is a good consideration for the transfer of negotiable paper has led to some conflict in the decisions upon this question. One line of cases holds that if the paper is indorsed in blank it may be retained by the subagent to be applied upon the account of the one that transmitted the paper to it. Wood v. Boylston Nat. Bank, 129 Mass. 358.

The facts as found are, so far as necessary to be stated, that complainant is a resident of Connecticut, and sent to the First National Bank of Johnson City a note and mortgage on George and wife, citizens of Washington county, inclosed in a letter in the following words:

I inclose herewith note and trust deed and insurance policy on loan of Phebe S. Sayles to F. M. George and wife, also a release of the trust deed. The amount due on the note is $900.00, with interest to be added from Feby. 2, 1894. Will you please notify Mr. George and wife that the papers have been sent you for collection, and, upon his paying to you the amount due, deliver to him the release, and forward draft to me for balance, less your fee.

Very respectfully yours,
Arthur G. Bell.

November 6, 1894, Mr. George delivered to the First National Bank a check drawn by the Magnetic Building & Loan Association on said bank for $1,000, which the president and acting cashier received, and an entry was made on the books of the bank, showing a

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If the absolute title is given to the collecting agent, and it forwards the paper to a correspondent for collection, the latter may retain the paper for application upon general account for past indebtedness. Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

If the indorsement placed upon paper delivered to a bank for collection is unrestricted, its correspondent may retain the proceeds upon a general indebtedness of the collecting agent to it, in case the latter closes its doors before it has remitted the proceeds. Vickrey v. State Sav. Asso. 21 Fed. Rep. 775.

In Marine Bank v. Fulton County Bank, 69 U. S. 2 Wall. 252, 17 L. ed. 785, in which the question of the relation of the subagent to the collecting agent simply, and not the question of insolvency, was before the court, it is said that the relation of principal and agent between the banks was changed the moment the money received on the notes was placed in the general funds of the bank and the transmitting bank credited on the books of the subagent with the amount. And that therefore the relation was simply that of debtor and creditor.

And the same principle is recognized in Planters' Bank v. Union Bank, 83 U. S. 16 Wall. 483, 21 L. ed. 473.

If the paper contains no restrictive indorsement, and is sent to a subagent for collection, the latter may hold the proceeds in satisfaction of a general balance due it from the collecting agent in case the latter becomes insolvent before the proceeds are paid to the owner. Bank of the Metropolis v. New England Bank, 42 U. S. 1 How. 234, 11 L. ed. 115.

The other line of authorities holds that a bank to which the paper is sent as subagent cannot acquire any better title to it than its correspondent had unless it pays a present valuable consideration for it. McBride v. Farmers' Bank, 26 N. Y. 450, Affirming McBride v. Farmers' Bank, 25 Barb. 657; Lindauer v. Fourth Nat. Bank, 55 Barb. 75; Dod v. Fourth Nat. Bank, 59 Barb. 265; Stark v. United States Nat. Bank, 41 Hun, 506.

Although the note is indorsed in blank the subagent does not acquire any title to it as against the owner for the purpose of applying it upon a general balance due it by the collecting agent. Van Namee v. Bank of Troy, 5 How. Pr. 161.

The mere crediting by the subagent of the proceeds to his correspondent will not prevent the owner of the paper from reclaiming the proceeds from the hands of the subagent. Arnold v. Clark, 1 Sandf. 491.

The subagent cannot hold the proceeds of the draft to apply on account unless it has made advances or given new credit to its correspondent on the faith of the paper. Hackett v. Reynolds, 114 Pa. 328.

If the subagent has made no advances he cannot retain the proceeds. Jones v. Milliken, 41 Pa. 252; First Nat. Bank v. Gregg, 79 Pa. 384.

If the subagent has not given credit on the faith of the draft sent for collection it cannot hold the proceeds on the general balances against the collecting agent in case of its insolvency as against the owner of the draft. Commercial Bank v. Marine Bank, 1 Trans. App. 302, 3 Keyes, 337.

In Naser v. First Nat. Bank, 116 N. Y. 492, it is said that it does not follow from the doctrine that the collecting agent cannot appoint a subagent, that the subagent, unless he has made advances on the paper can, as against the owner, retain the proceeds of it. The owner may revoke the agency and seek the paper or its proceeds in the hands of the subagent.

Although the paper is indorsed in blank, and the collecting bank and its agent have had prior dealings so that the collecting bank owes the agent a balance, the agent cannot retain the proceeds for application upon this balance if the course of dealing does not show that the paper was sent for credit on the account and no new credit was given on the faith of it. Millikin v. Shapleigh, 36 Mo. 595, 88 Am. Dec. 171.

Although the paper is indorsed in blank, the subagent cannot retain it for application upon a claim against the collecting agent, unless it has given new credit upon the faith of it. Lawrence v. Stonington Bank, 6 Conn. 521; Miller v. Farmers' & M. Bank, 30 Md. 392.

In Sweeney v. Easter, 68 U. S. 1 Wall. 166, 17 L. ed. 681, subagents to whom paper indorsed for collection was sent were not permitted to hold is as a credit on account of their correspondent as against the true owners of the paper.

Although the paper is indorsed in blank, and is collected by the subagent and placed to the account of the collecting agent, if the subagent makes no advances and gives no new credit on account of it, he cannot retain the proceeds as against the true owner. Wilson v. Smith, 44 U. S. 3 How. 763, 11 L. ed. 820.

A subagent is not entitled to retain the proceeds unless credit was given to the correspondent or balances suffered to remain in its hands to be met by negotiable paper transmitted or expected to be transmitted in the usual course of dealings between the two. Bank of the Metropolis v. New England Bank, 47 U. S. 6 How. 212, 12 L. ed. 409.

In the latter case the court apparently limits the general language used in the same case upon the former appeal as reported in 1 How. 243, *supra*, which would seem to lead to the opposite result. But since the doctrine of the supreme court as announced in other cases is that a past consideration is good to support a transfer of negotiable paper, the ground of the latter ruling is not clear, and it is also somewhat in conflict with a later case, which holds that if a bank receiving paper for collection sends it to its correspondent for that purpose and fails, the one sending the paper can recover from the receiver whatever is collected by the subagent after the insolvency, but not what was collected and charged by the subagent in the account of the collecting agent before the insolvency was declared. Commercial Nat. Bank v. Armstrong, 148 U. S. 58, 37 L. ed. 367. H. P. F.

collection of complainant's debt. It appears that the president of the bank made out an incomplete certificate of deposit, which was found in the bank a few days afterwards, when its doors were closed. On November 12th, 1894, the bank was placed in the hands of a national bank examiner as an insolvent concern. Before the court of chancery appeals, the contention was that the bank was hopelessly insolvent when the note was received, and this was well known to its president, and that it was a wrongful act to receive the note for collection under such circumstances; and it was further insisted by complainant that the bank, from the time the note was collected until it went into the hands of the bank examiner as receiver, had in cash and cash items largely more than the sum collected on the note, and it was insisted, therefore, that, when the money was received from George by the bank, the latter acted as complainant's agent, and became liable to her as a trustee, and the fund collected became a trust fund; that, being insolvent when the money was collected, the bank never had any title to the funds, because of the fraud practiced in withholding information of its condition; that, having funds sufficient to pay the note and interest all the while after it was received, such funds were presumably the funds of complainant, and payments made by the bank on other accounts were presumably funds derived from other sources; and, finally, that, if complainant's funds were wrongfully commingled with the funds of the bank, it was the duty of the bank to separate them, and not to devolve that task upon the complainant.

We think the question involved in this case is fairly presented and adjudicated in the case of *Akin* v. *Jones*, 93 Tenn. 353, 25 L. R. A. 523, where the general rule is held to be that an indorsement for collection vests no title to the paper in the bank, etc., and it may be recovered *in specie* before collection made; but if the bank make collection before it makes an assignment, even though it be in fact insolvent, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust character upon the proceeds; citing 1 Morse, Banks & Banking, 248. There may be special facts which will take the case out of the general rule, and create a trust in the funds collected; and the learned judge who delivered that opinion cited the case of *Continental Nat. Bank* v. *Weems*, 69 Tex. 489, and which is relied on in this case, as presenting a case with special facts, and he continues: "But the rule undoubtedly is, that unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the drafts stands upon no higher ground than the other creditors of the bank in a case where the bank collects the draft prior to making a general assignment." In that case the parties directed the bank of Columbia to send them its check on New York in payment of the proceeds of collection, and this was held to be the determining fact in the record. It was virtually a direction not to send the identical moneys collected, nor to hold them separate, but was an agreement that the bank might use the money collected, and pay the creditors by its own check on New York. In the present case the direction is to "forward draft to me for balance, less your fee," which clearly implies that the bank, after collection, should retain its charges, and forward the balance in its own draft to the sender of the note. The fact that George paid his note to the bank in a check upon itself can make no difference, as it was equivalent to a payment in money, even if the bank had failed the same day. Randolph, Com. Paper, §§ 1395, 1456; *Howard* v. *Walker*, 92 Tenn. 452.

It is said in this court that the question was not raised in the pleadings whether the complainant and bank stood in the relation of principal and agent, or that of debtor and creditor. We think the question of trust fund is fairly presented by the demurrer, and is, in effect, the same as to whether the bank must hold the funds separate and apart from all others, and remit them *in specie*, or whether it was authorized to hold the specific money collected in its own vaults, and remit its own check. The question of the fraud of the bank in receiving the note to collect when it was insolvent cannot alter the rule. The contest is not between the complainant and bank alone, but between complainant and the other creditors of the bank, all of whom probably occupy the same position of having been misled into a belief in the solvency of the bank and its reliability for its acts.

We can see no error in the decree of the chancellor, nor of the court of chancery appeals, and they are *affirmed*, with costs against the complainant.

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota, *ex rel.* John LITTLE *et al.*, *Appts.*,
v.
H. A. LANGLIE *et al.*, *Respts.*

(.....N. D.....)

***1. Where there is no other adequate and speedy remedy** to test the validity of an election held to relocate a county seat, mandamus to compel the county officers to hold their offices at the legal county seat is the proper remedy to determine whether the county seat has been legally changed.

2. While the statutory remedy by contest in the courts provided for by sections 1494 to 1498 both inclusive of the

*Headnotes by CORLISS, J.

NOTE.—For decisions as to what constitutes a majority or a two-thirds majority of voters at an election, see *note* to Lawrence v. Ingersoll (Tenn.) 6 L. R. A. 310.

As to a gift of a bonus or donation to secure the location of a county seat at a certain place, see Ayres v. Moan (Neb.) 15 L. R. A. 501, and *note*.

See also 35 L. R. A. 752; 37 L. R. A. 761; 42 L. R. A. 738.

Compiled Laws is an adequate and speedy remedy, and for that reason a remedy that would have precluded a resort to mandamus after the statute creating the remedy by contest was passed had the remedy by mandamus not been perpetuated by statute, yet the remedy by mandamus was in fact perpetuated by § 1499, Comp. Laws.

3. **The statute relating to elections for a relocation of county seats** provided that if an election was ordered it should be the duty of the board of county commissioners in the notices for the next general election to notify the voters of the county to designate upon their ballots at such election the place of their choice. The notice actually given was that an election would be held for the purpose, among others, "of voting upon the question of relocating the county seat of Traill county." At the election 1882 votes were cast on this question and the highest number of ballots cast at such election was 1960. *Held*, that the notice was sufficient; and that even if insufficient the election was not void, it appearing that the voters were not misled by the defect in it.

4. **The statute made it necessary that some one place should have "two thirds of the votes polled"** to work a change of the county seat to such place. *Held*, that this meant two thirds of the votes polled on that particular question and not two thirds of the highest number of votes polled on some other question at the same election.

5. **After a county-seat election has been ordered and held,** and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation when the board has found that it was so signed.

(1896.)

APPEAL by relators from an order of the District Court for Traill County in favor of respondents in a mandamus proceeding to compel defendants to remove their offices as county officers from Hillsboro to Caledonia which was alleged to be the true county seat of the county. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Crum & Hanson,** for appellants:

Mandamus is the proper remedy in the case at bar.

Calaveras County v. *Brockway*, 30 Cal. 339; N. D. Comp. Laws, §§ 606, 607, 1401, 5517.

When a statute is passed authorizing a proceeding which was not allowed by general law before, and directs a mode in which an act shall be done, the mode pointed out must be strictly pursued.

Sutherland, Stat. Constr. §§ 451, 454, 459; *Laws* v. *Vincent*, 16 Neb. 215; *People, Darnell*, v. *Hamilton County Comrs.* 3 Neb. 252.

Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court.

Freem. Judgm. § 517; *People* v. *Woodhull Twp. Bd.* 14 Mich. 28; *People* v. *Wayne County Circuit Ct. Judge*, 19 Mich. 296.

A limited tribunal taking upon it the exercise of jurisdiction not belonging to it, its decision is a nullity from which there need not be an appeal.

Langford v. *Monteith*, 102 U. S. 145, 26 L. ed 53; Freem. Judgm. § 525.

When determining the sufficiency of a petition for the removal of a county seat, the board acts in a judicial capacity and the order of removal is a judicial act.

Herrick v. *Carpenter*, 54 Iowa, 340; *Gordon* v. *State, Boder*, 4 Kan. 489; *Laws* v. *Vincent*, 16 Neb. 215.

In relocating a county seat the law must be followed.

State, Hess, v. *Washoe County Comrs.* 6 Nev. 104; *People, Darnell,* v. *Hamilton County Comrs.* 3 Neb. 244; *Laws* v. *Vincent, supra; Lowe* v. *Alexander*, 15 Cal. 301; *Rowley* v. *Howard*, 23 Cal. 402.

The submission must be made according to law, and if uncertain the vote is void.

People, Ellsworth, v. *Laine*, 33 Cal. 55; *Jones* v. *State, Atherby*, 1 Kan. 273; *People, Westbrook,* v. *Rosborough*, 14 Cal. 181; *Kenfield* v. *Irwin*, 52 Cal. 169; *McMillan* v. *Lee County*, 3 Iowa, 311; Cooley, Const. Lim. 6th ed. § 603, p. 758; *State* v. *Weimer*, 64 Iowa, 243.

The county commissioners are a body with special and limited jurisdiction and its record must show affirmatively necessary jurisdictional facts.

State v. *Washoe County Comrs.* 5 Nev. 317, 6 Nev. 104; *Wight* v. *Warner*, 1 Dougl. (Mich.) 384; *Brown* v. *New York*, 3 Hun, 685; *La Londe* v. *Barron County Supers.* 80 Wis. 380; *State, Swift,* v. *Ormsby County Comrs.* 6 Nev. 95.

There were not two thirds of all the votes polled at the election in favor of Hillsboro.

People, Wheaton, v. *Wiant*, 48 Ill. 263.

Those present and voting at the general election, not on any particular question then submitted, but on any question then to be voted upon, constitute the electors of the county; a majority of the votes polled at a general election is regarded by the law as a majority of the electors of the county.

Bayard v. *Klinge*, 16 Minn. 249; *Louisville & N. R. Co.* v. *Davidson County Ct.* 1 Sneed, 637, 62 Am. Dec. 452; *Taylor* v. *McFadden*, 84 Iowa, 262; *State, Mann,* v. *Anderson*, 26 Neb. 517.

Inferior jurisdictions, not proceeding according to the course of common law, are confined strictly to the authority conferred upon them.

Wight v. *Warner*, and *Brown* v. *New York, supra; Stone* v. *Miller*, 62 Barb. 430.

The county commissioners could have no authority to notify or call an election until they had found as a matter of fact that a petition was before them signed by two thirds of the qualified voters of the county.

Fox v. *San Mateo County Supers.* 49 Cal. 563; *Brown* v. *New York, supra.*

There can be no election for the removal of a county seat or any other election which a municipality may hold or not at its option, unless the county commissioners give the notice required by statute.

Platter v. *Elkhart County Comrs.* 103 Ind. 360; *People* v. *Martin*, 12 Cal. 409; *People, Westbrook,* v. *Rosborough*, 14 Cal. 181; Cooley, Const. Lim. § 603; *Fravert* v. *Finfrock*, 43

Ohio St. 335; *Ferris* v. *Bramble*, 5 Ohio St. 109; *Alcott* v. *Acheson*, 49 Iowa, 569.

The plaintiffs in this action were neither parties nor privies to the judgments which the defendants have attempted to set up as a bar to this action.

State v. *Little*, 1 N. H. 257; *Hunt* v. *Haven*, 52 N. H. 162; *Lownsdale* v. *Portland*, 1 Or. 386; *O'Brien* v. *Browning*, 49 How. Pr. 109; *Brower* v. *Browers*, 1 Abb. App. Dec. 214; *Lipscomb* v. *Postell*, 38 Miss. 476, 77 Am. Dec. 651; *Cecil* v. *Cecil*, 19 Md. 72, 81 Am. Dec. 626; Bigelow, Estoppel, 5th ed. 113-115, 142.

A judgment procured through fraud of either of the parties or by collusion of both, affecting the rights of some third parties, may be impeached by such parties, even in a collateral proceeding, by showing the fraud or collusion by which such judgment was obtained.

Lipscomb v. *Postell*, 38 Miss. 476, 77 Am. Dec. 656; *Sidensparker* v. *Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Michaels* v. *Post*, 88 U. S. 21 Wall. 426, 22 L. ed. 526; Freem. Judgm. 3d ed. § 336; 1 Black, Judgm. 5th ed. § 293; *Downs* v. *Fuller*, 2 Met. 135, 35 Am. Dec. 393; *Nason* v. *Blaisdell*, 12 Vt. 165, 36 Am. Dec. 331; *Atkinson* v. *Allen*, 12 Vt. 619, 36 Am. Dec. 361; *Hall* v. *Hamlin*, 2 Watts, 54.

Messrs. **Carmody & Leslie**, for respondents:

Mandamus is not the proper remedy, the contest must be by appeal.

State, Woodruff, v. *Dortch*, 41 La. Ann. 846; *Pinkerton* v. *Staninger*, 101 Mich. 273; *Thomas* v. *Franklin*, 42 Neb. 310; High, Extr. Legal Rem. §§ 49, 50.

A statutory method has been given for contesting county-seat and other elections.

Comp. Laws, § 1494.

Mandamus will not lie to contest an election for the relocation of a county-seat.

State, Ayres, v. *Stockwell*, 7 Kan. 98; *Scott* v. *McGuire*, 15 Neb. 303; *State, Mercer*, v. *Sullivan*, 73 Wis. 416; *State* v. *Stewart*, 26 Ohio St. 216; *People* v. *Cover*, 50 Ill. 100; *Dickey* v. *Reed*, 78 Ill. 261; High, Extr. Legal Rem. 2d ed. §§ 10, 15; Merrill, Mandamus, §§ 10, 51; *State* v. *Stewart*, *supra*; *McMillen* v. *Butler*, 15 Kan. 62; *State, Grisell*, v. *Marlow*, 15 Ohio St. 114; *State, Wolff*, v. *Sheboygan County Supers.* 29 Wis. 79; *Maxey* v. *Mack*, 30 Ark. 472; *State, Police Jury*, v. *Judge Second Jud. Dist. Ct.* 43 La. Ann. 125.

When the board of county commissioners are empowered by law with exclusive authority to receive a petition for the removal of a county seat and order an election upon the question of removal, and acting within the jurisdiction thus conferred they have received such a petition, passed upon its sufficiency, and ordered the election, no objection being interposed to their action until after such election, in which complainants participated, the removal of the county offices to the new location will not be enjoined because of insufficiency of the petition for relocation.

Ellis v. *Karl*, 7 Neb. 381; 2 High, Inj. 828; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Currie* v. *Paulson*, 43 Minn. 411; *Todd* v. *Rustad*, 43 Minn. 500; *Lawrence County Comrs.* v. *Hall*, 70 Ind. 474; *Baker* v. *Louisa County Supers.* 40 Iowa, 226; *County-Seat of Linn County*, 15 Kan. 500; *Atty. Gen.* v. *Lake County Supers.* 33 Mich. 289.

The decisions of the contesting boards are conclusive both as to the law and facts.

Batman v. *Megowan*, 1 Met. (Ky.) 533; *Newcum* v. *Kirtley*, 13 B. Mon. 515; *Sanders* v. *Metcalf*, 1 Tenn. Ch. 419; *Clay County Comrs.* v. *Markle*, 46 Ind. 96.

When a candidate does not contest the election before the state board of canvassers, he is bound by its decision, as it is a tribunal of last resort.

Pettigrew v. *Bell*, 34 S. C. 104; *People* v. *Jones*, 17 Wend. 81; 1 Herman, Estoppel & Res Judicata, 107, 423, 424, §§ 107, 366, 367; *People, Arcularius*, v. *New York*, 3 Johns. Cas. 79; *Caruthers* v. *Harnett*, 67 Tex. 127.

The statute does not point out the form of the notice nor the form of the ballot which should be used, if it did it might be only directory as to that part.

People, Hartwick, v. *Avery*, 102 Mich. 572; *State, Murphy*, v. *Bernier* (Minn.) 38 N. W. 368; *Wheat* v. *Smith*, 50 Ark. 266; *State* v. *Carroll*, 17 R. I. 591; *Seymour* v. *Tacoma*, 6 Wash. 427; *Adsit* v. *Secretary of State*, 84 Mich. 420, 11 L. R. A. 534.

The particular form and manner pointed out by the statute for giving notice is not essential; actual notice to the whole body of electors is sufficient, and the question in such cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election.

Com. v. *Smith*, 132 Mass. 289; *State* v. *Orvis*, 20 Wis. 236; *State* v. *McKinney*, 25 Wis. 416; *Dishon* v. *Smith*, 10 Iowa, 212; *State, Malloy*, v. *Skirving*, 19 Neb. 497.

In counting the votes no attention need be paid to ballots cast which contain votes on other questions but none on the county seat; a two-thirds vote of the persons voting on that question is what is meant by the statute.

State, Crocker, v. *Echols*, 41 Kan. 1; *Yesler* v. *Seattle*, 1 Wash. 308; *Walker* v. *Oswald*, 68 Md. 146.

The failure of the appellants to take an appeal leaves the certificate of election unappealed from and binding, and it cannot be questioned in a collateral proceeding or in any other manner than by such appeal.

Pinkerton v. *Staninger*, 101 Mich. 273; *State, Mercer*, v. *Sullivan*, 83 Wis. 416; *State, Police Jury*, v. *Judge Second Jud. Dist. Ct.* 43 La. Ann. 125.

The relators are not proper parties to a proceeding for mandamus.

It is not enough to be a voter and taxpayer, but one must have a special interest in the location of the county seat, independent of that which he holds with the public at large, and the public officers must apply for the writ.

Sanger v. *Kennebec County Comrs.* 25 Me. 291; *Linden* v. *Alameda County Supers.* 45 Cal. 6; *Adkins* v. *Doolen*, 23 Kan. 659; *Bobbett* v. *State, Dresher*, 10 Kan. 9; *Moon* v. *Cort*, 43 Iowa, 503; *Heffner* v. *Com., Kline*, 28 Pa. 108; *State, Oliver*, v. *Grubb*, 85 Ind. 213; *State, Bamford*, v. *Hollinshead*, 47 N. J. L. 439; *Lyon* v. *Rice*, 41 Conn. 245; *Atwood* v. *Partree*, 56 Conn. 80; *Peck* v. *Booth*, 42 Conn.

271; *Smith* v. *Saginaw*, 81 Mich. 123; *People*, *Russell*, v. *Inspectors of State Prison*, 4 Mich. 187; *Mitchell* v. *Boardman*, 79 Me. 469; *Weeks* v. *Smith*, 81 Me. 538; *Territory*, *Graves*, v. *Cole*, 3 Dak. 301.

Corliss, J., delivered the opinion of the court:

The appeal is from a final order in special proceedings. The order denied the relator's application for a peremptory writ of mandamus. The ostensible object of the proceeding was to compel the defendants, who held various offices in Traill county in this state, to remove their several offices from Hillsboro to Caledonia which was at one time the county seat of that county and which is still the county seat thereof unless such county seat has been lawfully relocated at Hillsboro. It is therefore evident that the real purpose of the relators, who are taxpayers in and residents of Traill county, is to settle the question whether there has been a legal change of the county seat of that county from Caledonia to Hillsboro. It is first urged by respondents that mandamus is not the proper remedy. On that point we are clear that the law is settled against their contention. *County Seat of Linn County*, 15 Kan. 500; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Ellis* v. *Karl*, 7 Neb. 381; *State*, *Ayres*, v. *Stockwell*, 7 Kan. 98; *Todd* v. *Rustad*, 43 Minn. 500; *Calaveras County* v. *Brockway*, 30 Cal. 325; *State*, *Bradford*, v. *Hamilton County Comrs.* 35 Kan. 640; *State*, *Currie*, v. *Weld*, 39 Minn. 426; *State* v. *Saxton*, 11 Wis. 27; *State* v. *Avery*, 14 Wis. 122; *State*, *Sears*, v. *Burton*, 47 Kan. 44; High, Extr. Legal Rem. § 79; Merrill, Mandamus, § 125; 2 High, Inj. § 1257. But it is urged that mandamus will not lie because there is another adequate and speedy remedy. We are referred to §§ 1494, 1495, 1496, 1497, and 1498, Comp. Laws, which provide that the validity of a county election may be contested in the courts by pursuing the proceedings specified in these sections. We agree with counsel that this remedy is both adequate and speedy. But the same act which created this new remedy in terms perpetuated the existing remedy of mandamus in such cases. Section 11 of this act (Laws 1885, chap. 54), being § 1499, Comp. Laws, provides that "this act shall not be construed to affect any of the remedies or rights of action or proceedings provided for in the Code of Civil Procedure." Mandamus is one of such remedies. As it could be employed before the act of 1885 was passed, to try the validity of a county-seat election, it can still be resorted to for such purpose for this is the explicit declaration of § 1499. That any taxpayer and resident could apply for the writ in the name of the state is not open to question in this state. *State*, *Dakota Hail Asso.* v. *Carey*, 2 N. D. 36. It is claimed that Hillsboro did not receive the necessary statutory vote to make it the county seat. Section 565, Comp. Laws, under which defendants seek to sustain the validity of the election, provides that if upon canvassing the vote so given it shall appear that any one place "has two thirds of the votes polled" such place shall be the county seat. It is undisputed that Hillsboro did in fact receive two thirds of all the votes polled on the specific question as to the relocation of the county seat; and it is also uncontroverted that it did not receive two thirds of all the votes cast at the same election, the question being voted on at the general election at which of course state and county officers were voted for. The highest number of votes cast for any one officer at this election was 1960. Hillsboro received 1291 votes, or less than two thirds of 1960. In our opinion the vote for Hillsboro was sufficient. The plain meaning of the statute is, that the place having two thirds of the votes polled on the particular question of relocation shall be the county seat. There is nothing in the statute indicating that to work a change of the county seat any one place must receive the votes of two thirds of all the voters of the county. Ample authority supports our decision. *Armour Bros. Bkg. Co.* v. *Finney County Comrs.* 41 Fed. Rep. 321; *Marion County Comrs.* v. *Winkley*, 29 Kan. 36; *Gillespie* v. *Palmer*, 20 Wis. 562; *Sanford* v. *Prentice*, 28 Wis. 358; *State*, *Crocker*, v. *Echols*, 41 Kan. 1. The case of *State*, *Mann*, v. *Anderson*, 26 Neb. 517, supports the contention of appellant's counsel. Many authorities are cited by him to sustain his contention that, to work a relocation of the county seat under § 565 to Hillsboro, that place must have received two thirds of all the votes cast at the election. But an examination of these cases will disclose the fact that the language of the constitutional and statutory provisions there construed was radically different from that of our statute. In those cases there was no room for construction. There was a plain statement in the law that to carry the measure before the people or to relocate the county seat a majority of the electors or voters of the county or city or town must vote in favor of it. *State* v. *Winkelmeier*, 35 Mo. 103; *People* v. *Wiant*, 48 Ill. 263; *People* v. *Brown*, 11 Ill. 479; *State*, *Stevenson*, v. *Babcock*, 17 Neb. 188; *Enyart* v. *Hanover Twp. Trustees*, 25 Ohio St. 618; *Everett* v. *Smith*, 22 Minn. 53; *Taylor* v. *Taylor*, 10 Minn. 107; *Bayard* v. *Klinge*, 16 Minn. 249. When a majority of the electors is spoken of the highest number of votes cast at the election must furnish the standard for determining whether the particular measure which must have such a majority has been carried. When 1,000 votes are cast at an election, and the particular measure which must receive the votes of a majority of the electors has in its favor only 400 votes, it is obvious that it has not received the vote of the majority of such electors, although there be no votes whatever against it. But our statute contains no such language. It carefully excludes the idea that two thirds of the electors must vote for a place to make it the county seat. When speaking of the number of signatures to the petition required it in terms declares that such petition shall be signed by two thirds of the qualified voters of the county. But when it specifies the vote necessary to relocate the county seat at another place it studiously avoids the use of this explicit language which is very appropriate to express the idea that appellants' counsel contends, is to be found in the statute. To our minds this fact is very significant. It discloses a purpose to avoid making it necessary that there should be a two-thirds vote of the electors of the county in favor of one place

to change the county seat to such place. The language which is employed makes it apparent that the two-thirds vote required is a two-thirds vote on the particular question of the relocation of the county seat. The statute declares that in the notice for the next general election the voters are to be notified to designate upon their ballots the place of their choice. Then the statute continues: "And if upon canvassing the votes so given it shall appear that any one place has two thirds of the votes polled such place shall be the county seat." The "votes so given" are the votes upon this particular question. If upon the canvass of such votes without any reference to any other vote at the same general election it appears that any one place has two thirds of the vote polled it shall be the county seat. The "vote polled" is the vote polled upon that question. That is the only matter the statute is dealing with. It is utterly unjustifiable to assume that by these words the legislature meant the highest vote polled at the same election no matter for what office or measure. The statute does not say "the highest vote polled at the same election for any office or measure," and we have no right to interpolate these words into the statute by construction. The general policy of the American people is to test the sufficiency of any vote by the vote on the particular question, and not by the vote on some other question. Unless the language is free from doubt we have no right to spell out of the statute by a far-fetched inference a purpose to depart from this general policy. It is to be observed that whenever the lawmaking power of a state has desired to make the highest vote at the same election the standard it has said so in unambiguous terms, as by requiring that there shall be a majority or two-thirds or three-fifths vote as the case may be of all the voters or electors of a city, town, or county, or by using equally explicit language.

It is next insisted that the election was void for the reason that the notice of election was not strictly in conformity with the statute. The statute declares that if the board orders an election it shall be its duty to notify the voters in the general election notices to designate upon their ballots at the election the place of their choice. Comp. Laws, § 565. The portion of the notice actually given reads as follows: "also to vote upon the question of relocating the county seat of Traill county." This notice was a substantial compliance with the statute. It distinctly informed the voters that that question was to be voted upon and a reference to the law would disclose the fact that each voter might, and must to make his ballot count, designate on it the place he desired to vote for as county seat. This was done by all who voted on the question, and it appears that while the highest number of votes cast for any one office was 1960 there were 1882 votes cast for different places for county seat. It does not admit of doubt that the voters of Traill county were fully apprised by the notice actually given of the question to be voted upon and how they should vote upon it. We recognize the greater importance of a strict compliance with the provisions of law as to notice where a special matter is to be voted upon at a general election, or some officer is to be voted for to fill a vacancy when but for such vacancy there would have been no vote for a candidate for such office at the general election, or when a special election is held as to the time and place of holding which the laws of the state furnish no notice,—than where there is an election of officers at a general election whose terms of office expire under the law so that the public have notice of such election from the statutes of the state without further notice. See *Adsit* v. *Secretary of State*, 84 Mich. 420, 11 L. R. A. 534. The rule is that if no notice of a special election or that a special matter will be voted for at a general election is given, and there is an inference from the vote cast that the failure to give the required notice has so operated to the prejudice of the voters that it cannot be said that there has been a fair election held with respect to the special matter, then the election to that extent is void. But, as we observed before, it is conclusively shown by the vote on the question of relocating the county seat in the light of the vote cast at the same time for county and state officers, that no possible injury to the voters resulted from the failure strictly to comply with the requirements of the law. As sustaining our ruling that the defect in the notice did not affect the validity of the election, see: *Wheat* v. *Smith*, 50 Ark. 266; *State* v. *Carroll*, 17 R. I. 591; *Seymour* v. *Tacoma*, 6 Wash. 427; *Ellis* v. *Karl*, 7 Neb. 381; *State, Malloy*, v. *Skirving*, 19 Neb. 497; *Dishon* v. *Smith*, 10 Iowa, 212; *Adsit* v. *Secretary of State*, 84 Mich. 420, 11 L. R. A. 534; *State, Berge*, v. *Lansing*, 46 Neb. 514.

We also think that there was such a substantial compliance with the statute as to the notice to be given that we would hold the election valid although it appeared that there was a much lighter vote on the question of relocating the county seat than for candidates for office voted for at the same election. The only other attack on the election proceedings made by the appellants relates to the number of signatures to the petition presented to the board of county commissioners requesting that the question of relocating the county seat be submitted to the voters of the county. The statute in terms requires that the petition be signed by two thirds of the qualified voters of the county. The petition presented to the board had upon it 864 names. There is no finding of the court that these did not constitute two thirds of the voters of the county; nor, on the other hand, is there any finding that they did. There is a finding that the board found "that said petition was signed by the necessary number of voters and electors of said Traill county." The records of the proceedings of the board do not disclose the fact that such a finding was made in terms by the board; but it is obvious that the board must be held to have reached such a conclusion from the mere fact that they ordered the election. See *Lawrence County Comrs.* v. *Hall*, 70 Ind. 469. We do not think that after an election has been held and a sufficient vote has been cast in favor of a place to work a change of the county seat to such place, the question whether the petition had upon it the requisite number of names is open to judicial investigation. While a sufficient petition is undoubtedly necessary yet the question lies deeper than that. What body is to settle this matter finally? This is the

pregnant inquiry. When we consider the nature of the question to be passed upon, the peculiar facilities that county commissioners living in close contact with the people have for reaching a correct result, the enormous expense involved in a trial of that question in court, we are impelled to the conclusion that the decision of the board is final at least after an election is had which demonstrates that the requisite number of voters were in favor of a change. In the case before us it appears that the voters of Traill county were almost unanimous in their desire for a change, Caledonia receiving only 218 votes out of 1882 votes cast on that issue. The board is to receive the petition, to pass upon its sufficiency; and is to order the election if satisfied that it is sufficient. Here is a clear submission of this question of fact to the board for adjudication. The statute contemplates that the board is to settle it one way or the other. No other body is given jurisdiction over the matter. It is left to the judgment of the board to the end that the taxpayers shall not be burdened with the expense of an election unless there is a strong sentiment in favor of a change; and also to the end that when there is a sufficiently widespread desire for a relocation to justify the expectation that the vote on the subject will accomplish something and not prove futile, the citizens of the county may enjoy the right to vote on this issue. We think such a question may be safely left to the final decision of the county commissioners of a county. They are elected for a short term. They stand close to the people and under such circumstances an abuse of the power is not to be expected. If the power is abused the attempt of the board will prove abortive if the voters do not desire a change. The only consequences of their wrongful action will be the expense of the election so far as it relates to the special matter, which will be trifling in view of the fact that the question is to be voted on at the general election, and in addition the increased excitement of the election owing to the additional issue before the voters for settlement. These consequences are trival as compared with the evils flowing from the doctrine that the question whether two thirds of the voters signed the petition is open to investigation after two thirds of the voters have declared in favor of a change of the county seat to another place and so open to investigation for all time. It is to be kept in mind that if this matter can be inquired into in the courts, the issue of fact is not settled by a reference to the poll list, as the question is not with respect to the number of voters at the time of any election but at the time the petition is presented. Where two thirds of the electors must vote for a measure it is obvious that the votes cast at the election will be controlling as to the number of electors. But the number of votes cast at any election is not and cannot be absolutely controlling as to the number of votes at another time. This may be prima facie evidence as to the number of qualified voters at a given time, but the investigation may and will probe deeper. It will always relate first to the question of the exact number of qualified voters in the county, and this involves inquiries into the original citizenship, residence, naturalization, and age of each and every voter in the county, and second, to the same inquiry with respect to the persons whose names are upon the petition and the additional fact whether the signatures are genuine. An exhaustive trial of these complicated facts in court would, in a single instance, involve the expenditure of thousands of dollars, and would occupy the attention of the courts for months. The expense would be enormous as compared with the slight additional expense to the county from ordering an election on the question of relocating the county seat, and it would have to be borne by the innocent public officers who in changing their place of holding their public offices would be acting in obedience to the will of the people as expressed at an election on the subject apparently regular and legal in all respects. Is it possible that years after an election is had at which the people have spoken as decisively in favor of a change as in the case at bar, the whole subject is open to review in the courts, and that the question where the legal county seat is located may after such a lapse of time be made to turn on the issue of fact whether a certain person was twenty-one years of age at the time the petition was signed; or whether at that time he had resided long enough in a certain precinct, or in the county, or in the state, to make him a legal voter; or whether at that time he was a citizen. If so then the county seat of a county may be adjudged to be in another place than that at which the people by a decisive vote have located it, years after such location, by proving that a single person was only twenty years and 300 days old when the petition was presented to the board, or that he had lived in the county only five months and twenty-five days, or in the state eleven months and twenty-five days, at the time of the presentation of the petition to the county commissioners for action thereon. It is evident, too, that after the lapse of even a short period of time it will often become impossible to show that the petition was signed by a sufficient number of voters although such was the fact. Suppose the petition in the case before us had been just sufficient on the theory that every signature was that of a voter, and suppose that on being apprised of the fact there was doubt as to the age of one of the signers of the petition, the board had investigated the fact and had become satisfied that he was twenty-one years of age, how intolerable would be the doctrine that notwithstanding such investigation and decision by the board such question of fact could be re-examined at any time with the result of overthrowing years afterward the clearly expressed will of the voters. We must assume in cases of this kind, as in all other cases, that the board has done its duty and has made a proper investigation. In our judgment their conclusion as to the fact whether the petition has a sufficient number of names of voters upon it is final after the election has taken place. Able courts have taken the same view of the law. *Currie* v. *Paulson*, 43 Minn. 411; *Ellis* v. *Karl*, 7 Neb. 381; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Baker* v. *Louisa County Supers.* 40 Iowa, 226; 2 High, Inj. §§ 1257 and 1258. In *Currie* v. *Paulson*, Judge Mitchell, speaking for the court, places the doctrine we enunciated in this case upon a solid foundation. The question before the court in that case was whether

there was a sufficient number of signatures of voters upon the petition. The court held that in a contest of the validity of a county-seat election under the statute, this question was not open to investigation. In his opinion Judge Mitchell says: "In the very nature of things, the determination of the board on this matter must be final and conclusive. It was certainly not contemplated, and contestants do not claim, that the court upon contest could proceed on new evidence to try *de novo* the question as to the genuineness of signatures, or the qualification of the signers; for if so the election might be held void although the county commissioners decided rightly upon the evidence before them. If the court is to review the determination of the commissioners at all, it must be by attempting to put itself in their place, and consider how they ought to have decided upon the evidence which they had before them. But the law makes no provision for preserving this evidence, or making up any record of it. If, as will often be the case, the evidence is oral, there is no possible way of ascertaining what the evidence before the board was. This difficulty is illustrated by the present case, in which the trial judge assumes to find what certain witnesses sworn to before the board. There are manifest reasons why the determination of the board of commissioners as to these facts should be final. It is the vote of the electors at the election and not the signatures to the petition, which determines the location of the county seat. The main, if not sole, purpose of requiring the petition in favor of the change before ordering an election is to save the public from the expense, loss of time, and the excitement incident to such an election, unless there is a reasonable probability that the required majority of electors will vote for the change. To go back to the action of the county board, and reverse their determination as to these facts, after the election is past, and the change carried by the popular vote, would certainly subserve no good purpose."

In *Edmonds* v. *Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, the validity of this same county-seat election was involved. But this question arose on demurrer. The plaintiffs in that case alleged, and the allegation was admitted by defendants' demurrer, that Hillsboro did not receive two thirds of the votes cast for county seat, but did receive a sufficient vote to make it the county seat under chapter 56 of the Laws of 1890. The only question discussed in that case was whether that statute was valid. The trial court held it was and sustained the demurrer. We came to the contrary conclusion and reversed the judgment of the district court. But it appears that the defendants admitted the fact that Hillsboro had not received two thirds of the votes cast merely for the purpose of settling the constitutionality of the act of 1890. After the case had gone back to the district court an answer was interposed and this fact was put in issue by such answer. A question of fact is not settled by a tentative admission of it for a special purpose. It is only when judgment is entered upon the basis of such a fact that it is no longer open to controversy. Had there been judgment entered in that case by the district court in favor of the plaintiffs on the demurrer the matter would be *res judicata*. No such judgment was rendered. On the contrary a judgment in favor of the defendants was subsequently entered and this judgment appears from the record in this case to have been founded on the finding by the court that Hillsboro had in fact received the necessary two-thirds vote. But even if it had not been founded upon such fact, but on a wrong theory of the law, it would be conclusive between the parties to such action on the issue whether Hillsboro was the legal county seat until reversed or set aside. It is possible we might legally rest our decision in this case on the conclusive force of the judgment in the case referred to, as there is much force in the contention that there is privity between the parties to that action and the parties to this proceeding, particularly in view of the fact that only public interests were then litigated and the same public interest is herein involved. But we prefer to meet the issues in the case before us on the merits to the end that citizens of the county may not feel that their interests have been trifled with by other citizens who instituted and controlled the former suit. Certain it is that there was no final judgment in that case in favor of those who instituted and prosecuted it, and without such final judgment in their favor there could be no conclusive settlement in their favor of the issue of fact raised by the answer interposed after the case had gone back to the district court whether Hillsboro had received the necessary two thirds vote. What we said in that case on the question of the number of signatures to the petition was not said with any view of settling the law whether the sufficiency of the petition could be inquired into in proceedings to test the validity of the election. No such question was before us for discussion. It was assumed by everyone in the case, for the purpose of settling on the appeal whether the act of 1890 was constitutional, that the change in the county seat could not be sustained under § 565, Comp. Laws. We cannot say from the record before us that the board of county commissioners ordered the election solely under the law of 1890 or under it at all. This fact is not set forth in the alternative writ, and there is no evidence in the case justifying such an inference. The petition presented did not ask that the election be ordered under that statute or refer to it at all. The board in no manner alluded to it in ordering the election, nor is there anything in the proceedings of such board, so far as they are in evidence in this case, tending to show that the board was proceeding exclusively under the act of 1890, or indeed under it at all. When the board canvassed the vote and issued the certificate it spread upon its records nothing to indicate that it made such canvass and issued such certificate on the theory that all of the election proceedings had been carried on under the statute of 1890. There is no testimony whatever in the case that either the petitioners for the election, or the board of county commissioners, did not proceed under § 565 of the Compiled Laws. Had it appeared in this case by competent evidence that the board was acting under the act of 1890 there would be no inference from the fact of ordering an election that the board had found that the petition was sufficient under § 565,

the act of 1890 requiring the petition to be signed by only one third of the voters of the county instead of by two thirds of such voters as required by § 565. In the absence of evidence to that effect we have no right to assume that the board proceeded under an unconstitutional statute when there was a valid law under which they could have proceeded.

Finding no error in the case, and being clearly of the opinion that the district court was right in its decision that the county seat had been lawfully relocated at Hillsboro, *the order denying the application for a peremptory writ of mandamus is affirmed.*

All concur.

C. A. CHRISTENSEN *et al., Appts.,*
v.
FARMERS' WAREHOUSE ASSOCIATION, *Respt.*

(.....N. D.....)

*1. **This court has original jurisdiction only** in the excepted cases mentioned in the Constitution. But chap. 82, Sess. Laws 1893, which provides that all cases tried below by the court shall on appeal be tried anew in this court, and final judgment entered thereon, does not require this court to perform any functions that do not pertain to appellate jurisdiction, and said chapter is not therefore a violation of the constitutional provisions conferring appellate jurisdiction only upon this court.

2. **One who purchases a promissory note before maturity** and for full consideration, and to whom the note is at the time indorsed by the payee and holder, takes such note in the ordinary course of business; and the fact that the purchaser took such note relying wholly upon the sufficiency of the mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, will in no legal sense affect his bona fides.

(April 30, 1896.)

APPEAL by plaintiffs from a judgment of the District Court for Richland County in favor of defendant in an action brought to foreclose a chattel mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. **McCumber & Bogart,** for appellants:

If the transfer is made before the maturity of the paper, for valuable consideration, to a purchaser having no notice of defenses that existed between the original parties or have subsequently arisen, such holder is called a bona fide holder for value.

1 Randolph, Com. Paper, § 14; Benjamin's Chalmers, Dig. art. 85; 1 Parsons, Cont. 254; 1 Dan. Neg. Inst. 718; 1 Edwards, Bills & Notes, § 516.

In *Wing* v. *Glick*, 56 Iowa, 473, 41 Am. Rep. 118, the court says: "We are not allowed to so construe a contract as to deprive it of all force if it is susceptible of any other reasonable construction."

Dewey, Cont. 45; *Story* v. *Salomon*, 71 N. Y. 420; *Pixley* v. *Boyington*, 79 Ill. 351; *Grizewood* v. *Blane*, 11 C. B. 526; *Wall* v. *Schneider* (Wis.) 17 Rep. 709; *Hunt* v. *Utica*, 18 N. Y. 443; *Gregory* v. *Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *First Nat. Bank* v. *Oskaloosa Pkg. Co.* 66 Iowa, 41.

The only option on the part of the seller was the option as to the time in the month in which the delivery is to be made. Such an option is not contrary to law.

Whitesides v. *Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Logan* v. *Musick*, 81 Ill. 415.

The buying of grain for future delivery and for future sale of the same grain is just as legitimate and proper as buying grain for present delivery with the intention to sell it in the future for a higher price.

Stanton v. *Small*, 3 Sandf. 230; *Kent* v. *Miltenberger*, 13 Mo. App. 503; Dewey, Cont. 209; *Mohr* v. *Miesen*, 47 Minn. 228; *Sawyer* v. *Taggart*, 14 Bush, 727.

Nor is it material that in order to protect the commission merchants the purchaser is required to put up margins.

Markham v. *Jandon*, 41 N. Y. 235; *Hatch* v. *Douglas*, 48 Conn. 116, 40 Am. Rep. 154; Dewey, Cont. 107, 108, and cases cited; *Wall* v. *Schneider*, *supra.*

Although the wheat buyer in this case may have sold in a very short time grain purchased to hedge against shipments of stored wheat, this would not tend to discredit his testimony of purchasing for that purpose.

Douglas v. *Smith*, 74 Iowa, 468.

The clearing house system of settlement between the parties is valid and does not tend to show any unlawful intent any more than the bankers' clearing house system of New York.

Dewey, Cont. 159–166.

Messrs. **Purcell, Wolfe, & Everdell** for respondent.

Bartholomew, J., delivered the opinion of the court:

The appellants, C. A. Christensen and J. E. Stair, commenced proceedings to foreclose, by advertisement, a chattel mortgage given by respondent, the Farmers' Warehouse Association, to the Mann-Frazer Company, a corporation doing business at Minneapolis, Minn., which said mortgage covered two certain frame elevators situated in Richland county, in this state, and was given to secure a promissory note for the sum of $2,850, executed by respondent to said Mann-Frazer Company. Said note and mortgage were dated July 3, 1893, and the note matured October 2, 1893. The foreclosure proceedings were commenced soon after the maturity of the note. The respondent presented to the judge of the district court for said county an affidavit of defense, under the law which is now embodied in § 5884, Rev. Code, whereupon said judge enjoined further proceedings by advertisement, and ordered that all further proceedings for foreclosure be had in the district court, whereupon the matter was transferred to said court, and tried under the provisions of chap. 82, Laws 1893; and a judgment dismissing the action and for costs having been returned against plaintiffs, they

*Headnotes by BARTHOLOMEW, J.

NOTE.—A statute attempting to require the supreme court of the state to review the facts is held unconstitutional in Klein v. Valerius (Wis.) 22 L. R. A. 609, but is distinguished in the present case.

appeal to this court, under the provisions of the statute last named. The portion of that statute material to the decision of this case reads as follows: "In all actions tried by the district court without a jury, wherein issue of fact has been joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence or any part thereof to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof by deposition: provided, that whenever such evidence is taken down in shorthand and written out at length, it shall be deemed to have been taken down in writing, and all testimony so taken in shorthand must, at the request of either party, be so written out at length and filed with the clerk. All evidence taken as provided by this section shall be certified by the judge at any time after the trial, and within one month before the time allowed for the appeal of said cause shall have expired, and shall thereupon become a part of the judgment roll, and the original of such judgment roll shall go on appeal to the supreme court, which shall try the cause anew upon such judgment roll, and render final judgment therein, according to the justice of the case." Under the above provisions, appellants procured the evidence to be properly certified and filed as a part of the judgment roll, and bring up on this appeal the original judgment roll only, no bill of exceptions or a statement of the case having been settled or allowed. Respondent in this court makes a preliminary motion to strike from the files all the record so transmitted to this court, except the notice of appeal, the summons and pleadings, the findings and conclusions of law made by the trial court, and the judgment thereon. In other words, respondent seeks to eliminate from the record everything except what would have appeared in the judgment roll had said chapter 82 never been enacted. The basis of the motion is the alleged unconstitutionality of said chapter 82 in that it attempts to confer upon this court a jurisdiction not contemplated or permitted by the Constitution, and that, being unconstitutional and void, the evidence could only be brought to this court by bill of exceptions or statement of the case under the practice and provisions governing other cases.

The question of the constitutionality of said chapter 82, Laws 1893, has received much informal discussion in legal circles throughout the state since its passage, but this is the first instance where the question has been directly raised in this court, although we have decided several cases that were brought to this court under the provisions of that act. See *Taylor* v. *Taylor*, 5 N. D. 58; *Nollman* v. *Evenson*, 5 N. D. —. The question is one involved in much difficulty, and upon which the members of this court have not at all times been in entire accord. Broadly stated, the objection urged against this law is that it attempts to confer original jurisdiction upon this court, while under the Constitution, our jurisdiction is appellate only, except in certain specified cases. The constitutional provisions are as follows: Section 86: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." Section 87: "It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same: provided, however, that no jury trial shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial." Section 103 of the Constitution, defining the jurisdiction of the district courts, reads: "The district court shall have original jurisdiction, except as otherwise provided in this Constitution, of all causes both at law and equity, and such appellate jurisdiction as may be conferred by law. They and the judges thereof shall also have jurisdiction and power to issue writs of habeas corpus, quo warranto, certiorari, injunction, and other and remedial writs with authority to hear and determine the same." It is apparent from these constitutional provisions that the decision of the question here raised must hinge largely upon the meaning that must be attached to the words "appellate jurisdiction," and "original jurisdiction" as used in that instrument, because it cannot be admitted for a moment, under the wording of our Constitution, that the legislature has power to impose upon us the exercise of any original jurisdiction whatever not specially authorized by the Constitution.

It may aid us to first accurately determine just what this court is required to do under the statute that has been attacked. The statute says that this court "shall try the case anew." This language, it is apparent, was not used with exact accuracy. The case is not tried anew. There is no new evidence or any evidence adduced in this court. The case must be decided upon a record already prepared by a judicial tribunal. This court simply reviews the record, and the practical and necessary result of such review is to correct the errors, if any, either of the law or fact, into which the court below may have fallen. It is difficult to perceive any marked distinction between the jurisdiction exercised by this court in a proceeding of this character and the jurisdiction exercised prior to the enactment of said chapter 82. Sec. 5237, Comp. Laws 1887, in providing what should be done by the supreme court on appeal, contained this provision: "Any question of fact or law decided upon trials by the court or by referee may be reviewed when exceptions to the findings of fact have been duly taken by either party and returned." This provision has been repeatedly acted upon since statehood, and we never heard its constitutionality questioned. In *Jasper* v. *Hazen*, 4 N. D. 1, 23 L. R. A. 58, this court took occasion to state at length what duty was devolved upon the supreme court by this provision. We then stated that this court would review questions of fact in proper cases, and would set aside findings of fact, when under the restrictions there stated, this court could see that such findings were not supported by a preponderance of the evidence. Under that provision, the judgment of

this court upon the facts was required to the same extent that it is required under the law here under discussion. The judgment of the trial court upon the facts must still have weight and influence with this court, especially when based upon the testimony of witnesses who appeared in person before that court. It may be that the strong presumption of correctness under which findings of fact came to this court under the former practice does not follow them with equal force under this statute, and it may be that to some extent the appellant is relieved from the burden of pointing out the specific error of the trial court. This would seem to follow from the fact that the particular errors of the trial court, if any there be, need not be discussed by this court, or pointed out to the court below, as was imperatively necessary in all cases where a reversal sent the case back for trial *de novo*. Nevertheless, the independent judgment of this court upon the record presented, irrespective of what the trial court may or may not have held, is based only upon a review of the record made in the trial court; and when the judgment of the trial court was based upon error in law or fact, the judgment of this court necessarily reviews and corrects such error. But the manner in which this result is accomplished is radically different under the two systems of practice. The statute under discussion requires us to render final judgment, and thus, by its mandate, forever terminate the particular litigation. This is such an innovation upon a practice that is familiar to and well settled in the professional mind that it is received with distrust. But to the legislative mind it doubtless suggested a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money. It avoids the delay and expense of a second trial and the risk of further errors that might necessitate a second appeal. If these legislative objects can really be accomplished, the value and propriety of the statute cannot be doubted.

Is there anything, then, in the added duties devolved upon the supreme court, that is beyond the scope of appellate jurisdiction, and that inherently pertains to original jurisdiction only? An appeal is a process of civil-law origin. In England it was in a great measure confined to equity, ecclesiastical, and admiralty jurisdictions, where trial by jury was unknown. As originally used, it removed the entire cause to the superior court, subjecting both law and fact to a retrial. For a review of errors of law in law courts the writ of error was universally used. See *United States* v. *Wonson*, 1 Gall. 13, Fed. Cas. No. 16,750; *Wiscart* v. *Dauchy*, 3 U. S. 3 Dall. 327, 1 L. ed. 622; *United States* v. *Goodwin*, 11 U. S. 7 Cranch, 110, 3 L. ed. 285. Appellate jurisdiction is defined in 1 Am. & Eng. Enc. Law, p. 629, as "pertaining to or having cognizance of appeals and other proceedings for the judicial review of adjudications." In a code state it is thus defined: "Jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court or by a tribunal having the attributes of a court." *Auditor of State* v. *Atchison, T. & S. F. R. Co.* 6 Kan. 505, 7 Am. Rep. 575. And again: "Appellate jurisdiction is, not only a continuation of the exercise of the same judicial power which has been executed in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power." *Piqua Bank* v. *Knoup*, 6 Ohio St. 391. And, for full discussion of this jurisdiction, see Elliott, App. Proc. §§ 16 *et seq.* We find no definition of appellate jurisdiction so limited that it will not permit the appellate court to review the facts as well as the law if the legislature so requires. As we have seen, the supreme court of the territory of Dakota, at the time of and prior to the adoption of our Constitution, was expressly required to review facts in certain cases, under § 5237, Comp. Laws. We have no warrant for saying that the constitutional convention intended to curtail that jurisdiction. Nor have we any warrant for saying that such convention used the words "appellate jurisdiction," in § 86, of the Constitution, in any other or different sense from that given to the same words in § 103, defining the jurisdiction of the district courts. And when, in the latter section, it is declared that the district courts shall have "such appellate jurisdiction as may be conferred by law," it is not meant that the legislature may define appellate jurisdiction, and make it mean one thing in one case, and a different thing in another case. It is only meant that it shall have appellate jurisdiction in such cases as the law may declare. It is undisputed that the appellate jurisdiction in such courts may be exercised by a strict trial *de novo*, upon new pleadings and entirely new evidence. But it is entirely competent—and it is almost universally done—for the legislature to declare that in certain cases, involving only small amounts, the appellate jurisdiction of those courts shall be exercised only in the correction of errors, and such provisions do not affect the question of appellate jurisdiction but of appellate procedure. In Story on the Constitution (§ 1761), that learned author, in discussing the appellate jurisdiction of the Federal Supreme Court, says: "In the first place, it may not be without use to ascertain what is here meant by appellate jurisdiction, and what is the mode in which it may be exercised. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which the legislature may choose to prescribe; but still, the substance must exist before the form can be applied to it." We know of no clearer statement of the points under discussion than is contained in Judge Story's language. Appellate jurisdiction cannot create a cause. It must be first created and adjudicated by another judicial tribunal. Those facts existing, the appellate court may exercise its jurisdiction in any form the legislature may prescribe. The legislature may require the appellate court to review the facts, and render

final judgment. If in so doing, it exercise some of the same functions as a court of original jurisdiction, we answer that there is neither constitutional nor legal reason why it should not. Judge Elliot clearly shows that the power to render and enforce judgments is and must be inherent in every appellate court. The Constitution of the state of Iowa (§ 4, art. 5) reads: "The supreme court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law under such restrictions as the general assembly may, by law, prescribe." Ever since *Preston* v. *Daniels*, 2 G. Greene, 536, the supreme court of that state has uniformly held that it had no original jurisdiction; but it has also uniformly held that the Constitution gave an absolute right to a trial *de novo* in that court in chancery cases,—a right which the legislature could not take away. *Sherwood* v. *Sherwood*, 44 Iowa, 192. We are clear that, on the authorities already cited, and on sound reason and legal principles, chapter 82 of the Laws of 1893 does not confer, or attempt to confer, upon this court, any original jurisdiction; and respondent's motion must be denied.

It is claimed that this question was differently ruled in *Klein* v. *Valerius*, 87 Wis. 54, 22 L. R. A. 609. We think the cases clearly distinguishable. The Wisconsin statute there held to be unconstitutional made it the "duty" of the supreme court to review "all questions of law or fact presented upon the record upon such appeal or writ of error." The learned supreme court of Wisconsin condemned the law, and a main reason therefor was that it deprived a party of the constitutional right to the verdict of a jury upon the facts of a law case, and, in effect, abolished the writ of error as it was known at the time of the adoption of the Constitution, and which that instrument declared should never be abolished. If there be any language in that opinion that indicates that the views of that court do not correspond with what we have said in this case, we can only say that our great respect for that court causes us to regret that our views are different. And, perhaps,—although we are not clear that such is the case,—our views differ from those expressed by the supreme court of Florida in *State, Pleasure*, v. *McClellan*, 25 Fla. 88.

On the merits of the case, the first inquiry that presents itself is this: Are the appellants indorsees in good faith of the note and mortgage which are the subject-matter of the action? We have scrutinized the evidence carefully. Its volume forbids even a synopsis of it. Respondent certainly claims for it all that it tends to fairly support. We quote from the brief of the learned counsel: "The evidence shows that the plaintiffs in this action are grain dealers in Minneapolis, Minnesota, members of the Chamber of Commerce of that city, having offices next door to and adjoining the offices of the payee named in the note. The business relations between the two firms have been intimate for years. They have both been engaged in wheat operations on the floor of the Chamber of Commerce for years. Plaintiffs knew that the mortgage in this case covered all of the elevator property owned by the defendants. They knew enough about the transaction out of which the note and mortgage grew to have an abiding faith at the time of the purchase of the note that it would not be paid. Their object in buying the note and mortgage was not, in the usual course of business, to make an investment in commercial paper, but indirectly to buy the property covered by the mortgage. This note drew only 8 per cent interest; yet the plaintiffs paid $12 more than the amount of the note, with interest to the date of purchase. No inquiries were made relative to the financial standing of the makers of the note; one of the plaintiffs testifying that he did not know, and that he did not care. The express object of the plaintiffs in buying this note and mortgage was to obtain the property mortgaged." Do these facts show that appellants are not protected under the law merchant? The whole basis of respondent's contention rests upon his statement that the notes were not acquired in good faith and in the usual course of business. It is conceded by counsel that suspicious circumstances sufficient to put a prudent man upon inquiry are not in themselves sufficient to overcome the presumption of bona fides in the purchase of commercial paper. Our statute (Rev. Code, § 4884) thus defines an innocent indorsee: "An indorsee in due course is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer, or one other than the payee, who acquires such an instrument of such an indorsee thereof." What is meant by the "ordinary course of business?" In *Kellogg* v. *Curtis*, 69 Me. 212, 31 Am. Rep. 273, the court says: "These words are usually defined to mean 'according to the usages and customs of commercial transactions.'" If the plaintiffs purchased the note before maturity for value, that would be such a transaction. Randolph on Commercial Paper (§ 988) illustrates the meaning of the words by stating what would not be "in the usual course of business"; and from his illustrations it is clear that a note purchased before maturity, for a valuable consideration, and duly indorsed by the payee, and delivered to the purchaser, is taken in the usual course of business. We need not multiply these definitions. Their correctness will not be questioned. What facts are relied upon to take this case out of the rule? It is admitted that the note was purchased before maturity, that full value was paid therefor. Indeed, respondent makes it a matter of complaint that appellants paid slightly more than the amount of the note at the time of the purchase. It is admitted that it was duly indorsed by the payee, and delivered to the purchaser, at the time of the purchase. But it is urged that as both the payee and indorsers of the note were members of the Minneapolis Board of Trade, and their business relations were intimate, therefore the indorsees were charged with notice that the note was given for gambling transactions on the Board of Trade. There is no rule of law that will support any such presumption. Again, it is said that appellants knew when they purchased the note that it would not be paid at

maturity, and that their object in making the purchase was to secure the elevators that had been mortgaged to secure the same. Counsel cite us to no case where it has ever been held that the ultimate object of the purchaser of commercial paper in making the purchase could be considered upon the question of his bona fides. In this case, appellants knew that they took the mortgages—the incidents of the debt—as free from all equities as the note itself. See Colebrooke, Collateral Securities, §§ 161 *et seq.* It would, indeed, be a novel doctrine if the fact that appellants relied upon the security in making the purchase should be held to constitute bad faith on his part; and, knowing the security to be ample, it is not strange that no inquiries were made touching the financial responsibility of the maker.

We reach the conclusion after full consideration of the evidence, that appellants were bona fide indorsees in the usual course of business, and, as such, were entitled to full protection against any equities between the original parties. The appellants are entitled to judgment against the respondent for the full amount of the note in suit, and a decree of foreclosure against the property described in the complaint, with costs of both courts. The district court for Richland County will enter judgment accordingly.

Reversed.

All concur.

OHIO SUPREME COURT.

August HERRMANN *et al.*, *Plffs. in Err.*,
v.
STATE of Ohio, *ex rel.* James COOPER.

(.....Ohio.....)

***Where by municipal authority a system of sewers is constructed** with a view to assessing a portion of the costs thereof equally upon the abutting property, and a portion of the assessments are paid, and a portion successfully resisted, a rule requiring as a condition to the use of the sewer that those who so resisted shall pay a sum equal to that paid by others towards its construction is not unreasonable.

(April 29, 1896.)

ERROR to the Court of Common Pleas for Hamilton County to review a judgment awarding a peremptory writ of mandamus to compel defendants to permit plaintiff to tap a sewer in one of the public streets of the city of Cincinnati. *Reversed.*

Statement by the **Court:**

In the court of common pleas, a peremptory writ of mandamus was awarded on the petition of Cooper against the board, commanding them to permit him to tap the sewer in Ashland street, upon which his residence fronts, on payment by him of the usual license fee of $5, but without payment of any portion of the cost of constructing the sewer. The material facts are that the city constructed a system of sewers on Walnut Hills, including the Ashland street sewer, at a cost of about $142,000. It made assessments on abutting property to the extent of $2 per front foot, which amounted to about half the cost of construction. Some of the assessments were paid, but a portion of the property owners, including him who was then the owner of Cooper's property, resisted the assessment, upon the ground of fraud by the contractor, and their defense finally prevailed. In consequence thereof, the city was adjudged to pay the balance of the contract price. When Cooper applied to the board for a permit to tap the sewer, it refused to grant it except upon compliance by him with the following rule, which it had previously adopted: "Wherever public sewers have been constructed, and the cost thereof has been wholly or partly paid out of the funds of the city, and the owner of any abutting property makes application for permit to tap such sewer, no permit shall be issued to any such abutting owner, unless he shall have paid the assessment or assessments levied against his said property for the cost of said sewer; or, if for any reason, said assessments have not been paid, or have been released, or no assessment has been levied, no permit shall be granted, unless such person shall first pay into the city treasury, for the purpose of repaying the city the amount paid out or to be paid out by said city on account of said sewers, a sum equal to an amount per front foot to be determined by taking the total cost of constructing the main and lateral sewers and drains into which he desires to tap, and divide the gross amount by the number of front feet abutting upon said sewers; provided, however, that the amount so to be paid shall in no case exceed the sum of $2 per front foot of the property abutting.

Messrs. **Frederick Hertenstein** and **William H. Whittaker** for plaintiff in error.

Mr. **C. J. McDiarmid** for defendants in error.

Per Curiam:

The rule adopted by the board of administration is not inconsistent with the judgment that the assessments for the construction of the sewer in question were void. The assessments were asserted against the owners of all abutting property, whether vacant or improved. They were asserted without regard to the use of the sewer. The rule in question prescribes conditions upon which connections may be made for the actual use of the sewer. The board is authorized by § 2402, Rev. Stat. to prescribe rules and regulations for the

* Headnote by the COURT.

NOTE.—The above case briefly disposes of what seems to be a new question respecting sewers by holding a contribution to the expense thereof necessary to the privilege of using a sewer by on who has succeeded in defeating an assessment upon it.

tapping of sewers. Certainly, it may not prescribe an unreasonable rule. In determining whether this rule is reasonable, it is important that the system of sewers of which this is a part was constructed by the city with a view to assessing the cost thereof, within the limit of $2 per foot, upon the abutting property, which, it is admitted, the statute authorized. The rule in question was adopted and properly conditioned to require that those who had not paid assessments should, when desiring to use the sewer, accept an equal burden with those who had. We cannot say that the rule is unreasonable. Its application to this case is obvious.

Judgment reversed.

William F. MORTON, *Plff. in Err.*,
v.
WESTERN UNION TELEGRAPH COMPANY.

(53 Ohio St. 431.)

***The negligent failure of a telegraph company to deliver a message** does not authorize an action by him to whom it is addressed to recover for resulting injury to his feelings and affections when no other injury results.

(October 29, 1895.)

ERROR to the Circuit Court for Madison County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for neglect to promptly transmit and deliver a telegraph message. *Affirmed.*

The facts are stated in the opinion.

Mr. **George B. Cannon,** for plaintiff in error:

If injury to the feelings be an element of actual damages in slander, libel, and breach of promise cases it should equally be so considered in cases of this character. The idea once prevailing that mere nominal damages could be recovered in such cases is now exploded.

Western U. Teleg. Co. v. *Cooper*, 71 Tex. 507, 1 L. R. A. 728; *So Relle* v. *Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805; *Gulf, C. & S. F. R. Co.* v. *Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Wadsworth* v. *Western U. Teleg. Co.* 86 Tenn. 695; *Western U. Teleg. Co.* v. *Broesche*, 72 Tex. 654; *Beasley* v. *Western U. Teleg. Co.* 39 Fed. Rep. 181; *Western U. Teleg. Co.* v. *Simpson*, 73 Tex. 422; *Stuart* v. *Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, *Hays* v. *Houston & G. N. R. Co.* 46 Tex. 272; *Reese* v. *Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583; *Houston & G. N. R. Co.* v. *Randall*, 50 Tex. 261; *Phillips* v. *Hoyle*, 4 Gray, 568; *Roberts* v. *Graham*, 73 U. S. 6 Wall. 578, 18 L. ed. 791; *Logan* v. *Western U. Teleg. Co.* 84 Ill. 468; *Wyman* v. *Leavitt*, 71 Me. 227, 36 Am. Rep. 303, and note 306; *Western U. Teleg. Co.* v. *Allen*, 66 Miss. 549; *Western U. Teleg. Co.* v. *Moore*, 76 Tex. 66; *Western U. Teleg. Co.* v. *Kirkpatrick*, Id. 217; *Western U. Teleg. Co.* v. *Henderson*, 89 Ala. 510; *Thompson* v. *Western U. Teleg. Co.* 107 N. C. 449; *Young* v. *Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Chapman* v. *Western U. Teleg. Co.* 90 Ky. 265; Shearm. & Redf. Neg. §§ 560, 605; *Western U. Teleg. Co.* v. *Adams*, 75 Tex. 531, 6 L. R. A. 844; *Western U. Teleg. Co.* v. *Feegles*, 75 Tex. 537; *Western U. Teleg. Co.* v. *Beringer*, 84 Tex. 38; *Western U. Teleg. Co.* v. *Erwin* (Tex.) 19 S. W. 1002; Thompson, Electricity, art. 5, chap. 11, 369-386; *Smith* v. *Pittsburg, Ft. W. & C. R. Co.* 23 Ohio St. 19.

Mr. **Henry Newbegin,** with *Mr.* **John F. Locke,** for defendant in error:

The exact case has never been before the court for adjudication but has practically been decided in the negative in *Mulford* v. *Clewell*, 21 Ohio St. 191; *First Nat. Bank* v. *Western U. Teleg. Co.* 30 Ohio St. 555.

The Federal courts without exception stand opposed to the doctrine.

Duer v. *Western U. Teleg. Co.*, and *Bales* v. *Western U. Teleg. Co.* (Tex. 1892); *Kennon* v. *Gilmer*, 131 U. S. 22, 33 L. ed. 110; *Chase* v. *Western U. Teleg. Co.* 44 Fed. Rep. 554, 10 L. R. A. 464; *Crawson* v. *Western U. Teleg. Co.* 47 Fed. Rep. 544; *Wilcox* v. *Richmond & D. R. Co.* 52 Fed. Rep. 264, 17 L. R. A. 804, 8 U. S. App. 118; *Tyler* v. *Western U. Teleg. Co.* 54 Fed. Rep. 634; *Kester* v. *Western U. Teleg. Co.* 55 Fed. Rep. 603; *Western U. Teleg. Co.* v. *Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706, 13 U. S. App. 317; *Chapman* v. *Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430; *Western U. Teleg. Co.* v. *Rogers*, 68 Miss. 748, 13 L. R. A. 859; *West* v. *Western U. Teleg. Co.* 39 Kan. 93; *Summerfield* v. *Western U. Teleg. Co.* 87 Wis. 1; *Victorian R. Comrs.* v. *Coultas*, L. R. 13 App. Cas. 222; *Lynch* v. *Knight*, 9 H. L. Cas. 577.

Per Curiam:

The plaintiff in error brought suit to recover damages for the negligent failure of the defendant to deliver to him at London, Ohio, a telegram as follows:

Henly, O., Oct. 12, 1890.
To Will Morton, London, Ohio:
Mother dying. Come immediately.
Frank Morton.

He alleges that the sender of the telegram, who was his brother, paid to the company the usual rates; that it negligently failed to deliver the message to him, whereby he was "left in total ignorance of his mother's illness, and was deprived of the solace and comfort of attending her in her last sickness, and of the privilege of attending her funeral, which he could and would have done but for the default of the defendant, its agents, and employees, and that he was injured in his feelings and affections thereby in the sum of $5,000." A demurrer to the petition was sustained in the court of common pleas, and that judgment was affirmed by the circuit court.

The judgment rests upon the elementary

*Headnote by the COURT.

NOTE.—The conflict of decisions as to damages for mental suffering in telegraph cases is continued by the alternate reinforcement of the decisions on each side. For a recent Iowa case on the other side, see Mentzer v. Western U. Teleg. Co. (Iowa) 28 L. R. A. 72.

Other cases on the subject are referred to in a note to Francis v. Western U. Teleg. Co. (Minn.) 25 L. R. A. 406.

See also 39 L. R. A. 463; 45 L. R. A. 160.

principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation. Cooley, Torts, 2d ed. p. 716; Greenl. Ev. § 267. Numerous reported cases show that this doctrine has been followed in cases of this character by the Federal courts and the courts of last resort in nearly all of the states The wisdom of the doctrine is well illustrated by the experience of the courts that have departed from it.

Judgment affirmed.

DEFIANCE WATER COMPANY, *Plff. in Err.*,
v.
Imeda OLINGER.

(--------Ohio--------)

*1. **One who collects on his own premises a substance liable to escape,** and, if it should escape, likely to cause mischief, must at least use reasonable care to restrain it. If for want of such care it escapes and injures persons or property rightfully on adjoining premises, he is answerable for the damages sustained on account thereof.

2. **Where such dangerous substances and a dwelling house are both situated on the same parcel of land,** and subject to the same general ownership, the dwelling house should be regarded, in this connection, as situated on adjoining premises, if it is in the possession of and occupied as a family residence by a tenant, even if such tenancy be at will only, by a servant of such owner, and his occupancy is without a fixed rental, but is part of the compensation paid for his services, and such services are performed in or about the business with which such dangerous substance is connected.

3. **A guest, by the express or implied invitation of such tenant,** is rightfully at his residence; and if, while there as such guest, such dangerous substance so collected on the adjoining premises escapes by the fault of the person who collected it, and injures her person, she may maintain an action against him to recover damages sustained on account thereof.

(*Burket, J., dissents.*)

(May 25, 1895.)

ERROR to the Circuit Court for Defiance County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Bradbury, J.**:

Almeda Olinger, defendant in error, brought an action in the court of common pleas of Defiance county, against the Defiance Water Company, plaintiff in error, to recover on account of injuries she claims to have received by reason of the negligent manner in which the water company stored water on its own premises. A demurrer to the petition was sustained by the court of common pleas. The cause was then taken to the circuit court on error, where the petition was held to be sufficient, and the judgment of the court of common pleas reversed. Thereupon a petition in error was filed in his court by the waterworks company, seeking to reverse the judgment of the circuit court and affirm that of the court of common pleas.

*Headnotes by the COURT.

NOTE.—In connection with the above case, see also Baltimore Breweries Co. v. Ranstead (Md.) 27 L. R. A. 294.

Messrs. **Henry Newbegin** and **Edward H. Newbegin,** for plaintiff in error:

Plaintiff took the risk of remaining in the vicinity of the standpipe with her eyes wide open as to the danger.

Defendant owed no duty to the plaintiff, not even if by any stretch of the imagination Gillum can be considered the lessee of the defendant.

Pittsburgh, Ft. W. & C. R. Co. v. *Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Faris* v. *Hoberg*, 134 Ind. 269; *Gibson* v. *Leonard*, 143 Ill. 182, 17 L. R. A. 588; *Benson* v. *Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714; *Doyle* v. *Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223; *Woolwine* v. *Chesapeake & O. R. Co.* 36 W. Va. 329, 16 L. R. A. 271; Bigelow, Lead. Cas. Torts, 697-703.

Messrs. **Enos & Johnston,** for defendant in error:

Everyone must use his own property in such a manner as not to injure others.

Ray, Negligence of Imposed Duties, 7, 8; *Columbus Gaslight & C. Co.* v. *Freeland*, 12 Ohio St. 392.

If a structure erected near the line of another's land falls over onto it to his injury, the owner of the structure is liable for the injury.

Schwartz v. *Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; Shearm. & Redf. Neg. pt. 498; *Bailey* v. *New York*, 3 Hill, 531, 2 Denio, 433; *Hay* v. *Cohoes Co.* 2 N. Y. 160, 51 Am. Dec. 279; *Tremain* v. *Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284.

The water company was liable for injury caused by the falling of its standpipe and knowledge cuts no figure. Its duty was to keep the pipe standing, or in the event of an injury to the public from its falling it must answer in damages.

Coupland v. *Hardingham*, 3 Campb. 398; *Gray* v. *Boston Gaslight Co.* 114 Mass. 153, 19 Am. Rep. 224.

It is the owner's duty to keep his land in such a state that his neighbor may not be injured by its fall.

Chauntler v. *Robinson*, 4 Exch. 163; *Nichols* v. *Marsland*, L. R. 10 Exch. 259; 2 Thomp. Neg. § 1220; *Shipley* v. *Fifty Associates*, 101 Mass. 253, 3 Am. Rep. 346; *Gorham* v. *Gross*, 125 Mass. 289, 28 Am. Rep. 234; *Milford* v. *Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Kappes* v. *Appel*, 14 Ill. App. 170; Ray, Negligence of Imposed Duties, 9, 147, 148.

When a person makes an artificial use of lands he is liable for all damages from such use without reference to the degree of care and precaution which he may have exercised to prevent injury.

Rylands v. *Fletcher*, L. R. 3 Exch. 352; *Fletcher* v. *Rylands*, L. R. 1 Exch. 265; *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089; *Smith* v. *Fletcher*, L. R. 7 Exch. 305; *Bonomi* v. *Backhouse*, El. Bl. & El. 622; *Stroyan* v. *Knowles*

See also 43 L. R. A. 435.

6 Hurlst. & N. 454; *Brown* v. *Robbins*, 4 Hurlst. & N. 185; *Pixley* v. *Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Mears* v. *Dole*, 135 Mass. 508; *Ball* v. *Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Baird* v. *Williamson*, 15 C. B. N. S. 376; *Buckingham* v. *Elliott*, 62 Miss. 296, 52 Am. Rep. 188.

Bradbury, J., delivered the opinion of the court:

The decision of this case depends upon the nature of the liability incurred by one who collects and maintains upon his premises a substance liable to escape and injure others. The petition discloses that the water company had erected on its own premises a large iron tank, or standpipe, about 20 feet in diameter and 140 feet high, which it maintained full of water, for the purpose of supplying its customers, the city of Defiance and its inhabitants; that it owned a dwelling house, situated within 50 yards of the standpipe, which was occupied by one John Gillum as a residence, who is conceded to have been a servant of the water company; that the defendant in error was the mother-in-law of said Gillum, and on the day of the accident was at said dwelling house as his invited guest; that the standpipe had been negligently constructed, and, prior to the accident, had become cracked and weakened, to the knowledge of the waterworks company; that they negligently permitted ice to form, and sand, earth, and dirt to accumulate therein; and that, by reason of its defective construction, this accumulation of ice, sand, etc., and its cracked and weakened condition, so negligently permitted, the standpipe fell, whereby the water escaped therefrom with such force as to crush said residence, and overwhelm the defendant in error, causing the injuries to her person of which she complained. That the fall of the standpipe and the resulting rush of its waters, by which the defendant in error was overwhelmed and injured, were due to the negligence of the plaintiff in error, is admitted by the demurrer to the petition. She was at the dwelling house of her son-in-law, as the guest of himself or family, as she had a lawful right to be, and, while such guest, without the slightest fault chargeable to her in connection with the accident, sustained injuries attributive solely to the wrongful conduct of the plaintiff in error. If, under these circumstances, she cannot recover for those injuries, it is because the plaintiff in error owed no duty to her in this connection.

The terms, as to rent or otherwise, upon which the dwelling house was occupied, do not appear. Gillum, the servant of the company, may have been a mere tenant at will, occupying it as part of the consideration he was receiving for his services, the latter being determinable at the pleasure of either party. Whether this supposition accords with the facts, or whether he was occupying it for a definite period at a fixed rental, is not material. In either case it was in his possession, and occupied by him as a family residence. Whatever might be the character or duration of his title, it was within the principle of those rules of law which protect a proprietor against injuries caused by acts committed on adjoining premises. His rights may not have been as extensive and valuable as those an owner in fee would have had, but such rights as he possessed were entitled to protection. These protective principles enfold persons and personal property, as well as real estate. To collect and maintain upon one's premises substances likely to do mischief if they escape menaces persons and personal property in the vicinity equally with the real estate; and such persons or personal property, when rightfully there, should be equally protected. The defendant in error was the guest of the occupant of the dwelling house. It was his privilege to expressly or impliedly invite her, and she had a right to accept the invitation. Being rightfully there, as the guest of the occupant of the dwelling house that was overwhelmed by the escaping water, we think her rights in this connection equal to his rights.

This brings us to the consideration of the question of the liability of one who, for his own purposes, collects upon his premises a substance likely to injure others in case it escapes. The principle upon which liability rests in such case is quite unlike that which determines the liability of one who leaves unguarded excavations upon his own lands, or one who negligently constructs a building so that it falls upon his own premises. In these latter cases no one can be injured unless he comes upon the premises. If he remains away, he is safe. In the former, the danger arises from the natural tendency of the things to escape from the premises where stored, together with the likelihood of its doing injury if it does escape therefrom. In England it seems to be settled, by *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, that the duty rests upon one who collects and stores upon his premises inanimate substances or animate things from the escape of which injury is likely to follow, to prevent such escape. While this duty may not extend to trespassers, or those who, for their own purposes, without express or implied invitation from the proprietor, choose to come upon the premises, yet that case (*Fletcher* v. *Rylands*, *supra*) should be regarded as extending this duty to all persons who may be rightfully on adjoining premises. Blackburn, J., in the course of an able opinion, and speaking for the whole court, used the following language: "We think that the true rule of law is that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of a *vis major*, or the act of God. . . . The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought some-

thing on his own property which was not natural there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural or anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

This doctrine would seem to be in exact accord with justice and sound reason, but in the case before us we are not required to apply it to its full extent, because the defendant in error, in her amended petition, expressly avers negligence in the construction of the standpipe, as well as a knowledge that it had afterwards cracked and become weakened, a negligent failure to make repairs, and that the accident which caused her injuries was the direct result of such negligence. Therefore, whether or not she could recover, in the absence of negligence on the part of the water company in storing the water, does not concern us at this time, for, however that may be, certainly one who, like defendant in error, is rightfully on premises adjoining those upon which such substances are stored, and is injured by their escape, should, upon the plainest principle of natural justice, recover from the proprietor storing the same damages for such injury, where the escape was caused by negligence.

Judgment affirmed.

Burket, J., dissenting:

As I read the petition, the house at which plaintiff below was visiting was on the same premises as the standpipe, and was a part of said premises, and was not on adjoining premises, and therefore the water company owed no duty to her, and, when she went upon the premises without the invitation of the company, she went at her own peril. There is no rule of law warranting the placing of the house by construction on adjoining premises when it in fact stands upon the premises of the water-works company.

OREGON SUPREME COURT.

MON LUCK, *Appt.*,
v.
George C. SEARS, Sheriff of Multnomah County, *Respt.*

(.....Or.....)

Possession of opium without having a license therefor, or without having obtained it on the prescription of a physician or pharmacist for medicinal purposes, may be made a criminal offense in the discretion of the legislature without violating any constitutional right.

(April 27, 1896.)

APPEAL by petitioner from a judgment of the Circuit Court for Multnomah County denying his application for a writ of habeas corpus to procure his discharge from the custody of the sheriff, to which he had been committed for violation of the provisions of an act for the regulation of the sale of opium. *Affirmed.*

The facts are stated in the opinion.

Mr. **R. W. Wilbur,** for petitioner:

The writ of habeas corpus lies when an order or process has been issued, though in proper form, in a case not allowed by law.

Or. Code, § 622, subs. 4; Church, Habeas Corpus, § 236.

The court in a habeas corpus proceeding, in inquiring into the legality of an imprisonment, should see if the original court had jurisdiction.

Church, Habeas Corpus, § 236; Or. Code, § 622; *Barton* v. *Saunders*, 16 Or. 53; Wood, Habeas Corpus, 130.

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

Or. Const. art. 4, § 20.

When the Constitutions require the subject to be expressed in the title of an act of the legislature, the same must be taken into consideration in a construction of the statute and may often limit the meaning of the act.

23 Am. & Eng. Enc. Law, p. 328; *State* v. *McGuire*, 24 Or. 377, 21 L. R. A. 478.

It cannot become a legal wrong for one to become intoxicated in the privacy of his own room.

Tiedeman, Pol. Power, § 68.

It is a fundamental law of the land that every man can do with his own what he wills, and liberty and pursuit of happiness are violated when such right is denied.

Cooley, Const. Law, 436, 716; Tiedeman, Pol. Power, § 68.

The legislature cannot pass a law which prohibits the simple possession of opium or intoxicating liquors.

Tiedeman, Pol. Power, §§ 140–140*a*; *State* v. *Gilman*, 33 W. Va. 146, 6 L. R. A. 847; *Wynehamer* v. *People*, 13 N. Y. 384; *Preston* v. *Drew*, 33 Me. 558; *Ex parte Ah Lit*, 11 Sawy. 447; *People* v. *O'Neil*, 71 Mich. 334; *Ah Lim* v. *Territory*, 1 Wash. 173, 9 L. R. A. 395.

Mr. **C. M. Idleman,** Attorney General, for respondent.

Bean, Ch. J., delivered the opinion of the court:

This is a habeas corpus proceeding, and comes here on appeal from a judgment of the court below remanding the petitioner to the custody of the sheriff of Multnomah county. The petitioner was arrested, tried, and convicted for having in his possession opium, in violation of the provisions of an act entitled

NOTE.—As to the validity of statutes making it criminal to have possession of property which is capable of criminal use, see *note* to State v. Lewis (Ind.) 20 L. R. A. 52.

See also 40 L. R. A. 151; 41 L. R. A. 551.

"An Act to Regulate the Sale and Gift of Opium, Morphine, Engshe or Cooked Opium, Hydrate of Chloral or Cocaine," approved February 21, 1887 (Laws 1887, p. 87). The 1st section of this act provides that "no person shall have in his or her possession, or offer for sale," any of the drugs enumerated in the title "who has not previously obtained a license from the county clerk of the county in which he or she resides or does business." Sections from 2-6 inclusive provide the form of the license; that it shall be issued only to regularly qualified physicians who keep a stock of drugs and medicines for their own use in prescription, and regularly qualified druggists; prohibits the sale and gift of any of the enumerated drugs to any person except on the prescription of a physician or regularly qualified pharmacist, and then only of the kind and quantity therein named; provides that none but physicians and pharmacists who have duly registered as required by the act shall be authorized to prescribe the use of any of such drugs, and then only for the cure of disease, and in such cases and quantities as are recognized by medical science as proper and fit. Section 7 requires physicians and pharmacists who have prescribed any of said drugs to keep a record thereof, which shall be open to public inspection, showing the date of the prescription, the name and residence of the patient, the disease for which it was prescribed, and how much and how often the patient was instructed to use the same. Section 8 defines who shall be deemed physicians and pharmacists within the meaning of the act. Section 9 provides the penalty for its violation, and section 10 gives the justice's court jurisdiction of offenses described therein. The petitioner claims that he is illegally restrained of his liberty, because (1) the act of 1887 does not intend to make the possession of opium a crime unless it is kept for sale or gift; and (2) if it does, it infringes upon the fundamental rights of liberty and property, and is therefore void.

That the act with which the defendant was charged, *viz.*, having in his possession opium without either a license therefor or it having been obtained on the prescription of a physician or pharmacist for medicinal purposes, is within the restraint of the statute, there can be no doubt. The act provides, in plain and unambiguous language, that no person shall have in his or her possession opium who has not previously obtained a license therefor, unless, as the law clearly implies, it be obtained on the prescription of some duly qualified physician or pharmacist for medicinal purposes. Its evident purpose and object is to regulate the sale and traffic in opium and the other enumerated poisonous drugs so as to prevent a prevalent evil by confining their use to strictly medicinal purposes, and to that end it prohibits any person except licensed physicians and druggists from having such drugs in his or her possession unless obtained for medicinal purposes in the manner provided in the act; and such provision is clearly germane to and within the subject of the act as expressed in the title. Black, Intoxicating Liquors, § 64; *State* v. *Shaw*, 22 Or. 287.

Nor do we think the act, as so interpreted, unconstitutional, as being an infringement on the rights of liberty and property as guaranteed by the fundamental law. Opium is an active poison, and has no legitimate use except for medicinal purposes; but it is frequently used to produce a kind of intoxication by smoking or eating, a loathsome, disgusting, and degrading practice, which results not only in pauperism and crime, but also in the serious impairment of the mental and physical condition of those who indulge in it. The sale and disposition of such a drug may unquestionably be regulated and controlled by law, and whether its nature and character are such that, for the protection of the public, its possession by unauthorized persons should be prohibited, is a question of fact and of public policy, which belongs to the legislative department to determine. The discretion of the legislature in the employment of means which are reasonably calculated to protect the health, morals, or safety of the public is very great; and so long as it does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitations upon the means of living or some material right essential to the enjoyment of life, its determination is conclusive upon the courts. And while the state cannot assume to be the guardian of morals, it has the undoubted power to enact measures calculated for the suppression of such forms of vice as threaten its welfare by generating disease, pauperism, and crime; and primarily, it is for the legislature to determine what laws and regulations are needful for that purpose. *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253. Of course this power must be so exercised as not to arbitrarily infringe upon personal and property rights, but "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." *Yick Wo* v. *Hopkins*, 118 U. S. 370, 30 L. ed. 226. To this last class, in our opinion, belongs the case before us. The act does not forbid the possession or prohibit the sale of opium, but allows both under such regulations and conditions as will, it is believed, tend to prevent its harmful and improper use. No right secured by the fundamental law is interfered with or impaired by this legislation, because the possession and use of the drugs are not restrained thereby, so as to destroy its value as a remedial agent,—its only recognized legitimate use. Its object and purpose is to so regulate the possession, sale, and disposition of a dangerous yet useful drug as to prevent the weak and unwary from using it to their own physical and mental ruin, and to the serious injury of the general public; and in our opinion, violates no constitutional right. *State* v. *Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *Ex parte Yung Jon*, 28 Fed. Rep. 308; *Ah Lim* v. *Territory*, 1 Wash. 156, 9 L. R. A. 395; *Davis* v. *State*, 68 Ala. 58, 44 Am. Rep. 128; *State* v. *Smyth*, 14 R. I. 100. We are not unmindful of the fact that some courts have held that the legislature cannot make it a crime to have in one's possession intoxicating liquors, although it may regulate, or even prohibit, the sale and disposition thereof. *State* v. *Gilman*, 33 W. Va. 146, 6 L. R. A. 847; Tiedeman,

Pol. Power, § 68. But the principle of these cases has no application here. It is a matter of common knowledge that intoxicating liquors are produced principally for sale and consumption as a beverage, and so common has been their manufacture and use for this purpose that they are regarded by some courts as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium for any purpose other than as permitted in this act has no place in the common experience or habits of the people of this country, but is admitted by all to be an insidious and demoralizing vice, injurious alike to the health, morals, and welfare of the public; and therefore its possession, unless in the manner provided by the legislature for the purposes stated, cannot be presumed to be of any value to its owner except on the hypothesis that he intends to make a use of it injurious to himself and the general public, and hence it is within the legitimate exercise of the police power of the state to regulate its sale, and confine its possession to certain designated persons, as a means of public safety. It follows that *the judgment of the court below is right, and must be affirmed.*

RHODE ISLAND SUPREME COURT.

Town of BRISTOL
v.
BRISTOL & WARREN WATERWORKS
et al.

(.....R. I.....)

1. **One against whom no relief is sought** except that he be ordered to convey certain property which the bill shows that he has already conveyed is not a proper party to the bill.
2. **A contract between a town and a waterworks company** for the purchase by the town of the waterworks at a price to be mutually agreed upon, or, on failure to agree, to be fixed by arbitrators, will be enforced by the court if the waterworks company refuses to agree or to appoint arbitrators; where the agreement to purchase is merely a part of another more extensive contract under which the parties have incurred obligations so that they cannot be placed *in statu quo.*
3. **The failure to appoint an arbitrator** under an agreement for arbitration cannot be objected to by another party who has expressly given notice of a refusal to comply with the contract for arbitration.
4. **An averment in a bill that plaintiff is ready and willing or able to pay the price** to be fixed by arbitrators is not necessary in a bill framed upon the theory that the time for arbitration has passed because the respondent has refused arbitration.
5. **The objection that a town has not power** to purchase waterworks cannot be made by the owner of the works in order to defeat its contract with the town for the sale thereof.

(March 28, 1896.)

ON DEMURRER by defendant to a bill to compel it to comply with its agreement to sell its plant to plaintiff. *Overruled.*

The facts are stated in the opinion.

Messrs. **Benjamin M. Bosworth** and **Arnold Green,** for respondents, in support of demurrer:

The respondent company is affected with knowledge of the limitations of the complainant's powers and the powers of the complainant's committee.

Austin v. *Coggeshall,* 12 R. I. 329, 34 Am. Rep. 648; *Farnsworth* v. *Pawtucket,* 13 R. I. 82.

The complainant has no power to purchase or to pay for the waterworks, or to hold or to manage the same, except as given by chap. 1430 of the Public Laws, passed May 23, 1895. This act limits the amount to be borrowed to $200,000, and this sum is to cover several items of expenditure, only one of which is the purchase of the waterworks; it also contains a provision by which the complainant town cannot issue any bonds, however small in amount, without action by the electors in town meeting. The act confers limited powers, but it creates no liability or responsibility.

The power of a municipality to tax must emanate from the legislature. The power is to be strictly construed, and doubts resolved in favor of the public and against the power.

25 Am. & Eng. Enc. Law, p. 581; *Minturn* v. *Larue,* 64 U. S. 23 How. 435, 16 L. ed. 574; *Re Second Ave. M. E. Church,* 66 N. Y 395; Dill. Mun. Corp. §§ 763–765; *O'Byrne* v. *Savannah,* 41 Ga. 331, 5 Am. Rep. 532.

The complainant cannot enter into an arbitration mutually binding.

Should the arbitrators name a purchase price sufficiently less than $200,000, the complainant would possess power to claim a conveyance and title. Should the arbitrators name a purchase price of more than $200,000, the complainant must rejoin. Our powers are limited.

Farnsworth v. *Pawtucket, supra.*

Messrs. **Comstock & Gardner,** for plaintiff:

Where the contract to sell does not stand alone, but is a part and perhaps a subsidiary part of another contract for a more extensive purpose, the performance of which has already been entered upon, the manner of determining the price is a matter of form rather than of substance, and if it becomes evident that it cannot be determined in the manner provided for in the instrument, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other.

Coles v. *Peck,* 96 Ind. 333, 49 Am. Rep. 161.

If in case of the refusal to arbitrate the

NOTE.—As to the purchase of waterworks from a private corporation by a municipality, see also National Waterworks Co. v. Kansas City (C. C. App. 8th C.) 27 L. R. A. 827.

As to the sale of its waterworks by a city, see *note* to Huron Waterworks Co. v. Huron (S. D.) 30 L. R. A. 848.

parties can be placed *in statu quo* the contract will not be enforced. If, however, they have incurred other obligations under the agreement, so that they cannot be placed *in statu quo* the court will itself enforce the agreement.

Tscheider v. *Biddle*, 4 Dill. 55; *Herrman* v. *Babcock*, 103 Ind. 461; *Lowe* v. *Brown*, 22 Ohio St. 463; *Biddle* v. *Ramsey*, 52 Mo. 153; *Hug* v. *Van Burkleo*, 58 Mo. 202; Morse, Arbitration & Award, 94; Pom. Spec. Perf. Cont. §§ 148–151; Waterman, Spec. Perf. § 44.

By the laws of the state of Rhode Island in force at the time the contract was made and also at the time of the passage of the vote to purchase, towns have power "to purchase and hold real and personal estate" and to "make all contracts necessary and convenient for the transaction of the business of the town," and may raise by a tax on real or personal estate, or on both, such sums of money as they may deem necessary "for all necessary charges and expenses whatsoever arising within the town."

R. I. Pub. Stat. chap. 34, §§ 2–5.

Under statutes similar to this or even less comprehensive it has been held that a town could establish a system of waterworks.

Rome v. *Cabot*, 28 Ga. 50; *Wells* v. *Atlanta*, 43 Ga. 67; *Livingston* v. *Pippin*, 31 Ala. 542; *Grant* v. *Davenport*, 36 Iowa, 396; *Hardy* v. *Waltham*, 3 Met. 163; *Allen* v. *Taunton*, 19 Pick. 485.

Tillinghast, J., delivered the opinion of the court:

The substantial allegations of the bill, in so far as the same are material to the questions raised by the demurrer, are as follows, *viz.*: (1) That on the 30th day of January, 1882, the town of Bristol entered into a contract with the respondent George H. Norman for the construction of a system of waterworks for supplying pure water to said town. (2) That by said contract said town granted to said Norman, his successors and assigns, the exclusive right and use of the public streets, squares, and lanes of said town for the purpose of laying water pipes, and of continuing the same therein, and selling water, for the period of fifty years from and after the date of said contract, or until the town should avail itself of the option of purchase reserved to it in said contract; said town agreeing to pay to said Norman, his successors and assigns, the sum of $3,000 each year for the use of hydrants and the water required for fire purposes in said town, and, in addition thereto, a sum each year equal to the amount of all the taxes assessed in said town by said town or the state of Rhode Island on said waterworks, for a supply of water for the Rogers Free Library, the public schools, town house, town hall, fire-engine house, hook and ladder house, police station, and four drinking fountains; and that said Norman, in considera tion thereof, agreed to construct a complete waterworks for the supply of said town for the purpose of domestic, manufacturing, and other uses, to lay pipes in all the streets in the compact part of the town, and connect fire hydrants with said pipes, and to at all times maintain a head of water not less than 125 feet above high tide; and also to furnish certain drinking fountains, and at all times maintain an ample supply of water for domestic and manufacturing purposes, at rates not higher than charged for the same at Newport, R. I. It was further provided in said contract, and as a part of the consideration for the privileges, grants, and payments aforesaid, that said town of Bristol might, at its option, purchase said waterworks and all pipes, reservoirs, pumps, and other property, rights, and appurtenances connected with said works, at any time after ten years and within fifteen years from the date of said contract, for a fair and reasonable price, to be agreed upon by said town on the one part and said Norman, his successors or assigns, on the other part, or fixed by a majority of arbitrators appointed for the purpose, one by said town, one by said Norman or his representative, and the third by the two so chosen. (3) That, shortly after the making of said contract, said Norman made and entered into another contract with the town of Warren for the construction of waterworks for the supplying of that town with water, and that, after the making of said contracts with said towns of Bristol and Warren, said Norman proceeded to construct a single system of waterworks for the supplying of water to both said towns; and that from thence hitherto he has supplied said town of Bristol and the inhabitants thereof with water, and has received payment therefor, in accordance with the terms of said contract. (4) That, soon after the completion of said system of waterworks, said Norman conveyed the same, and all his right, title, and interest therein, to the Bristol & Warren Waterworks, a corporation created by the general assembly, by deed duly recorded in said towns of Warren and Bristol. (5) That the qualified electors of said town of Bristol, at a meeting duly called and held after the expiration of ten years and within fifteen years from the date of said contract between the town of Bristol and said Norman, passed a vote whereby it voted to purchase of the Bristol & Warren Waterworks the said waterworks and other property, rights, and appurtenances belonging thereto, in accordance with the option aforesaid, and appointed a committee of said town, with authority to agree with said company upon a fair and reasonable price for such waterworks, and, in default of such agreement, to appoint an arbitrator in behalf of said town, in accordance with the terms of said contract, and to take such legal and other proceedings as might be necessary to procure for said town of Bristol the title to said waterworks; and that said committee, immediately after its appointment, notified said Bristol & Warren Waterworks of the aforesaid action of said town, and requested said corporation to agree with them, as representing said town, upon a fair and reasonable price to be paid for said waterworks, and also gave such notice and made such request to said respondent George H. Norman; but that he and the Bristol & Warren Waterworks expressly refused, and still refuse, to attempt to agree with said town upon a fair and reasonable price to be paid for such waterworks, and refuse to appoint an arbitrator to determine a price to be paid for such waterworks, in accordance with the terms of said contract, and also refuse to convey said waterworks to said town of Bristol. (6) That unless the com-

plainant shall be enabled to purchase said system of waterworks said Norman and said waterworks company and its assigns will, in accordance with the terms of said contract, continue to have and enjoy the exclusive right and privilege of maintaining a system of waterworks in said town of Bristol for the term of fifty years, as aforesaid, notwithstanding the vote of said town to purchase the same, and in violation of the conditions of said contract. The prayer of the bill is that it may be ascertained, by reference to a master, or in such other manner as the court may deem proper, how much and what part of said waterworks system the said respondents, or either of them, can convey to the complainant for use in connection with a system of waterworks for said town of Bristol, and how much and what part of the same it is incumbent upon the complainant to purchase and pay for, and also what is a fair and reasonable price to be paid for the same; and that said respondents, either or both of them, as the court may determine to be proper and necessary, may be ordered by decree of the court to convey to the complainant said waterworks, or such part thereof as it may be found that they, or either of them, are able to convey and should so convey, upon payment by the complainant of such fair and reasonable price as may be determined, which price the complainant is ready and willing and offers to pay; and for other relief.

To this bill of complaint the respondents respectively have demurred. The ground upon which the respondent Norman bases his demurrer is that it appears that, previous to the bringing of the bill in this cause, he had conveyed all his right, title, and interest in said system of waterworks to the Bristol & Warren Waterworks, a corporation created by the legislative assembly of the state of Rhode Island, by deed duly recorded in the towns of Warren & Bristol, and in Bristol county, in the state of Massachusetts, and hence that he has no interest in the subject-matter of the suit which can make him liable to the claims of the complainant, as set forth in the bill. We think this demurrer must be sustained. The bill seeks for no relief against the respondent Norman except that he be ordered to make conveyance of said waterworks; and as it appears that he has already sold and conveyed all his right, title, and interest therein to said Bristol & Warren Waterworks, he is, of course, unable to convey the same to complainant, and hence is not a necessary or proper party to the bill.

The demurrer of the Bristol & Warren Waterworks is based upon the grounds: (1) That the contract is one to convey, at a price to be agreed upon, or to be fixed by arbitrators; (2) that for such price the court cannot substitute a price to be fixed by itself directly, or through the agency of a master; (3) that said bill of complaint contains no averment that the complainant has appointed the arbitrator provided for in said contract to be appointed by itself; (4) that said bill of complaint contains no averment that the complainant has appointed the arbitrator provided for in said contract, and has communicated such appointment to this respondent; and (5) that said bill of complaint contains no averment that said complainant is ready and willing, or is ready or is willing or is able to pay the price which may be fixed by the arbitrators provided for in said contract, or that it has the legal power, either by loan or by taxation, to raise the amount of the price so to be fixed by said arbitrators.

The first and second grounds of said demurrer may properly be considered together. The case which the record presents is this: The town of Bristol had the right, under the contract aforesaid, to purchase the waterworks in question, at a price to be mutually agreed upon by the parties thereto, or, in case of a failure so to agree, to have the price fixed by arbitrators, chosen as aforesaid. It has elected to exercise said right. The Bristol & Warren Waterworks, which confessedly stands, so far as said contract is concerned, in the shoes of said Norman, with the same rights and liabilities which appertained to him, has refused either to agree upon a price for said waterworks or to appoint arbitrators to fix the same. In other words, it has deliberately violated the express terms of said contract in this regard; and it is suggested that, unless this court has jurisdiction to either compel a specific performance thereof or to grant the relief prayed for, said waterworks company may continue to hold said property, and enjoy the privileges and immunities secured by said contract, for the remainder of the term of fifty years, in continual violation of said contract. But, however this may be, we think there is no doubt as to the jurisdiction of this court to grant the relief prayed for. Said company having failed to comply with the terms of said contract in the particulars aforesaid, this court clearly has the authority to provide some means for the fixing of the price at which said waterworks shall be conveyed to said town, and to order such conveyance; and we think that the regular and proper mode to accomplish this object is by first referring the case to a master, to ascertain and determine the price at which said works shall be conveyed. If the case was that of a simple agreement or contract for the sale of land or other property at a price to be fixed by arbitrators, where one of the parties had refused to appoint an arbitrator, the court probably could not, upon the application of the other party, either fix a price itself or appoint arbitrators, for the reason suggested in the demurrer, *viz.*, that the contract, being simply for a sale at a price to be fixed in a certain manner, the parties could not be compelled either to sell or to buy at a price not so fixed. Such is the English doctrine. *Milnes* v. *Gery*, 14 Ves. Jr. 400; *Wilks* v. *Davis*, 3 Meriv. 507; *Vickers* v. *Vickers*, L. R. 4 Eq. 529. The same rule has been followed in this country when there have been no circumstances to distinguish the case from *Milnes* v. *Gery*, Pom. Spec. Perf. Cont. § 150.

The cases of *Providence* v. *St. John's Lodge*, 2 R. I. 46, and *Dike* v. *Greene*, 4 R. I. 285, would seem at first blush to establish a different rule. But in these cases the contract was to sell at a price to be fixed by appraisement, with no stipulation as to how the appraisers should be appointed. The court held in these circumstances that it could itself appoint a master to make the appraisal, and would decree a specific performance at the price so determined. But, as well stated by

complainant's counsel, where the contract to sell does not stand alone, but is merely a subsidiary part of another contract for a more extensive purpose, the performance of which has already been entered upon, a different rule prevails. In such a case the courts hold that the manner of determining the price is a matter of form, rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other. *Coles* v. *Peck*, 96 Ind. 333, 49 Am. Rep. 161. In other words, if the parties have incurred obligations under the contract so that they cannot be placed *in statu quo*, the court will itself enforce the agreement. *Tscheider* v. *Biddle*, 4 Dill. 55, Fed. Cas. No. 14,210; *Herrman* v. *Babcock*, 103 Ind. 461; *Lowe* v. *Brown*, 22 Ohio St 463; *Biddle* v. *Ramsey*, 52 Mo. 153. See also Morse, Arbitration & Award, 94; Pom. Spec. Perf. Cont. §§ 148–151; Waterman, Spec. Perf. § 44; *Flint* v. *Pearce*, 11 R. I. 576. Pom. Spec. Perf. Cont. § 151, states the law applicable to this class of contracts as follows: "The second class embraces those contracts in which a mode for ascertaining the price is mentioned, but from the language of the stipulation it is regarded as nonessential, and as something rather by way of suggestion, so that the agreement itself is virtually one to sell for a fair price. In such a case if the means specified for fixing upon the price fail for any reason, the court does not treat the contract as fatally defective; but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself; it will pursue any such mode as the circumstances of the case show to be expedient. The tendency of the later English decisions is to consider these stipulations for a determination of the price by a third person, rather as a matter of form than of substance; to construe them in such manner that they become incidental only to the main object of the agreement. The court will always look at the substance of the agreement, and disregard the mere forms which had been provided for effectuating it, and which cannot be made operative." See cases cited in note 1, p. 214. In other words, "equity regards not the form but the real nature of the transaction." *Thompson* v. *Taylor*, 12 R. I. 111. The case before us is a typical one for the application of this doctrine. The agreement to sell is clearly a subsidiary part of a much more extensive contract,—a contract by virtue of which the respondent has for nearly fifteen years enjoyed exclusive privileges in the highways of said town, and collected large sums of money from the town and its inhabitants, and by virtue of which it may continue, unless said sale can be consummated, or other relief be granted, to enjoy the same exclusive and valuable franchise for the remainder of said term of years. Nor can the complainant, by any possibility, be put in the position in which it was before the contract was executed.

As to the third and fourth grounds of demurrer, *viz.*, that the bill contains no averment that said complainant has appointed the arbitrator provided for in said contract to be appointed by itself, and that it contains no averment that the complainant has communicated such appointment to the respondent, we need only say that the case shows that the respondent, in reply to a written request from a committee duly appointed by and representing the town of Bristol to arrange with said water company as to a fair and reasonable price to be paid for said waterworks, in accordance with the contract aforesaid, expressly declined to name a price for which it would sell said waterworks to said town, and also declined to appoint an arbitrator to meet the arbitrator from said town to determine upon a fair and reasonable price for said waterworks. In other words, the bill alleges facts which excuse the appointment of an arbitrator by the town, *viz.*, the positive and distinct refusal of the respondent to appoint an arbitrator on its part. And it is clear that the respondent cannot be heard to object that the complainant did not make an appointment after it had expressly notified said complainant that it refused to comply with the terms of said contract in this regard. The law does not require the performance of an utterly useless or futile act.

As to the fifth ground of demurrer,—*viz.*, that the bill contains no averment that the complainant is ready and willing or is able to pay the price which may be fixed by the arbitrators, or that it has the legal power, either by loan or by taxation, to raise the amount of the price so to be fixed by said arbitrators,—we have to say that, as to the first part thereof, we do not see that any such averment is necessary. The bill is framed upon the theory that the time for arbitration has already passed. The respondent, as before stated, has expressly refused either to name a price or to submit the fixing thereof to arbitrators, as provided in the contract. That the complainant was so ready and willing before the respondent refused to arbitrate appears from its vote to purchase, under the conditions of the contract which required it to pay the price fixed by arbitration, and by the action of its committee as aforesaid; and it avers that it is now ready and willing to pay the price which shall be determined under the direction of the court. We fail to see that the complainant is in any default whatsoever in the premises, or that it can properly be called upon to do anything more than it has already done in order to entitle it to the relief prayed for.

As to the objection that the bill contains no averment that the complainant has the legal power to raise the amount of the price to be fixed, we think it clear that no such averment is necessary. The contract provides that the town may purchase; and the respondent cannot be permitted to set up, as an excuse for its refusal to carry out said contract, that the town has not the power to purchase. It cannot treat a part thereof as binding, and reject the rest. In short having entered into said contract, the respondent is estopped from denying that the town had authority to make the same. See Herman, Estoppel, §§ 749, 764, 800, and cases cited. Moreover the mere fix-

ing of the price to be paid for said waterworks will not devest the respondent of its property therein, or in any way prejudice its rights in connection therewith. It will simply be a step in the direction of carrying out the contract of purchase. But not until the price which shall be fixed shall have been paid by the complainant will the property rights of the respective parties be other or different from what they now are. We are therefore of the opinion that *the demurrer* of said waterworks company is not well founded, and that the same *should be overruled.*

MICHIGAN SUPREME COURT.

Aaron DEFREESE
v.
John A. LAKE *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. A life estate only is given to the first taker by a devise to one "and after his decease said real estate to belong to his heirs."

2. In case of a devise to a person for life with remainder to his heirs, the heirs under the Michigan statute take as purchasers.

3. Testimony of the one who drew a will unambiguous on its face is not admissible to prove an intent as to the disposition of the property different from that expressed by the language of the will.

4. Acceptance of the devise by a life tenant will be presumed if he goes into possession, although he claims the fee under sales for taxes while the property was in possession of a prior taker, but such presumption may be overthrown by proof of acts inconsistent with acceptance.

5. Upon the question of collusion between two life tenants to cut off the remainder by permitting tax sales, evidence that the land was advertised and bid in by a third person is admissible.

6. A devisee of a life estate in remainder cannot cut off the remainders limited upon his life estate by purchasing the property at tax sales caused by default of the first taker.

7. A quitclaim deed by the "heirs" of a living person, who have a remainder after his life estate, is good under a statute making future estates alienable in the same manner as estates in possession.

8. A limitation of life estates to two living persons in succession with remainder over is not void for remoteness.

9. The question is for the jury whether or

NOTE.—*Duty of life tenant to pay taxes.*

I. *Tenants for life strictly.*
  a. *General rule as to taxes.*
  b. *General rule as to assessments.*
II. *Tenant by the curtesy.*
III. *Tenant in dower.*
IV. *Property taken in lieu of dower.*
V. *As between husband and wife.*
VI. *Assignee of life tenant.*
VII. *Duty in case of dispute.*
VIII. *Decisions under state statutes.*
IX. *Devisee for life.*
X. *Devise of income.*
XI. *Devise to widow.*

As to the effect of a tax sale upon land held by a life tenant, see *note* to Estabrook v. Royon (Ohio) *post*, 805.

I. *Tenants for life strictly.*

a. *General rule as to taxes.*

In Gross v. Taylor, 81 Ga. 86, 88, it was stated that the property must pay the taxes, and parties interested must see that they are paid in order to protect such reversionary or other interests as they may have therein.

The doctrine is that it is the duty of a tenant for life to pay all the ordinary taxes assessed and accruing during his tenancy. Prettyman v. Walston, 34 Ill. 175, 191; Stansbury v. Inglebart, 9 Mackey, 134; McCook v. Harp, 81 Ga. 229; Austell v. Swann, 74 Ga. 278; Chaplin v. United States, 29 Ct. Cl. 231, 233.

It is well settled that the burden of paying current taxes is upon the tenant for life rather than upon the remainderman. Hagan v. Varney, 147 Ill. 281, 292; Clark v. Middlesworth, 82 Ind. 240; Olleman v. Kelgore, 52 Iowa, 38; Menger v. Carruthers (Kan.) 44 Pac. 1096; Fox v. Long, 8 Bush, 551, 554; Stetson v. Day, 51 Me. 434; Varney v. Stevens, 22 Me. 331, 334; Dunn v. Snell, 74 Me. 22, 24; Barnum v. Barnum, 42 Md. 255; Plympton v. Boston Dispensary, 106 Mass. 544, 547; Jenks v. Horton, 96 Mich. 13, 15; Watkins v. Green, 101 Mich. 493, 498; Bone v. Tyrrell, 113 Mo. 175, 188; Disher v. Disher, 45 Neb. 100; Peirce v. Burroughs, 58 N. H. 302; Holcombe v. Holcombe, 29 N. J. Eq. 597; Outcalt v. Appleby, 36 N. J. Eq. 73, 80; Murch v. J. O. Smith Mfg. Co. 47 N. J. Eq. 193; Pratt v. Douglas, 38 N. J. Eq. 516, 542; Cairns v. Chabert, 3 Edw. Ch. 312; *Re* Miller, Tucker, 346, 348; Gillespie v. Brooks, 2 Redf. 363; Lawrence v. Holden, 3 Bradf. 142; Booth v. Ammerman, 4 Bradf. 129; Griswold v. Griswold, Id. 216; *Re* Shipman, 82 Hun, 108; Fleet v. Dorland, 11 How. Pr. 489; Clarke v. Clarke, 8 Misc. 339, 342; King v. King, 9 Jones & S. 516; Bidwell v. Greenshield, 2 Abb. N. C. 431; Thomas v. Evans, 105 N. Y. 601, 611, 59 Am. Rep. 519; Piper's Estate, 2 W. N. C. 711; McDonald v. Heylin, 4 Phila. 73; Jewell's Estate, 1 W. N. C. 404; Stovall v. Austin, 16 Lea, 700; Ferguson v. Quinn (Tenn.) 36 S. W. 576; Phelan v. Boylan, 25 Wis. 679; Little v. Edwards, 84 Wis. 651; Patrick v. Sherwood, 4 Blatchf. 112; Pike v. Wassell, 94 U.S. 711, 24 L. ed. 307.

One in possession or having the ownership of real estate must pay the taxes, assessed on the value of such land, no matter whether his ownership be that of the fee, or of a mere life estate. Arnold v. Smith, 3 Bush, 163; Dubois v. Campau, 24 Mich. 360; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524.

And if he is the owner or possessor of a portion of the whole property he must pay the taxes on such portion. Johnson v. Smith, 5 Bush, 102, 104.

The owner or possessor of an interest in a tract of land or a lot in a town or city must pay the taxes, and if he is not the owner and possessor of the whole tract or the whole lot he must pay the taxes on the interest or share which he does own in it, and the words "owner or possessor" are used as precautionary to embrace both classes, and thereby the better to secure the payment of the taxes assessed. So held in Johnson v. Smith, 5 Bush, 102, decided under Ky. Rev. Stat. chap. 83, art. 3, § 2, art. 6, § 12.

So, a tenant in common for life of one third of real estate is bound to pay one third of the taxes

not a devisee of a life estate in remainder after a prior life estate, who purchased at tax sales caused by default of the first life tenant and entered into possession after the latter's death, had accepted or renounced the devise.

(May 26, 1896.)

ERROR to the Circuit Court for Shiawassee County to review a judgment in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. **Watson & Chapman** for plaintiffs in error.

Mr. **John T. McCurdy,** for defendant in error:

Under How. Anno. Stat. § 5544, after the death of Henry Casler his children and their representatives were entitled to an absolute title in fee of the land in question.

Fraser v. *Chene*, 2 Mich. 81; *Case* v. *Green*, 78 Mich. 540; *Martin* v. *Cook*, 102 Mich. 267.

The court committed no error in striking from the record the evidence of Mr. Hartwell.

Bailey v. *Bailey*, 25 Mich. 188; *Jones* v. *Jones*, Id. 401; *Tuxbury* v. *French*, 41 Mich. 12; *Tewksbury* v. *French*, 44 Mich. 100; *Ireland* v. *Parmenter*, 48 Mich. 631; *Toms* v. *Williams*, 41 Mich. 565; *Eyer* v. *Beck*, 70 Mich. 179.

Where there is no ambiguity on the face of a will none can be raised by extrinsic evidence.

Kinney v. *Kinney*, 34 Mich. 250; *Forbes* v. *Darling*, 94 Mich. 621.

Oral evidence cannot be received to explain the intent, except as it may bring before the court such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed.

Waldron v. *Waldron*, 45 Mich. 353; *Tuxbury* v. *French*, 41 Mich. 7; *Ford* v. *Ford*, 80 Mich. 42; *Byrne* v. *Hume*, 84 Mich. 185.

In construing a will the plain intention of the testator as evidenced by the language of the will must prevail, and such intent must be gathered from all the parts of the instrument.

Wales v. *Templeton*, 83 Mich. 177; *Stebbins* v. *Stebbins*, 86 Mich. 474.

It is the duty of a tenant for life to pay the taxes assessed upon the property and to make repairs in order to prevent waste.

Smith v. *Blindbury*, 66 Mich. 323; *Jenks* v. *Horton*, 96 Mich. 13; *Watkins* v. *Green*, 101 Mich. 493.

And if a life tenant should fail and neglect to pay the taxes assessed against the land in which he has an interest, and the second life-estate man should bid it in at a tax sale, it would amount to nothing more than a payment of the taxes so far as the remaindermen would be concerned.

Cooley, Taxn. 2d ed. 500-509.

This whole subject relative to the rights acquired by Henry Casler by the purchase of the land at tax sale before mentioned is foreclosed against him by—

Dubois v. *Campau*, 24 Mich. 360; *Blackwood* v. *Van Vleit*, 30 Mich. 118.

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assessed thereon. Anderson v. Greble, 1 Ashm. 136.

He must protect the interests of the remainderman. Watkins v. Green, 101 Mich. 493, 498.

It is the duty of the tenant for life to pay the taxes, and by a discharge of such duties he can acquire no rights u der the statute of limitations. Higgins v. Crosby, 40 Ill. 262, 263.

And this is so for the reason that he enjoys the use of the property, its income, etc., free of rent, and therefore he should pay the taxes and keep the property improved. Creutz v. Heil, 89 Ky. 429; Holcombe v. Holcombe, 29 N. J. Eq. 597.

And for the further reason that the burden is incident to the present use and enjoyment thereof. Waldo v. Cummings, 45 Ill. 421, 425.

He must transmit the estate as he received it. Holcombe v. Holcombe, *supra*.

By neglect of such duty he commits a wrong against the reversioner. Varney v. Stevens, 22 Me. 331, 334.

But the burdens assumed with the enjoyment of the life estate relate to the future only. Harrison v. Peck, 56 Barb. 251, 265.

A tenant for life of real estate must pay the taxes if there is any income to pay them with. Newby v. Brownlee, 23 Fed. Rep. 320; Peirce v. Burroughs, 58 N. H. 302.

And it is the duty of one entitled in remainder, who brings suit against a tenant for life for damages occasioned by the failure of the latter to pay taxes, to prove that the income of the estate was sufficient, to compel the tenant for life to pay the same. Clark v. Middlesworth, 82 Ind. 240.

The liability of a tenant for life to keep down taxes is limited to the rental value of the premises, but the rents of the whole term of his estate are answerable for the payment of taxes accruing during such term. Murch v. J. O. Smith Mfg. Co. 47 N. J. Eq. 193.

And a discount received by a tenant for life for the prompt payment of taxes will not be allowed in accounting for the same. Barnum v. Barnum, 42 Md. 255.

In Roche v. Waters, 72 Md. 264, 7 L. R. A. 533, it was held that taxes upon city property and assessments thereon for street improvements must be paid by the life tenant, and that he could not compel the remaindermen to contribute toward such payment.

So, where a reversioner covenanted in a mortgage of his reversionary interest to pay the taxes assessed upon the land, it was held that the life tenant was not relieved from his obligation. Jenks v. Horton, 96 Mich. 13, 15.

And a purchaser of a reversion, either by way of mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against the tenant for life, including the right to compel the life tenant to pay the taxes. *Ibid.*

A tenant for life has the right to cut down the timber upon the estate in such quantity and at such locations as will not impair the value of the inheritance, where the cutting is done in order to redeem the land and pay the taxes. Cannon v. Barry, 59 Miss. 290.

But in an action against a tenant for life to recover damages for waste, it was held that a claim made by the defendant that he was required to sell the growing timber to provide funds for the payment of current taxes could not be sustained for the reason, *inter alia*, that as between such tenant for life and the remaindermen, it was the former's duty to pay the taxes. Disher v. Disher, 45 Neb. 100.

The obligation of the tenant for life does not rest in covenant express or implied, but in equity as an incident to the estate, and therefore, where one contracts for a life estate he must be supposed to contract with reference to the incidents thereto attached, and the reservation of rent does not change the nature of the estate, or create an equity

Hooker, J., delivered the opinion of the court:

One Peter Casler, being owner in fee of the premises in controversy, made a will which contained the following provisions: "I give and bequeath to my wife, Betsey Casler, all the west half of the southeast quarter, and the south half of the east half of the southeast quarter, except so much of said land on the south as will make 40 acres, on section 31, according to the original survey of the United States, being in the township of Shiawassee, county of Shiawassee and state of Michigan, it being the same farm on which I now reside. After her decease the said real estate above described I give and bequeath to Henry Casler, my son, and after his decease said real estate to belong to his heirs." It appears that, during the time that Betsey Casler occupied the land, it was assessed for taxes to her for the years 1874 and 1875. It was sold for these taxes, and tax deeds were executed to Henry Casler on December 9, 1876, and December 13, 1877. After the testator's death his widow, Betsey Casler, entered and occupied the premises until her death, which occurred in September, 1877. Afterwards Henry Casler entered and held possession until November 7, 1879, when he conveyed the premises to John L. Lake by warranty deed. Mary Lake is the wife of John Lake, and, at the time this action of ejectment was brought against them, resided with him upon the premises. Henry Casler died September 15, 1886, leaving issue. The plaintiff claims title to the land in question under quitclaim deeds obtained from the descendants of Henry Casler, executed and delivered before his death; also, a quitclaim deed purporting to have been given by other persons, styling themselves "heirs at law of Peter Casler, deceased," dated after Henry's death. Some of them were admitted to be heirs at law of Henry Casler. Thus we find the plaintiff claiming title, and a right to recover the premises, by virtue of a deed from Henry Casler's heirs, while the defendants are in possession, claiming under a deed from Henry Casler himself. The plaintiff contends (1) that Henry Casler took only a life estate, with remainder to his heirs; (2) that the purchase of the lands at tax sale inured to the benefit of the remaindermen, and title, as against them, cannot be claimed under such deeds. On the other hand, the defendants say that Henry Casler took title in fee simple, under the will, and that, failing in that, his tax deeds gave him such title.

The will has been quoted. It conveyed a life estate to Betsey Casler, with remainder to her son Henry. So far there can be no dispute. Was this a remainder in fee simple? Obviously, this must depend upon the construction to be given to the words, "I give and bequeath to Henry Casler, my son, and after his decease said real estate to belong to his heirs." Does this language evince an intention upon the part of the testator to limit Henry's interest to an estate for life?

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in favor of the tenant for life paramount to that of the reversioner or remainderman. Carter v. Youngs, 10 Jones & S. 418, 421.

And such obligation must be discharged even if it exhausts the whole of the rents. King v. King, 9 Jones & S. 516.

Such duty does not rest upon the theory that there ought to be an equitable division of the charges upon the land between the several owners of the fee, as he is bound to pay them even if he does not own any portion of the fee. *Ibid.*

So, a tenant for life cannot recover annual taxes paid by him as against the remaindermen, even when ejected by the latter and though he holds under a deed purporting to convey the fee. Bone v. Tyrrell, 113 Mo. 175, 188.

Where property was leased and demised for a term of the defendant's natural life, at the annual rent of a dollar, with power to sublet and collect the rents during the term without either covenants or conditions or clause of re-entry, it was held that the defendant was bound to keep down the taxes, and that in case of his neglect so to do a receiver would be appointed. Carter v. Youngs, *supra.*

While taxes are due and payable in advance on the first day of each year, yet the tenant for life should not be charged therewith any longer than his tenancy, and therefore if he dies during the year the same should be apportioned between himself and the remainderman. Crump's Estate, 2 Pa. Dist. R. 478.

In the above case the court followed its prior decision in the case of Fest's Estate, 28 W. N. C. 415.

Where a borough ordinance made it the duty of the owner or occupier to pave the sidewalk with brick within three months after the passing of the enactment, it was held that the tenant for life was chargeable with the expenses thus incurred. Hitner v. Ege, 23 Pa. 305.

It has been held that a land tax and quit rents and other charges were not apportionable as between the life tenant and the remainderman. Sutton v. Chaplin, 10 Ves. Jr. 66.

Where it was insisted that the tax in question could not be wholly imposed upon the tenant for life, as it was in the nature of an assessment for a sewer tax, and was to be regarded as a permanent benefit, the court did not decide the point, for the reason that, if the life estate was not to be sold first, then the sale was to be according to the general provisions of the statute. Weaver v. Arnold, 15 R. I. 53, 55.

In Hite v. Hite, 93 Ky. 257, 19 L. R. A. 173, it was held that money expended from the income of an estate for taxes or improvements upon unproductive real estate should be refunded to the life tenants from the proceeds of the sale of such real estate.

b. *General rule as to assessments.*

The general rule applicable to the relation of life tenants and remaindermen does not authorize the former to charge the latter with the costs and expenses of permament improvements put upon the property by him during the life tenancy; and it is also the general rule that municipal assessments for permanent improvements are apportionable between the tenant for life and the remainderman according to the circumstances of the case and their respective interests in the property. Thomas v. Evans, 105 N. Y. 601, 611, 59 Am. Rep. 519.

Equity apportions the burdens occasioned by assessments for improvements upon the land between the tenant for life, who has the present enjoyment of the property, and the remainderman, whose right of enjoyment is postponed until the death of the tenant for life. King v. King, 9 Jones & S. 516.

So, extraordinary assessments and permanent

If the intention had been to devise an estate in fee simple, the most apt and proper words would have been, "I give and devise to Henry Casler, my son, his heirs and assigns forever." An equally effective and perhaps common method of expression would be "I give and devise to Henry Casler, my son," the law in such case supplying the necessary words to create the estate in fee simple. But this testator used neither expression, but added to the devise to Henry the provision that after his decease "said real estate should belong to his heirs,"—words which necessarily imply that Henry Casler was to have only a life estate, if they are not to be treated as superfluous. We are not without precedents in this state which warrant the conclusion that this devised a life estate. *Fraser* v. *Chene*, 2 Mich. 81, construed a will in which the following language was used: "I give and bequeath unto my beloved son, Gabriel Chene, my eldest, the farm I now reside on, for and during his lifetime, with all the appurtenances thereon; and after he, my said son, the said Garbriel Chene, is deceased, then the right, title, and appurtenances of the aforesaid farm is to become the property of the said Gabriel Chene's male heirs." The court said: "It would seem to anyone reading the will in this case that the intention of the testator to give a life estate only to his son Gabriel was so very plain that it could not be doubted." In the case of *Gaukler* v. *Moran*, 66 Mich. 354, the testator devised premises to a daughter "during her natural life, and afterwards to her heirs and assigns." This was held to give the daughter a life estate merely. See also *Cousino* v. *Cousino*, 86 Mich. 323; *Jones* v. *Deming*, 91 Mich. 481. We are of the opinion that the words used indicated a plain intention to give to Henry Casler a life estate only. This being so, the statute (2 How. Anno. Stat. § 5544) applies, and the heirs of Henry Casler take as purchasers. This may seem at variance with the case of *Fraser* v. *Chene*, *supra*, but it is not, as the will in that case antedated the statute.

One Hartwell testified on behalf of the defendant that he drew the will, and that he had a conversation with the testator, at the time the will was drawn and executed, in regard to the provision hereinbefore mentioned, and that he understood the testator to wish Henry to have the land "in his own name, free;" that the witness "was in doubt, some, how to word the will, as it was new business to him;" and that "he asked the testator particularly what he wished,—how he wished the estate disposed of after his death,—whether Henry was to be allowed to use it all, or keep it in trust," and he said: "'It is no matter. Henry will not have anything left, any way. It is all for Henry.'

Q. Did you understand you were creating a fee simple?

A. Yes, sir.

Q. By the use of those words?

A. Yes, sir."

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improvements should be apportioned between the tenant for life and the remainderman. De Witt v. Cooper, 18 Hun, 67; Lawrence v. Holden, 3 Bradf. 142; Cairns v. Chabert, 3 Edw. Ch. 312.

And the life tenant must pay his equitable proportion of assessments for local improvements. Fleet v. Dorland, 11 How. Pr. 489.

The same doctrine is declared in Outcalt v. Appleby, 36 N. J. Eq. 73, 80, as to assessments for improvements which go to the benefit of the inheritance, as to which some equitable method of apportionment between the income and the *corpus* should be adopted.

To the same effect, Holcombe v. Holcombe, 29 N. J. Eq. 597; Pratt v. Douglas, 38 N. J. Eq. 516, 542.

An outstanding life estate is chargeable with an equitable apportionment of assessments for local improvements which are of permanent benefit to the property. *Re* Miller, 1 Tucker, 346, 348.

Assessments are imposed upon the remaindermen because although they are special taxes, they are deemed to be levied for the benefit accruing to the estate in consequence of a public improvement. King v. King, 9 Jones & S. 516.

In Bobb v. Wolff, 54 Mo. App. 515, where the freehold had been benefited in a substantial manner by work, with respect to which a special tax had been imposed upon the property, it was held that as between the tenant for life and the remaindermen the tax was to be ratably and equitably apportioned, there being a likelihood of a substantial benefit to the remainder.

In the above case the property had been improved by means of granite pavements.

So, a municipal assessment for the flagging of sidewalks and other improvements must be apportioned between the tenant for life and the remainderman. Gillespie v. Brooks, 2 Redf. 363.

In Peck v. Sherwood, 53 N. Y. 615, it was held that a municipal assessment for flagging a sidewalk in front of a homestead was not an annual tax chargeable to the tenant for life, neither was it a permanent improvement of such a nature as to exempt him from contributing to its payment, but was an improvement which ought to be apportioned between himself and the remainderman.

So in Roche v. Waters, 72 Md. 264, 7 L. R. A. 533, assessments for street improvements were charged to the life tenant.

In Gunning v. Carman, 3 Redf. 69, an assessment levied before the death of the tenant for life for permanent improvements was paid after his death with interest by the trustees of the estate, and it was held that the interest from the date of the levy to the time of the death of the life tenant was properly chargeable to him, but that the balance and the principal were to be charged to the remainderman.

The remainderman ought to pay the principal of permanent improvements. King v. King, 9 Jones & S. 516.

Under the Massachusetts [statute] an assessment for betterment upon the laying out of a highway is a tax, not, however, in the nature of an ordinary tax, but in the nature of an extraordinary assessment laid on the premises in view of the permanently increased value of the estate by reason of the public improvement of the vicinity, and must therefore be treated, as between the life tenant and remainderman, as an incumbrance on the whole estate to which the tenant for life must contribute to the extent of interest during his life on the amount paid, and at his death the remaindermen must bear the charge of the principal, the burden of the assessment being borne by them in the same proportions in which they would have received the benefit of the entire damages assessed against the city, in case the estate had been

This testimony was afterwards stricken out, on motion of plaintiff's counsel, upon which error is assigned. There was no ambiguity on the face of the instrument, and the testimony was not admissible. *Fraser* v. *Chene, supra; Kinney* v. *Kinney*, 34 Mich. 250; *Waldron* v. *Waldron*, 45 Mich. 354; *Forbes* v. *Darling*, 94 Mich. 625.

It being settled that Henry Casler's title to the premises, acquired through the will terminated at his death, we will next consider the question of the tax titles. It will be remembered that he procured a tax deed of the premises before the termination of Betsey Casler's estate. These taxes were properly assessed to Betsey Casler, who owed the duty of payment, both to the state, and to the remaindermen. *Jenks* v. *Horton*, 96 Mich. 13; *Smith* v. *Blindbury*, 66 Mich. 319. But Henry Casler was in a different situation. He certainly owed no duty of payment to the state, though his interest in the premises was liable to sale therefor. It is a general proposition that a life tenant to whom taxes are assessed, and upon whom the law imposes the burden of such taxes, cannot acquire the title in fee by allowing the premises to be sold for taxes, and bidding them in, thus cutting off the remainderman. But in this case Henry Casler was not a life tenant in possession, and, so far as the record shows, he had not done anything tending to show whether or not he had accepted the devise prior to the time he obtained his tax deeds, which manifestly he was under no obligation to do unless he chose. 2 Redf. Wills, 304, and cases cited; *Doe, Smyth*, v. *Smyth*, 6 Barn. & C. 116; 4 Kent, Com. 534; *Townson* v. *Tickell*, 3 Barn. & Ald. 31; 2 Story, Eq. Jur. §§ 1075–1079. In 3 Washb. Real Prop. p. 6, the author says: "An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect." Again, at page 542, the author says: "It is hardly necessary to add, that no one can make another the owner of an estate against his consent by devising it to him, so that, if the devisee named disclaim the devise it becomes inoperative, and goes to the heir." It is said that a parol disclaimer will not prevent the devisee from subsequently claiming the devise, and that the reason of the necessity of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry. See *Perry* v. *Hale*, 44 N. H. 365. It is, in our opinion, illogical to say that a deed is necessary because of the presumption that the title has vested, when the title does not vest by a devise unless there is an acceptance. It would seem that the deed would be necessary only where the title had actually vested, which appears to depend upon acceptance. If it be admitted that the law will presume an acceptance, it is not a conclusive presumption, and, when it is shown to have been renounced, it is shown that the title did not vest, and apparently there would be no

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injured instead of being benefited by the improvement. Plympton v. Boston Dispensary, 106 Mass. 544, 547.

II. *Tenant by the curtesy.*

The doctrine that a tenant for life is bound to keep down the taxes upon the property has been held to apply to a husband entitled to the use and profits of the wife's estate. Creutz v. Heil, 89 Ky. 429; Johnson v. Stewart, 8 Ky. L. Rep. 557.

A tenant by the curtesy must keep down the taxes. King v. King, 9 Jones & S. 516.

In Wade v. Malloy, 16 Hun, 226, action was brought by the remainderman to recover damages sustained by the failure of the tenant by the curtesy to keep down the interest on a mortgage and to pay the annual taxes which had accrued thereto. It was held the action would lie. In that case the life tenant, by his neglect, had caused the property to be foreclosed and the land sold, and plaintiff sought to recover the damages occasioned thereby.

III. *Tenant in dower.*

There is nothing peculiar in the nature of a tenancy in dower to distinguish it, in respect to the payment of taxes, from other estates of freehold for life, and the widow, standing in the place of the husband in respect of the portion of the land assigned her in dower, must necessarily be held subject to the charges, duties, and services to which the estate may be properly liable. Whyte v. Nashville, 2 Swan, 364.

And a tenant in dower therefore stands in the same position as any other tenant for life. *Ibid.*

A widow is seised of the freehold, and is, properly speaking, the owner of the estate, to the extent of the assignment in dower. *Ibid.*

If land is assigned to a widow for her dower, although she has only the present enjoyment of the land, yet she must pay the taxes. King v. King, 9 Jones & S. 516.

A widow who becomes a tenant for life in a dower interest in her husband's land is bound to pay the taxes on the land. Little v. Edwards, 84 Wis. 649.

When a charge is upon the entire estate of which the husband died seised, the dowress is only bound for one-third part of it as she takes only a third; but where the charge falls exclusively upon the part of the estate which has been assigned in dower, she is separately and exclusively liable for the taxes imposed. Whyte v. Nashville, *supra.*

If a widow, who is entitled to a dower interest in real estate, neglects to pay the taxes and assessments charged upon the premises, the heirs or remaindermen may pay the same in order to protect the estate, and upon so doing are entitled to recover the amount from the widow in an action at law, or may proceed to the appointment of a receiver of the rents and profits. Bidwell v. Greenshield, 2 Abb. N. C. 427.

Where the yearly income or value of the widow's dower in real estate is not susceptible of a division, and when she is to take such annual sum in lieu of dower under §§ 28 and 29 of the Missouri act relating to dower (Rev. Code, 435), such yearly value is the net annual product without the expenditure of money or labor upon it, after deductions have been made from its gross income of all the charges to which it is subject, such as taxes, repairs, etc. Riley v. Clamorgan, 15 Mo. 331, 335.

But with respect to taxes assessed and unpaid before the assignment of dower, they cannot be charged upon the estate assigned to the widow where there is personal estate sufficient to pay them. Harrison v. Peck, 56 Barb. 251, 265; Vanderbeck v. Rochester, 122 N. Y. 285, Affirming 46 Hun, 87.

So, the dower interest of a widow cannot be

occasion for devesting a title that had not vested. There are two classes of cases in which it may become necessary to determine what constitutes a renunciation or acceptance: (1) Cases where the devisee or his privies are denying renunciation; and (2) where they are asserting it. In the former (*i. e.* before the devisee can be deprived of the estate) there are cases that hold that renunciation is not to be lightly inferred, and that equivocal acts will not do, and it has been contended that a deed is necessary when the devise is of an absolute and unconditional fee. On the other hand, if the devisee or his privies are asserting renunciation, or, what is equivalent, denying acceptance, it has been said that "the presumption of assent is never conclusive; neither are acts which indicate an intention to accept." *Wheeler* v. *Lester*, 1 Bradf. 293; *Perry* v. *Hale*, *supra*. But an entry and occupation under the will have been considered the most satisfactory evidence of acceptance, in cases where action has been brought against the devisee, where the devise was subject to the payment of debts. *Pickering* v. *Pickering*, 6 N. H. 120; *Glen* v. *Fisher*, 6 Johns. Ch. 34, 10 Am. Dec. 310; *Kelsey* v. *Western*, 2 N. Y. 501. In this case the devisee is dead, and his grantee sets up the claim that he entered and occupied the premises under another title; *i. e.* a tax title acquired after the devise, but before the end of the preceding estate. There is no other evidence bearing upon the question of acceptance or renunciation, except the fact that he claimed title in fee, contrary to the terms of the devise, and we are asked to determine whether this was sufficient evidence or renunciation to go to the jury. In *Doe, Smyth*, v. *Smyth*, 6 Barn. & C. 112, the court said that a devisee cannot be compelled to accept the devised interest, but may by some mode renounce and disclaim it. ". . . And it is not necessary in the present case to decide whether such renunciation and disclaimer may be by parol, because in whatever form they are made, we think they must be a clear and unequivocal disclaimer of any estate in the land. In this case the disclaimer is not of any estate in the land, but only of benefit under the will, accompanied in every instance with an assertion of a right to the land by a higher and better title. This proceeded on a mistake, of which the lessor [devisee] of the plaintiff, though slowly and reluctantly, was at last convinced. No case similar to this was cited, or has been found. And we therefore think the lessor of the plaintiff is not precluded from acting under her improved judgment, and taking the land as devisee under the will." Here the devisee was denying renunciation, and her contention was sustained. Whatever we may think of the holding that a disclaimer of a devise is not good unless it goes to the extent of disclaiming any interest in the land, although such claim may be based upon other and better title, it must be conceded that the case turned upon that, or that, at all events, it did not decide that a disclaimer must be

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diminished by the taxes or any portion of the taxes assessed against the land, either in her husband's lifetime or during her quarantine. Graves v. Cochran, 68 Mo. 74; State, Moore, v. White, 61 Mo. 442.

Where a husband conveyed land without the wife's releasing her right to dower, and before his death taxes and assessments for municipal improvements were levied upon such property, it was held that the widow was entitled to dower free from the taxes, but that such dower should be assigned subject to the increased value arising from such permanent improvements charged with one third of the principal of such assessments during the continuance of her estate. Jonas v. Hunt, 40 N. J. Eq. 660.

In Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 642, a widow claimed dower out of partnership lands, and in assessing the same and interest upon the arrears thereof, the court stated that the statute allowed no abatement for taxes or anything else.

A widow who is charged on a settlement of her accounts as administratrix, for failure to have her dower assigned as for a devastavit, is chargeable with only two thirds of the value of the rent from the time when she should have had dower assigned, the other one third belonging to her as dower, and she is entitled to have two thirds of the taxes credited to her for the same time. Benagh v. Turrentine, 60 Ala. 557, 561.

Where, with regard to a dowress, the owner of the fee occupied the position of a tenant *per autre vie*, and was entitled to possession during the husband's life, and thereafter on demand the widow's right matured, it was held he was therefore subject to the general rule that tenants for life in possession are bound to meet the annual charges upon the estate so that they may not become a charge against those entitled in remainder. Jonas v. Hunt, *supra*.

Where apartments in a dwelling house in New York city were given to a widow in assignment of dower the remainder of the house being in the possession of the heir at law and, in order to relieve her share of the premises from a sale for nonpayment of taxes, and to prevent the accumulation of a percentage as a penalty for nonpayment, she paid the whole of the amount due, it was held she was entitled to recover the same or a proportion thereof from the heir at law with interest from the time of payment. Graham v. Dunigan, 2 Bosw. 516.

In the above case it was held that the taxes and assessments ought to be equitably apportioned between the widow and the heir, although such an apportionment could not be made in a manner which would entitle either party to pay a portion thereof and discharge his part of the premises from the charge or encumbrance.

As between the widow, who is tenant in dower, and the heirs, assessments which relate to and benefit the fee are to be borne by the heirs, and the widow is not to be chargeable with them, but she must bear one third of the interest of the capital of the assessments on the property assigned to her for dower, to commence from the time the assessments were confirmed and became a charge, provided that such confirmation and charge were subsequent to the widow's death. Williams v. Cox, 3 Edw. Ch. 178.

It has been held that the 27th section of the Illinois dower act, which declares that the widow may in all cases retain the full possession of the dwelling house in which her husband must usually dwell next before his death, together with the outhouses and plantation thereto belonging, free from molestation and rent until her dower is assigned, is plain and will not admit of construction, and extends to the entire plantation, and that therefore the widow, being entitled as tenant for life in dower

by deed. This case was decided in 1826. The case of *Bryan* v. *Hyre*, 1 Rob. (Va.) 102, 39 Am. Dec. 246, decided in 1842, affirmed a case where the trial judge had instructed the jury that a disclaimer of a devise must be in writing. This is based upon the rule laid down in Coke upon Littleton,—that where a devisee enters the freehold is in him before he enters, and in that case the heir takes nothing. Co. Litt. 111*a*. The case of *Townson* v. *Tickell* was cited, but it does not decide the point, for there the disclaimer was in writing. The decision really rests upon *Doe, Smyth*, v. *Smyth*, 6 Barn. & C. 112, which, as has been shown, did not pass upon the question. Indeed, that case (*i. e. Doe, Smyth*, v. *Smyth*) seems to have overlooked the earlier case of *Townson* v. *Tickell*, 3 Barn. & Ald. 31, decided in 1819. The Virginia case mentions it to disapprove the opinion of Holroyd, J., where he says: "I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent, until the contrary be proved; when the contrary, however, is proved, it shows that he never did assent to the devise, and, consequently that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to show that he did not assent to the devise. Unless some strong authority were shown to that effect, I cannot think that the law requires either of these forms. I am confirmed in that opinion by the case of *Bonifaut* v. *Greenfield*, 1 Leon. 60, Cro. Eliz. pt. 1, p. 80." In that case the renunciation was by deed, and it was claimed that was insufficient, and that a disclaimer in a court of record was necessary. All of the judges agreed that the disclaimer by deed was good, and the *dictum* contained in the opinion of Holroyd was apparently approved by the other justices. So far, then, we have *dictum* against *dictum*, in the English cases, with the Virginia case holding a writing necessary. The question was up in Massachusetts in the same year that *Doe, Smyth*, v. *Smyth* was decided (*i. e.* 1826). *Stebbins* v. *Lathrop*, 4 Pick. 43. It was there held that nothing short of an express renunciation could be taken notice of by a court of probate. The court said: "Nothing appears amounting to a renunciation. But, if this were doubtful the question is not to be settled in the court of probate. The respondent has a right to be heard on this point in a court of law, and he cannot be so heard if the grant of probate should be revoked. The most that appears at present is an intention to renounce, and even this is not very clear. It is possible that the intention was merely to impede the creditors in the collection of their debts. Until the legatees shall actually renounce their legacies, their assent to the provisions of the will which are apparently beneficial to them will be presumed. *Townson* v. *Tick-*

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to receive the rents and profits, is bound to pay the taxes during such time as she has the exclusive control and enjoyment thereof. Strawn v. Strawn, 50 Ill. 256.

The New York statutes (2 Rev. Stat. 491, § 18), declaring the effect of the admeasurement of dower and the recovery thereof, provide that the widow shall hold the same during her natural life subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession, and therefore such provision makes her liable for the taxes upon the premises assigned or admeasured to her. Bidwell v. Greenshield, 2 Abb. N. C. 431.

Under § 6 of 1 N. Y. Rev. Stat. 741, which provides for the dower of a widow in surplus moneys on foreclosure, the widow's dower interest is to be ascertained after deducting the costs and expenses of the proceedings, as well as the amount due on the mortgage. It was held that the taxes and assessments upon such real estate were not to be deducted in ascertaining the amount in which she was dowable. Taylor v. Bentley, 3 Redf. 34.

In Linden v. Graham, 34 Barb. 316, the plaintiff, who was entitled to the fee simple of the premises in question subject to a widow's right to dower, brought action under the New York statute of April 12, 1855, against the widow for the purpose of obtaining a due apportionment of taxes and assessments, and for an adjustment of the same, and sought a decree compelling the widow to pay her proportion of the same, and it was held the action would lie, the court stating that such action might even have been maintained in equity under the old system of practice.

Where the widow occupied the intestate's residence with his children, some of whom were of age, it was held that she was not chargeable with taxes accruing between her husband's death and the assignment of dower. Branson v. Yancy, 1 Dev. Eq. 77.

In the above case, however, there was a dissenting opinion, Justice Henderson holding her liable therefor.

A valid sale and conveyance of land for the nonpayment of taxes will, under the terms of the Ohio statute, bar even the right of a widow to dower. Jones v. Devore, 8 Ohio St. 430.

In ascertaining the net rents of a widow entitled to dower under the provisions of the Ohio statute, § 14 of the act of January 22, 1823, the expenses of reasonable repairs and taxes should be deducted from the gross rentals, but no reduction should be made on account of water rents or insurance. Hillgartner v. Gebhart, 25 Ohio St. 557.

IV. *Property taken in lieu of dower.*

Where the dividends and income of shares of bank stock were devised to a wife during her natural life, or so long as she remained a widow, in lieu of dower, with remainder over to the daughters of the testator who were also residuary legatees, it was held that the gift did not amount to an annuity but was one of the income, and that therefore the tenant for life was bound to pay the taxes upon the stock, she receiving the income thereof. Pearson v. Chace, 10 R. I. 455.

In Spangler v. York County, 13 Pa. 322, testator directed that his wife should have the interest of the dower fund, or a third part of the whole, which said interest should be paid to her annually during her natural life or widowhood, the dower fund to be invested on good real estate, the other two thirds of his real and personal estate to be equally divided among his children, and the question was whether the sum so put to interest for the widow's use was taxable for state and county purposes, and if so, by whom the tax was payable. The court held that such fund was so taxable, and that the taxes were payable out of the interest of the same.

ell, 3 Barn. & Ald. 31. If they should persist in the intention to renounce the estate, the probate of the will will not restrain them. And then the question will be fairly raised whether this can be done to the prejudice of creditors. This being the light in which we view this point, it will not be necessary to determine whether the acts of the devisees will in law amount to a renunciation. It is sufficient to justify the proceedings of the judge of probate in this particular that these acts, taken together,—especially the acts of Miner Stebbins,—are equivocal, and that nothing short of an express renunciation can be taken notice of in a court of probate. And there seems no good reason why the fact should not be verified by the record, when the parties are present and may renounce if they are so inclined. No doubt a devisee may disclaim by deed the estate devised, as was decided in the case of *Townson* v. *Tickell*, 3 Barn. & Ald. 31; and perhaps he may disclaim without being subjected to the expense and trouble of executing a deed, as Holroyd, J., seemed to think. But it does not follow that a court of probate shall receive evidence of such disclaimer, and most certainly not when the evidence relates to acts of a doubtful bearing. In the case of *Proctor* v. *Atkyns*, 1 Mass. 321, it was decided that a court of probate could not determine upon a claim set up by deed, because it was determinable exclusively at the common law. The same reason applies with force to the supposed disclaimer in this case." In *Webster* v. *Gilman*, 1 Story, C. C. 499, Fed. Cas. No. 17,335, the following appears: "It may be even doubtful whether under our laws any renunciation, or disclaimer, not by deed or matter of record, would be an extinguishment of the right of the devisee. But, at all events, it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation, or disclaimer which will prevent all future cavil, and operate in point of evidence as a quasi estoppel." Here, again, the question was not decided. The question was before the United States circuit court again in *Ex parte Fuller*, 2 Story, C. C. 330, Fed. Cas. No. 5,147, and again it was not passed upon. The court said: "As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the estate is devised absolutely, and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required, to establish his renunciation or disclaimer of it. Until that is done, *stabit presumptio pro veritate*. That is sufficiently shown by the case of *Townson* v. *Tickell*, 3 Barn. & Ald. 31, cited at the bar, and the still later case of *Doe, Smyth*, v. *Smyth*, 6 Barn. & C. 112. *Brown* v. *Wood*, 17 Mass. 68, and *Ward* v. *Fuller*, 15 Pick. 185, manifestly proceeded upon the same foundation. Now, in the present case, there is no pretense to say, that Ross has ever renounced or dis-

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So, in Harrison v. Peck, 56 Barb. 251, 265, certain lands were set apart by deed executed by the sole devisee and the dowress to the latter for dower, and the balance was released by her, and after a recital to the effect that the lands of which the decedent died seised were subject to certain unpaid taxes and assessments, the parties covenanted to pay "his or her fair equitable and legal proportion thereof." It was held that the widow was bound to pay her fair and equitable proportion of such unpaid taxes and assessments, even though the land was subject to the same at the time of her marriage, and that there was no proportion of such taxes for her to assume.

Where bonds were secured by mortgage, and represented the principal sum, which was payable with interest, the interest being payable to the widow in lieu of dower, the persons entitled in remainder being entitled to the principal fund and the widow to a life estate, it was held that the assessment and tax should be levied only upon the amount of interest which had become due and was unpaid upon the bonds and mortgage when, in contemplation of law, the assessment was made. State, Hill, v. Hansom, 36 N. J. L. 50.

Where one, in satisfaction of a widow's dower, mortgaged land on condition to pay her a given amount annually, it was held that the payment being annually secured by the land, it was liable for the tax in proportion as the land paid. Atwood v. Lamprey, 3 P. Wms. 127, note.

In Clarke v. Clarke, 8 Misc. 339, 342, a testator devised the use of his homestead to his wife during her life or widowhood, and also bequeathed an annuity in lieu of dower, giving the residue of his estate to an executor with power to sell and distribute it among his heirs in the same manner as though he had died intestate; and the testator directed that the taxes, repairs, necessary improvements and insurance should be paid out of his general estate without any charge upon the wife's annuity, with a proviso that if she rented the whole or any part of the homestead she should bear a proportion of such charges according to the part so rented, which sum should be retained out of the annuity. It was held, where the widow elected to occupy the premises and the whole balance of the estate became exhausted, that the testator's intention was to relieve the wife's estate from the taxes, and that the same was not, as between herself and the heirs, chargeable with the taxes assessed during the continuance of such life estate, even though the executor was without funds wherewith to pay the same.

V. *As between husband and wife.*

In Paul v. Fries, 18 Fla. 573, 586, it was held that under the Florida statute real estate was to be assessed in the name of the owner or occupant, and the statute giving the husband the care and management of his wife's property, the possession thereof by the family was the possession and occupancy of the husband, and that he was therefore rightly assessed as occupant, even though his wife lived with him.

Where an assessment was made upon the proprietors of adjoining land for the expenses incurred in the flagging and paving of the sidewalk, the proprietors being husband and wife, the husband a tenant for life, and the wife a tenant in fee simple, it was held that such assessment should be apportioned to each in proportion to the right of property, and the sum due from the tenant for life should be directed to be paid by him, while the amount due from the wife as tenant in fee simple should have been assessed on her. Williams v. Brace, 5 Conn. 190, 195.

In Vanderbeck v. Rochester, 122 N. Y. 285, Affirming 46 Hun, 87, action was brought to recover the sum paid as the amount of an assessment, less

claimed the estate devised to him. The statement of facts is, that he has done no act accepting or declining the devise. If so, then the presumption of law is, that he has, by implication, accepted it, since it gives him an unconditional fee." The case of *Ward* v. *Fuller*, 15 Pick. 185, went no further than to hold that a devisee before entry had a sufficient seisin to maintain a writ of right. In 4 Kent, Com. pp. 533, 534, it is said that "an estate vests, under a devise, on the death of the testator, before entry. But a devisee is not bound to accept of a devise to him *nolens volens*, and he may renounce the gift, by which act the estate will descend to the heir, or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act, and it is left undecided whether a verbal disclaimer will be sufficient. . . . And some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances." See also *Perry* v. *Hale*, 44 N. H. 364.

Form the foregoing, we conclude that an acceptance should be presumed in this case, which presumption may be overthrown by acts inconsistent with acceptance. The only evidence here is the purchase of tax titles, and procuring and recording tax deeds of the premises, and the conveyance, by full warranty deed, within two years after Betsey Casler's death, of the premises devised. The inference is strong that Henry Casler's design in obtaining the deeds was to acquire a better title than that conveyed by the will, either because of some inherent defect in the latter, or from a desire to obtain the fee. There is perhaps room for the suspicion that his mother, Betsey Casler, permitted this, as the plaintiff's counsel contends, or that Henry accomplished it without her knowledge, but in either case it tended to show a desire to obtain a better title than he then had. It does not necessarily follow that he was willing to disclaim a valid life estate for his chances under a tax title which, if invalid, might compel him to share his life estate with his brothers and sisters. Again, the testimony of the witness Bear that he found the land advertised in the paper, and bid it in, tends to show that the sale was not the result of collusion or fraud, and that Henry Casler obtained the tax title from Bear to protect his mother as well as himself. This testimony should not have been stricken out upon plaintiff's motion. If the son, Henry Casler, never accepted the devise, it is an end of the case upon this record, entitling the defendants to a verdict, inasmuch as the tax deeds are prima facie valid, and conveyed the fee.

But, if Henry Casler accepted the devise, it becomes necessary to inquire whether he can set up his tax deeds against the remaindermen. This is said to depend upon the question whether he owed a duty to them to pay the taxes, or preserve the estate for them, analogous to the duty which his mother owed to him and them. We have found no case upon all fours with this, and we doubt if it can be said that the law imposes any such duty upon the second life tenant, during the tenancy of his predecessor, but we think it

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credit allowed for damages for land taken, made upon real estate by plaintiff's husband in his lifetime, more than six years having elapsed since the payment of the assessment, with no steps taken to open and make available for the public use the street which was the basis of the assessment, plaintiff alleging, as the foundation of her right, a failure on the part of the defendant to return any consideration for the money paid. The facts showed that the assessment was valid when made, and also that the personal estate of the intestate was inadequate to pay the same, and that upon receipt of notice charging interest upon such assessment the plaintiff paid the same. It was held that she was not entitled to recover back the sum so paid, the assessment having been made prior to the intestate's death and was therefore payable out of his personal estate, and there was no legal obligation upon the plaintiff to pay, her only interest in the estate being that of dower, which interest was not in jeopardy, the payment on her part being merely voluntary, and although made under mistake of law was so done with a full knowledge of the facts and circumstances, there being no fraud or improper conduct.

VI. *Assignee of life tenant.*

In Prettyman v. Walston, 34 Ill. 175, 191, where a wife who was tenant for life in real estate assigned her life interest, it was held that such assignee was bound to pay the annual taxes.

The obligation of a tenant for life to pay his proportion of a special tax for work which enhances the value of the property in a substantial manner will not be released by a transfer of his life estate, where such tax is levied during his tenancy and is payable prior to the date of such transfer. Bobb v. Wolff, 54 Mo. App. 515.

A purchaser at a sale under a judgment of a life estate takes it *cum onere* and must devote the rents and profits to the payment of the taxes due before the purchase as well as to subsequent taxes. Murch v. J. O. Smith Mfg. Co. 47 N. J. Eq. 193.

VII. *Duty in case of dispute.*

If a tenant for life disputes the legality of the taxes assessed upon the property, he should notify the reversioner of the fact in order that he may be indemnified against loss in case payment is resisted. Stetson v. Day, 51 Me. 434.

VIII. *Decisions under state statutes.*

The Revised Statutes of Kentucky have not changed the law as it existed before their adoption, and therefore a tenant for life is bound to pay the taxes assessed upon the property. Johnson v. Smith, 5 Bush, 102.

Under 2 Ky. Rev. Stat. chap. 83, art. 5, § 2, p. 250, which provides that all estates real and personal, and all interests in such estates, named and specified in the tax book, shall be assessed for taxation, and the tax paid by the owner or possessor thereof to the person authorized by law to receive the same, the person entitled to and owning the life estate in possession must pay the taxes on the fair value of such land, without reference to whether he owned the fee or only a life estate. Arnold v. Smith, 3 Bush, 163.

N. Y. Laws 1841, chap. 341, and Laws 1854, chap. 391, make provision for carrying out the rule of law which charges an outstanding life estate with an equitable apportionment of assessments for local improvements which are of permanent benefit to the property. *Re* Miller, Tucker, 346, 348; Fleet v. Dorland, 11 How. Pr. 489.

As to taxes and assessments, if the parties will not

does not necessarily turn upon a duty to pay. While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remaindermen, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave him an estate, thereby recognizing their right. Good faith towards the testator should forbid such an attempt to defeat his purpose. Were this claim to be sustained, it would make it easy for two life tenants, by collusion, to defeat the remaindermen, under circumstances like these. It may be said that this could be done by the mere disclaimer, but this is a mistake. See How. Anno. Stat. § 5548. We are cited to *Blackwood* v. *Van Vleit*, 30 Mich. 118, and *Sands* v. *Davis*, 40 Mich. 14, to sustain the claim that Henry Casler was under no disability as a claimant of the fee under the tax deed. The former was a case where one who went into possession before the tax levy was held not to be precluded from making and relying upon a purchase of land at tax sale. In *Sands* v. *Davis* the question arose between tenants in common. In that case one bought a tax title that was outstanding at the time of the purchase of his interest in the premises, and therefore which he owed no duty to the state or his cotenants to pay, and it was held that he might set up such title against his cotenants. Both of these cases recognize the proposition that one asserting a tax title may be under a disability, owing to his relations to others claiming interests in the land. In *Blackwood* v. *Van Vleit* it is said: "It was not claimed in the case, so far as the record shows, that there were contract or other relations between Blackwood and Van Vleit that would preclude the latter from buying the former's land for delinquent taxes." In *Sands* v. *Davis*, Campbell, Ch. J., uses the following language: "If Sands had gone into possession by the aid of the other tenants, or in recognition of their rights, he might in that way, perhaps, have incurred some duties towards them. But he went in as a stranger to their claims under a claim which denied their existence or validity. He became liable to an action of ejectment the moment he assumed possession. We see, therefore, no reason why he could not then or thereafter, as well as he could have done it before, purchase a title which was at that time adverse to the holders of the whole original title. . . . The case of *Blackwood* v. *Van Vleit*, 30 Mich. 118, holds in conformity with these views that there can be no estoppel against purchasing tax titles except against one who had a duty to pay the tax or remove the burden." There is abundant authority that a tenant in common, whose duty it is to pay a portion of the taxes, cannot acquire a title, as against his cotenant, by purchase at a tax sale for the entire tax. *Dubois* v. *Campau*, 24 Mich. 360, and notes. 1 Wood, Land. & T. § 54, says: "In the absence of any reservation of rent, or

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voluntarily contribute their shares, the New York act of 1841 makes provision for the case, and authorizes a bill to be filed by any person interested in the estate, to compel a just and equitable apportionment, and to order a sale of any part or parts in fee to pay the tax or assessment, and to adjust the equities of the parties according to their estates and interests. Fleet v. Dorland, *supra*.

In North Carolina, by Rev. Stat. chap. 102, § 2, all real estate held by deed, grant, or lease, or by title of dower, curtesy, or otherwise, is subject to the payment of public taxes, except land of the University, and houses set apart for divine worship; and it has been held that under this statute real estate is to be taxed according to its fee-simple value, and whoever is owner of the land for the time being is bound to pay the tax, and therefore one entitled to a life estate therein must pay the same during the continuance of his tenancy. Willard v. Blount, 11 Ired. L. 624.

Section 76 of the Ohio Tax Laws of 1859 (2 Swan & C. 1464) gives the right to the reversioner to forfeit the life estate, whether held by curtesy or as dower, where the tenant neglects to pay the taxes for so long that the land shall be sold for nonpayment, unless the same is redeemed within one year from the time of sale, and the reversioner may redeem the lands in the same manner as other lands may be redeemed in other cases of sale for taxes; but it was held that such right was only an inchoate one until decreed by a court having full jurisdiction. Johnson v. Pettit, 1 Cin. Sup. Ct. Rep. 25.

Under the provisions of R. I. Pub. Stat. chap. 42, §§ 4, 6, and chap. 44, §§ 8, 10, 12, it was the intention of the general assembly that the tenant for life who enjoys the use and income of the property should pay the ordinary taxes on it during the continuance of his estate, and that if he neglects to pay them his life estate shall be sold for their payment before any resort is had to the reversion or remainder. Weaver v. Arnold, 15 R. I. 53, 55.

Section 561 of the Tennessee Code provides that the person who is the owner of real estate on a given date in any year shall be bound to pay the taxes assessed thereon for that year, and in the case of Anderson v. Hensley, 8 Heisk. 834, the question as to whether the widow or the devisees were bound to pay the taxes depended upon the question of the ownership of real estate, and the widow, being in possession, was decreed to pay the same.

In Webb v. Burlington, 28 Vt. 188, it was held that, under Vt. Comp. Stat. chap. 80, § 15, property which was bequeathed to and held upon trust as to the interest or income for the benefit of one for life, and after her decease the principal to go to the testator's heirs at law, was assessable to the tenant for life, who was entitled to the income.

If one is entitled to the income and another to the ultimate inheritance or bequest of the principal, without its turning again into the mass of the estate, the purport of the legislature under Vt. Comp. Stat. chap. 80, § 15, ¶ 5, is to make the assessment upon the present usufruct. *Ibid.*

IX. *Devisee for life.*

The general doctrine that a tenant for life is bound to pay the taxes accruing during his tenancy applies to one who is a devisee for life, where the will contains no provision to the contrary. Waldo v. Cummings, 45 Ill. 421, 425.

And the rule is well settled, even though the life estate is created by a will, unless the language of the will is so explicit as to require these burdens or some part of them to be paid out of the *corpus* of

other provision in the lease or conveyance providing therefor, a tenant for life as between himself and the reversioner is bound to pay the taxes assessed upon the premises, and if he fails to do so, and they are sold therefor, and the tenant becomes the purchaser, he cannot claim a title in fee against the reversioner." See also *Cairns* v. *Chabert*, 3 Edw. Ch. 312; *Smith* v. *Blindbury*, 66 Mich. 323; *Patrick* v. *Sherwood*, 4 Blatchf. 112, Fed. Cas. No. 10,804; *McMillan* v. *Robbins*, 5 Ohio, 28; *Pike* v. *Wassell*, 94 U. S. 711, 24 L. ed. 307; *Sidenberg* v. *Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Varney* v. *Stevens*, 22 Me. 331; *Prettyman* v. *Walston*, 34 Ill. 175; *Hitner* v. *Ege*, 23 Pa. 305. Some of these cases hold that where the life tenant is compelled to make permanent betterments, or to pay off encumbrances to prevent a forfeiture, he may enforce contribution against the remaindermen, to the extent of their interest in the land. *Cairns* v. *Chabert*, 3 Edw. Ch. 312; *Foster* v. *Hilliard*, 1 Story, C. C. 77, Fed. Cas. No. 4,972; *Daviess* v. *Myers*, 13 B. Mon. 512; *Bell* v. *New York*, 10 Paige, 49; *Eastabrook* v. *Hapgood*, 10 Mass. 313; *Atkins* v. *Kron*, 8 Ired. Eq. 1.

Thus it appears that while the life tenant in possession may be under no legal obligation to pay an encumbrance, and therefore owes no duty to the remainderman, if to prevent a forfeiture of his estate he does pay it, he has a claim against the interest of the remainderman. Either party may buy in the encumbrance, but cannot hold it to the exclusion of the other, who is willing to contribute his share to the amount paid for the purchase. See cases cited, and *Connecticut Mut. L. Ins. Co.* v. *Bulte*, 45 Mich. 122; *Whitney* v. *Salter*, 36 Minn. 103. In this case it was not clear that any portion of the encumbrance was chargeable to the life tenant, yet it was said that he should be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman,—citing 1 Washb. Real Prop. 96; Bisset, Estates for Life, 26; Law Lib. 248; Cooley, Taxn. 2d ed. 500-509. We see no reason why this doctrine should not apply equally to the devisee of a life estate not in possession, and can see no difference in principle. And we think the rule as applicable to taxes as to any other encumbrance. Therefore we think the right to assert these deeds against the remaindermen hinges on the acceptance or renunciation by Henry Casler of the devise.

Counsel for defendants attack plaintiff's

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the estate. Wilson v. White, 133 Ind. 614, 19 L. R. A. 581; Smith v. Blindbury, 66 Mich. 319.

And the rule exists unless the life tenant voluntarily pays them out of other funds. ST. PAUL TRUST CO. v. MINTZER.

In the case of a tenant for life of lands, it is the duty of the trustees to see that the equitable tenant for life, in rightful possession, pays all taxes and rates. Holcombe v. Holcombe, 29 N. J. Eq. 597.

Unless it appears by the will of a testator that in creating a life estate the taxes should be paid out of his estate, the same must be paid out of the rents and profits by the tenant for life. Clarke v. Clarke, 8 Misc. 339, 342.

A widow, as executrix, cannot pay out of the principal of the estate the interest on mortgages, encumbrances, or taxes upon real estate devised to her for life. Jewell's Estate, 1 W. N. C. 404.

So, a widow, who is equitable tenant for life must pay the taxes. Cadmus v. Combes, 37 N. J. Eq. 264, 266.

Taxes due at the time of the death of a testator should be paid out of his personal estate, but taxes subsequently accruing are chargeable upon the lands and follow the same into the hands of the life tenant. Griswold v. Griswold, 4 Bradf. 216.

In order that an exception may be shown to the general rule there must be a fair, clear provision contained in the will creating the life estate, which exempts the property from the payment of such taxes. Lawrence v. Holden, 3 Bradf. 142.

There must be some express provision contained in the will showing that it was the purpose and intention of the testator to cast the burden of taxation as regards such life estate upon the trust estate, and not upon the life tenant. De Witt v. Cooper, 18 Hun, 67.

In Garland v. Garland, 73 Me. 97, it was held that the duty of the tenant for life to pay the taxes was entirely independent of a condition imposed by the testator, which called for the payment of a certain sum annually to his estate, in order to entitle the devisee to retain the possession during his life, the testator saying nothing which exempted the tenant for life from the performance of the duty to pay taxes.

Where a testator gave to his brother a life estate upon condition that he should pay annually, to those lawfully representing his estate, the legal interest on a specific sum, it was held that this imposed upon such life tenant the payment of the taxes while in possession of the estate, according to the maxim *Transit terra cum onere; qui sentit commodum sentire debet et onus. Ibid.*

And where the devise contained the words "free and clear of all encumbrances," it was held that such words were connected with the devise, and with the mode of enjoyment, and did not excuse the life tenant from payment thereof. Lawrence v. Holden, *supra*.

So, in Lansing v. Lansing, 45 Barb. 182, 189, it was held that a fund directed by a testator to be invested in real-estate securities for the benefit of one for life, with a direction to reinvest the interest during minority, the income, being given without any particular amount being specified, was chargeable with commissions and taxes.

Again, in Sidenberg v. Ely, 90 N. Y. 257, 43 Am. Rep. 163, where a mortgagor devised the mortgaged premises to one for life with remainder over, and it was held that the burden of paying such taxes was cast upon the tenant for life, as well after payment by the mortgagee as before, and that the same were chargeable against his interest in any surplus remaining after foreclosure.

In De Witt v. Cooper, *supra*, the use of two pieces of real estate was devised to a tenant for life, dependent upon her election to occupy them, and it was held that, having elected to occupy, and accepted the use of the property, the burden of ordinary taxation and needful repairs fell upon such tenant for life.

But where a testator devised real estate, subject to the payment of an annuity, to his daughter for life, with remainder to her issue, and prior to his death such estate had been assessed for taxes and the assessment roll delivered for the purpose of ascertaining the amount, it was held that such taxes were properly paid by his executors out of his estate, and were not chargeable as against the income and rents and profits coming to the tenant for life out of such property, such taxes, being fixed prior

title, claiming that the quitclaim deeds given by the heirs of Henry Casler before his death conveyed no interest, for the reason that there "are no heirs to the living." But the statute is a sufficient answer. The remainder was a future estate, which the statute (How. Anno. Stat. § 5551) declares to be descendible, devisable, and alienable in the same manner as estates in possession.

Counsel also contend that the devise is void under How. Anno. Stat. § 5531, which reads as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section." We think that statute has no application, for the power of alienation was suspended for the period of two lives in being only, *viz.*, Betsey Casler and Henry Casler. See also § 5535.

Plaintiff's title is also attacked upon the ground of want of jurisdiction in the probate court to admit the will to probate, but we think this question is foreclosed by the stipulation that said will was duly probated, etc.

There is a further question in the case which is discussed by counsel for the defendants. There is nothing to show that the will was ever recorded, while the tax deeds were promptly placed upon record. The latter fact has significance upon the subject of renunciation, because, if Henry Casler was claiming under the will, there was no occasion for his recording such deeds. Again, the defendants are not shown to have had any actual or constructive notice of the will, or the rights of any of the parties under it. He was therefore apparently a bona fide purchaser, relying upon the record of the tax deeds, which was the only title appearing of record in Henry Casler.

As foreshadowed, our conclusion is that it was a question for the jury to determine, whether Henry Casler accepted or renounced the devise, and that it was error to direct a verdict for the plaintiff.

The judgment will be reversed, and a new trial ordered.

Long, Ch. J., and **Grant** and **Moore**, JJ., concurred. **Montgomery**, J., concurred in the result.

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to his decease becoming debts the payment of which were chargeable upon his estate, the same being within the provisions of 1 N. Y. Rev. Stat. 389, § 1, and Laws 1882, 410, § 814. *Re* Babcock, 115 N. Y. 450.

In Plympton v. Boston Dispensary, 106 Mass. 544, 547, real estate was devised in trust to pay three fifths of the income to a daughter and two fifths to charitable purposes, during her life, and on her death the capital was to go to the corporation, the will containing a proviso enabling the daughter to live in a dwelling house upon the premises at a specified low rent against her share of income. An assessment was made upon the dwelling house during such occupation for a betterment occasioned by a public improvement, and it was held that the trustee should pay the assessment out of the capital during the life of the daughter if she lived in the house so long, charging her with interest on the amount paid, distributing such interest between the daughter and the corporation by allowing her to retain the three fifths, collecting and paying the corporation the two fifths.

X. *Devise of income.*

The same reasons for the rule do not always exist as to a life interest in personalty, that do in a life estate in realty. Wilson v. White, 133 Ind. 614, 19 L. R. A. 581.

The same rule is, however, applied to an investment by an executor under the directions of a will for the benefit of another for life; and so long as the life tenant enjoys the entire produce of the fund, he should be required to keep down the taxes upon it, otherwise the fund would become impaired, and the entire burden thrown upon those who take the fund at the death of the life tenant. Holcombe v. Holcome, 29 N. J. Eq. 597.

It is settled in New Jersey that a life tenant who has the use of a fund must pay the taxes assessed against that fund, his or her liability being limited to the income received. *Re* Tuttle, 49 N. J. Eq. 259.

So, in the case of a bequest of the income of a fund, the general rule is that the taxes on the fund and the expenses of the trust must be paid out of the income. *Re* Shipman, 82 Hun, 108.

And in order to construe the terms and provisions of a will so as to render the capital of a trust fund liable for the payment of taxes, the will must show an unmistakable import pointing unequivocally in that direction so as to free the income in the hands of a tenant for life from the payment thereof. *Ibid.*

In the case of a bequest of the income of real estate "after payment of taxes," it was held that assessments were not to be deducted from the income. Bohde v. Bruner, 2 Redf. 333.

No taxes or expenses of the trust can be recovered against the income of a sum given to a legatee for life to be used and enjoyed by her as her absolute property, so long as the estate is not closed, but remains in the hands of an administrator. Wilson v. White, *supra*.

Where the gift was not of a specific annuity without charge, but a bequest of a given sum, it was held that the income must be charged with the reasonable expenses of the trust, and the taxes on the principal sum. Clark v. Foster, 8 Met. 568.

But a holder of an annuity can only be taxed on the sum actually due and payable at the time of the assessment. State, Howell, v. Cornell, 31 N. J. L. 374.

In Dorr v. Boston, 6 Gray, 131, the question was whether the plaintiff was legally taxable for shares in the stock of the corporation established in the state of New York and other places, or for the income of those shares, the legal title to which was vested in trustees residing in New York, and held by them "in trust to pay over the income, dividends, or interests" thereon to her, and the court held that under chap. 7, Mass. Rev. Stat., the plaintiff, an unmarried woman, and an inhabitant of the state, was not so taxable.

Where a fund is held in trust for one for life with remainder to another, and a part of such fund is lost by reason of the insecurity of a particular investment, the loss is to be apportioned between the tenant for life and the remainderman, in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security was realized. In such a case taxes assessed against the security while it is held pending realization upon it must be charged against and paid out of the amount apportioned to the life tenant. *Re* Tuttle, 49 N. J. Eq. 259.

In Currie v. Gould, 2 Madd. 163, where the agent of an executor paid interest on a legacy for seven-

MINNESOTA SUPREME COURT.

ST. PAUL TRUST COMPANY, Admr., etc., of W. L. Mintzer, Deceased, *Appt.*,
v.
Anna R. MINTZER, *Respt.*

(.....Minn.....)

***The life tenant in a homestead estate neglected and refused to pay taxes** or make repairs thereon for many years, and to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having the power so to do by the express terms of the will. *Held*, that such administrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to pay the taxes and necessary expense of repairs and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or necessary expense for repairs necessarily made to save the property; and that, if such rental is insufficient, the receiver may, under authority and direction of the trial court, proceed to sell the life estate of the defendant, in the premises, or so much thereof as may be sufficient for such purpose.

(June 16, 1896.)

APPEAL by plaintiff from an order of the District Court for Ramsey County sustaining a demurrer to a bill filed for an accounting by defendant an injunction to prevent her interference with property, and a receiver to take charge of it and collect the rents and profits and pay a claim which plaintiff held against her. *Reversed.*

The facts are stated in the opinion.

Mr. **Harvey Officer** for appellant.

Messrs. **Stevens, O'Brien, Cole, & Albrecht,** for respondent:

The right of action is given to "any person injured by the waste. But §§ 5879, and 5889 alone show that within the provision of the statute the person injured is the reversioner or remainderman. But the party injured or aggrieved must have an interest in the estate and that interest must be that of a reversioner or remainderman.

Peterson v. *Clark*, 15 Johns. 206; *Perrine* v. *Marsden*, 34 Cal. 17; 6 Wait, Act. & Def. 251; Bliss, Code Pl. ¶ 33; 3 Bl. Com. ¶ 223.

The word "was'e" as used in the Minnesota statute is undoubtedly used "in its strict technical sense, and signifies an act which amounted to waste at common law, where a privity of estate existed."

Lander v. *Hall*, 69 Wis. 326.

The Minnesota statute does not define waste, therefore resort must be had to the common law.

Benson v. *State*, 5 Minn. 19.

Appellant has no estate in remainder or reversion.

Respondent has an absolute unconditional estate for life.

McCarthy v. *Van Der Mey*, 42 Minn. 193; *Mintzner* v. *St. Paul Trust Co.* 45 Minn. 323.

Appellant has no title to, or interest in, the real estate.

Wilson v. *Proctor*, 28 Minn. 16; *Noon* v.

*Headnote by BUCK, J.

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teen years without deducting property tax, it was held he could not afterwards deduct out of the future interest the amount of the property tax on such precedent payments.

In Hepburn v. Hepburn, 2 Bradf. 74, testator gave the whole of his estate, real and personal, to two persons for life with remainder in fee to the issue of one, and, in case of his decease without issue, then over, authorizing his executors to take charge of and rent his real estate and invest the personalty and pay the whole income to the life tenants. It was held that the income was liable to the payment of all ordinary taxes and assessments, and that the balance should be paid to the tenant for life.

Where property was held in trust to pay the income to one for life with remainder over, and it was taxed to the executors on a given date, and the tenant for life died within a year and before the tax was paid, it was held that it could not be apportioned by the executors between the estate of the tenant for life and the remaindermen, but was wholly chargeable upon the former's estate or the income had therefrom. Holmes v. Taber, 9 Allen, 246.

In Whitson v. Whitson, 53 N. Y. 479, testator gave and bequeathed to his wife a life use of a certain sum of money, directing his executors to semiannually pay to her the lawful interest thereof, and after her decease, directed such sum to descend to his heirs by such wife, and, the executors having paid the taxes on such sum out of the interest received by them, and paid the balance to the widow, the latter claimed the whole of the interest without a deduction for such taxes. The court held that such taxes were a charge upon such income, and ought not to be paid out of the estate, the bequest being of the income and not by way of annuity.

Where the trustees assumed the trusts of a will and permitted the daughter, according to its terms, to occupy the premises either personally or by tenants who paid her rent, the trustees paying the taxes and insurance upon such premises out of the income of the residuary fund, which was devised to the trustees upon trust, after deducting all necessary taxes, as therein declared for a period of twenty three years, rendering annual accounts therefor which were approved, but a subsequent account being disapproved of by the younger son of the testator upon the ground that the payments were a misapplication of the income derived from such residuary estate, such son applying for an injunction to restrain such application of income and to recover one third of the amounts so previously paid by them,—the court held that such taxes on the premises so occupied by the daughter ought to be paid from the rents and profits derived therefrom, and could not be charged upon the residuary fund or the income thereof, but the court refused to allow the previous accounts of the trustees, which had been approved, to be opened. Amory v. Lowell, 104 Mass. 265.

In *Re* Bailey, 13 R. I. 543, 560, the testator gave the residue of his estate to trustees in trust to set apart and invest a specific amount, and to accumulate the income, subject to a life annuity, until a grandson arrived at the age of twenty-one, when the same with the income of the accumulations was to be paid to him for life, with various remainders over, and the question was whether such specific

Finnegan, 29 Minn. 420; *Hill* v. *Townley*, 45 Minn. 167.

The will does not give the executor an estate in reversion or remainder.

Preston v. *Smith*, 26 Fed. Rep. 888; *Schauber* v. *Jackson, Bogert*, 2 Wend. 33; *Taylor* v. *Benham*, 46 U. S. 5 How. 269, 12 L. ed. 147.

The interests of the trustees cannot be broader than the duties imposed.

Farmers' Nat. Bank v. *Moran*, 30 Minn. 165.

It is no concern of the personal representation in the absence of creditors what use the wife makes of the property in her lifetime.

Sutphen v. *Ellis*, 35 Mich. 449; *Page* v. *Davidson*, 22 Ill. 112.

A creditor, even with a specific lien upon land, cannot and never could bring an action of waste.

Tiedeman, Real Prop. ¶ 351; 2 Washb. Real Prop. 5th ed. 139.

Buck, J., delivered the opinion of the court:

William L. Mintzer died on the 23d day of February, 1883, at the city of St. Paul, Minn., leaving a will, which was duly probated, and one John Jones, one of the executors named in the will, duly qualified as such, and entered upon the discharge of his duties, but he died about the 4th day of May, 1886, leaving the will unexecuted, and on or about June 11, 1886, this plaintiff was duly appointed by the probate court of Ramsey county as administrator *de bonis non* with the will annexed, and duly qualified and entered upon the discharge of its duties, and ever since has been, and now is, acting as such administrator. Mintzer left surviving him a widow, but no issue. The will has been so far executed that all the just debts and demands existing against him at the time of his death have been paid in full, and all specific legacies of money or personal property and all lawful devises of specific real estate have been paid and satisfied in full, save and except that the tenth subdivision of the will has not been executed. The tenth subdivision reads as follows: "All the rest, residue, and remainder of my estate I give, bequeath, and devise as follows: I direct my executors to take charge of the same, collecting the rents, paying all taxes, assessments, and charges thereon, and to make report of all their doings to the probate court of Ramsey county, Minnesota, at least once a year. The balance in their hands, if anything shall remain of said rents after paying the charges aforesaid, shall be distributed to the persons entitled to the real estate as hereinafter provided. I wish this to continue during the life of my nephew, William Mintzer, son of George Mintzer, and the life of George A. Hicks, provided, however, that at the expiration of ten years from my death, if either or both of said parties, William Mintzer and George A. Hicks, should be living, nevertheless the property may be sold by the executor or their successors, and the proceeds divided among my nephews and nieces hereinabove named, *viz.*, Sarah Mintzer, daughter of Adam Mintzer (married to one Clough), George, Charles, Fred, John, Amelia, Josephine, Maggie, Charles, Charles Titus, Dr. William Titus, Almira Egbert, and the children of Adam Snyder one share, except and provided that I wish one lot in Dunwell & Spencer's addition to West St. Paul to be given and conveyed to Charles Flynn, aforesaid, his heirs and assigns; the

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fund was chargeable with taxes. The court held that the same should, until actually set apart, share with the other trusts the income and taxes of the estate, and that as to the personalty of the residue, out of its income should be paid the taxes on the personalty.

Where the interest of personal estate was given to a daughter during her natural life, at her decease the principal to be equally divided among her children, the executors being residuary devisees and legatees, it was held that the testator's intention was to give the daughter a definite annual sum equal to the lawful interest on the amount specified, and that therefore under Mass. Stat. Feb. 28, 1831, § 2, which provides that persons entitled to the income of any personal property held by others in trust for themselves, or for a particular and special use of their wives, shall be taxed for the principal or capital sum, as there was no capital or principal sum given by such bequest, owned legally or equitably by or held in trust or otherwise for the testator's daughter, she was not liable to taxation under the statute, and that the investment of the money made by the executors with the consent of the daughter in trust to pay her the income had no effect upon her rights in regard to taxation under such statute. Swett v. Boston, 18 Pick. 123.

XI. *Devise to widow.*

A widow who takes as devisee in real estate for life is bound to pay one third of the taxes, the estate being chargeable with the other two thirds. Cochran v. Cochran, 2 Desauss. Eq. 521.

If a widow takes a freehold estate under a will as tenant for life she is bound to keep down the taxes. Anderson v. Hensley, 8 Heisk. 834; Whyte v. Nashville, 2 Swan, 364.

So, if she takes as equitable tenant for life she must keep down the taxes. Cadmus v. Combes, 37 N. J. Eq. 264, 266.

Where the will is silent as to the payment of taxes the widow must bear the tax out of the income. Hoff's Appeal, 24 Pa. 200, where the devise to the widow of the interest on a specific sum of stock was held not to be a specific devise of the stock, but only of the interest thereon.

In Waldo v. Cummings, 45 Ill. 421, 425, one third of testator's real estate was devised to his widow during her natural life, with remainder in trust for his children, with a proviso that in case his children should cause their share to be sold for taxes, and the same should not be redeemed, they should forfeit their title to the unredeemed portion. The court held that the language of the will did not prevent the application of the general doctrine which imposed upon the tenant for life the duty of paying taxes, and that therefore the widow was bound to keep down the taxes during the continuance of her estate.

Where a testator bequeathed to his widow the income of a certain sum annually, that sum to be put at interest by the executor and to be equally divided among the children after her decease, it was held that he intended that there should be that sum left at the decease of his widow, and that therefore the income to be given to her would be the net income after deducting the taxes and other expenses. Arnold v. Mower, 49 Me. 561.

In Cadmus v. Combes, *supra*, the income of real estate and personal property was devised to a wife

selection of the lot to be left to my executors, but I request them to give him one of the best." The ten-years' limitation provided for in the will for the division and distribution of the estate expired on February 23, 1893, at which time the plaintiff fully accounted to the probate court for all business and transactions performed by it in behalf of the estate, and said court, on the 13th day of March, 1893, by its decree and judgment duly made and entered in the matter of said estate, duly decreed and adjudged that there was then due and owing to this plaintiff, as such administrator, for taxes, assessments, and other lawful charges, disbursements, and expenses of administration a balance and sum of $16,750.69 over and above all moneys by it then had and received. There was no money or personal property belonging to said estate wherewith the said balance due this administrator could be paid and the devisees and legatees under said will, including this defendant, failed, neglected, and refused to pay said balance, or any part thereof, and by reason thereof no final decree assigning and awarding the said estate to the persons entitled thereto was made, or could be lawfully made, in the matter of said estate in said probate court. By reason of the nonpayment to plaintiff of such balance, it was necessarily compelled, against its wishes, to exercise the duties as such administrator, and upon a subsequent accounting in said probate court it was decreed and adjudged that there was due upon said estate to this plaintiff, as such administrator, the sum of $20,143.02, and that there was not, and is not now, any money or personal property belonging to said estate in the hands of this administrator, and that there is no real property belonging to said estate except one small house or shanty, the rents whereof were and are nominal, and do not exceed the sum of $60 per annum, and except the homestead tract, which consists of 30 acres and $\frac{36}{100}$ of an acre, particularly described in the plaintiff's complaint, and of which the testator died seised in fee, and at which time there were valuable tenements, improvements, fences, and buildings, to wit, a dwelling house, barn, and outhouses thereon, and which premises, prior to the time of his decease, were occupied by the testator and his wife as a homestead, and which premises the defendant, as the widow of the testator, continued to hold as a homestead until about the 10th day of March, 1891, at which time she removed from said homestead to another dwelling house in the county of Ramsey, where she has ever since continuously resided, and occupied the same as her homestead, having rented her first-described homestead to tenants not members of her family, and received the rents and income therefrom, but has wholly failed and neglected to pay the taxes assessed thereon, amounting to the sum of $2,507.04, for the years 1885 to 1890, inclusive, which plaintiff, as such administrator, was compelled to pay to save said homestead from tax sale for taxes, penalties, costs, charges, and expenses; said taxes having been so paid also under the order and authority of the probate court of Ramsey county, and at the request of the reversioners. The unpaid taxes, costs, and penalties upon said homestead now due for the years 1891 to 1894, inclusive, amount to $2,221.91, which have not been paid by this plaintiff for want of funds. The defendant has also, ever since she became entitled to the right and use of said premises as a homestead, refused and ne-

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for life with power to the executors at their discretion to sell the real estate or any part of it. It was held that the personal estate was liable to the payment of the taxes upon the real estate no portion of which could be sold for that purpose.

In Sillcocks v. Sillcocks, 50 N. J. Eq. 25, the residue of the estate was given to a widow "for the full term of her natural life" and at the termination of such estate three specific legacies were given out of the sale, the will providing, "and all the rest and residue of my estate then remaining, that is after the death of my said wife, I give in three equal parts and shares," it was held that the wife, who held possession of the premises, was liable to pay the annual municipal taxes assessed upon it.

Where a testator gave to his wife the use and income of certain real and personal estate, and also the interest of a certain sum of money to be invested on a bond and mortgage, it was held that the taxes, expenses, and commissions were not chargeable upon the estate generally, but that the bequest must bear its own burden, and she was therefore chargeable with the taxes, which were to be paid out of her income. Pinckney v. Pinckney, 1 Bradf. 269.

In Stillwell v. Doughty, 2 Bradf. 311, a widow was entitled to the clear income of real estate, and the assessment was levied thereon for permanent improvements. It was held that the annual interest on the improvements was to be borne by the tenant for life, but that the principal was properly charged against the remainderman.

In the case of a devise to a wife "free and clear of all encumbrances," the will containing a direction for the sale of the property in case the wife desired it, and that the proceeds should be invested, giving her the interest and dividends thereof for life, it was held that the current taxes and assessments were not chargeable upon the testator's general estate. Lawrence v. Holden, 3 Bradf. 142.

Where the words used in the will were merely "free from the debts, interference, or control of any other person whatever," it was held that it only meant that it was the income after payment of the proper charges, which was to be paid to the widow for her separate use, and therefore the phraseology of the will could not be taken to change or affect the ordinary rule of apportionment of assessments for local improvements, which were of a permanent benefit to the property. *Re* Miller, Tucker, 346, 348.

In Deraismes v. Deraismes, 72 N. Y. 154, the testater devised to his wife a farm together with a dwelling house and buildings thereon, and all his real estate in a certain town for the term of her natural life, stating that he made such devise "to my said wife for a home for herself and my infant children, but my intent is nevertheless that the same shall be, at all times during said term, wholly subject to her will and control," the will containing express provision for the payment of taxes in regard to other property therein devised. It was held that the widow was bound to pay the taxes upon the property so devised as a home.

Where the testator directed that his wife should "receive all the income from my estate during her life, arising as well from the rest and residue bequeathed, as from any sums set apart to pay the legacies provided for in the . . . items of my will" it was held that the expression "all the income" was not to be construed as meaning that the

glected to keep the buildings, fences, and other improvements thereon situated in proper repair, and has suffered the same to become dilapidated and out of repair. The plaintiff paid said taxes upon the said estate at the written request of all persons interested therein except this defendant, first exhausting all rentals received from other premises for such purpose, and made the advances to save such estate. The reasonable market value of said homestead does not exceed $23,100, and in the present condition of the real-estate market it would not sell for a sum exceeding $10,000; and the defendant, while having ample means outside of said homestead to pay the taxes thereon and keep the same in repair, refuses and neglects to do so. The defendant still collects the rental from said homestead, which is continually depreciating in value, and is not adequate security for the taxes paid and unpaid thereon. The relief asked is for an accounting; that the value of defendant's life estate in the premises be ascertained; that a receiver be appointed of said premises; that the defendant be enjoined from leasing or collecting rents from said homestead; that her life estate be adjudged terminated, or her homestead right adjudged forfeited; and that the names of persons now in possession as tenants be disclosed, that they may be made parties therein. A demurrer was interposed to the complaint upon three grounds: (1) That the plaintiff had not the legal capacity to sue; (2) that several causes of action are improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained upon the ground that the facts alleged in the complaint do not show that the plaintiff is entitled to the reversion of the real estate so as to entitle it to an eviction, and because the facts pleaded do not show that the plaintiff is a creditor of the defendant, and that the facts pleaded as an abandonment do not operate as such in favor of the plaintiff.

The facts pleaded, however, do show the very strongest grounds for equitable relief. We regard the certain persons named as beneficiaries in the tenth subdivision of the will as reversioners, within the legal or equitable definition of that term. But we do not consider the abandonment of the homestead by the defendant, and her subsequent acquirement of another, at all material. She had only a life estate in the premises, and it was therefore her duty to pay all taxes properly assessed against them. This she refused or neglected to do. Upon the death of John Jones, the executor, this plaintiff was appointed administrator with the will annexed of the estate not administered. Gen. Stat. 1894, § 4453, provides that the term "executor" in this Code shall be construed to include an administrator with the will annexed. Referring again to the tenth subdivision of the will, we find that it was the duty of the executor to take charge of all the rest, residue, and remainder of the testator's property not specifically devised, collect the rents, pay all taxes, assessments, and charges thereon, and make report to the probate court of Ramsey county at least once a year. The duties of the administrator in this respect were those of a trustee, and, whatever plaintiff did in this respect in regard to paying taxes upon the homestead, it was not that of a volunteer, but performing a duty specif-

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testator by it indicated an intention that his wife should have the gross, income of the estate, and she was therefore held liable for the taxes. *Re* Shipman, 82 Hun, 108.

In Parkinson v. Parkinson, 2 Bradf. 77, testator gave his wife the use, "for three years, of his house in a certain street," free to occupy or to let as she may prefer. At the expiration of that period he directed the property to be sold by his executors and the proceeds to be divided between his two sons, and the question was, Who should pay the taxes, the will being silent on that point? The court held that the tenant was bound to keep down the accruing charges on the property where he took by gift and not by contract, and that the person enjoying the present use and possession of the property should keep the estate clear of such burdens as arise from the ordinary annual taxes, and not throw them upon the reversioner.

In *Re* Archer's Estate, 23 N. Y. Supp. 1041, a testator devised and bequeathed all his property, real and personal, to his executors "in trust to receive the rents, issues, and profits thereof for and during the life of [his widow], and apply the same to the use of" certain persons therein mentioned, namely his wife and three sons, with a proviso that if two of his sons and his wife desired to reside in the dwelling house, they should occupy the same without paying rent during the lifetime of the widow, each paying a third of the actual living expenses of the household. The court held that the estate being devised in trust, the executors holding the legal title with a duty of maintaining and protecting the same during the widow's lifetime, it was their duty to receive the rent, income, and profits, and to pay and discharge the taxes, and therefore that the taxes should be paid by the executors out of the income of the estate, the estate devised to the widow and sons not being analogous to a life estate.

Where a residuary estate was devised in trust to pay the rents "to the sole use" of a widow for life, the same being also charged with legacies payable after her decease out of capital, the widow to have the use of testator's farm during her life, the trustee to "pay out of his estate all taxes" on said farm, and the trustees paid the same from income, which payments were objected to by the executors of the widow upon the ground that they ought to be payable out of capital, it was held that the words, "pay out of my estate," were not sufficient to support the construction contended for, for the reason that the other provisions of the will showed an intention to preserve the *corpus* intact for ultimate disposition upon the death of the life tenant, and in order that the will might be so construed it should contain words most unmistakably pointing in that direction. *Re* Albertson, 113 N. Y. 434.

And when the use and occupation of a dwelling house were devised to a widow during widowhood, and the testator expressed a desire that, if agreeable to her, her daughter should occupy one room and her son another in the house, it was held that the widow was the owner of the freehold and must keep down the taxes. Anderson v. Hensley, 8 Heisk. 834.

Where by the terms of a will the executors invested money on bond and mortgage conditioned for the payment of the interest to the widow dur-

ically enjoined by the terms of the will itself. When the defendant refused or neglected to pay the taxes for years upon the homestead, and there was danger of the premises being thereby lost to the reversioners, the homestead fell within the provision in the will, *viz.*, "all the rest, residue, and remainder of my estate," which it was plaintiff's duty to save if the life tenant was guilty of not paying the taxes thereon. The reversioners were under no obligations to pay taxes, nor protect the property as against waste by reason of nonrepairs, so far as concerned the life estate of the defendant. That was the duty of the defendant herself, for the law is too well settled to need discussion that a tenant for life of real estate is compelled to pay taxes and the expense of repairs out of the rents and profits, whether such life estate comes by will, conveyance, or operation of law, unless the life tenant voluntarily pays them out of other funds. In this case, if the life tenancy ceased by reason of the death of the defendant or otherwise, the reversioners would be entitled to take the fee, unless, after the death of the testator's nephews, William Mintzer and George Hicks, subject to the right of the trustee to sell the premises, and divide the proceeds among the nephews and nieces of the testator, as specifically provided by the terms of the will. Of course, a power may be granted by devise in a last will and testament. Gen. Stat. 1894, § 4334. And the trust conferred by the terms of the will upon the executor was valid as a power, and, this being so, the acceptance of the trust made the duty of the trustee co-ordinate with the power conferred. One of the duties or trusts expressly enjoined by the will was that the executor should collect the rents and pay taxes, and, the plaintiff having been duly substituted in place of the executor as administrator with the will annexed, it was its duty to use due diligence in this matter. 2 Perry, Tr. § 527. The power of an administrator with the will annexed to perform the duty conferred upon the executor by the terms of the will is expressly authorized by Gen. Stat. 1894, § 4464, *viz.*: "To perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose." The right of the plaintiff to be reimbursed out of the life estate does not rest upon the fact that she has abandoned it as a homestead, but upon the broader ground that, she having failed to pay the taxes thereon, and not kept the same in repair, and thereby allowed it to depreciate in value, with great danger of entire loss to the reversioners, it became the duty of the plaintiff, under the terms of the will, to discharge this duty, and for the expense so incurred it is entitled to be reimbursed out of the life estate. These taxes were paid at the request of all of the reversioners, and with the approval of the probate court; and while these facts do not constitute plaintiff's authority for so doing, they materially aid in showing its good faith. Therefore, assuming that it was the duty of the life tenant to keep down the taxes, and to keep the premises in such repair, and also preserve the property from decay to the extent, at least, of the rental value of the premises, and she having neglected and refused to do so, the plaintiff is entitled to have a receiver appointed to collect the rents sufficient in amount to discharge the liabilities of the life tenant's estate for which she is answerable. *Murch* v. *J. O. Smith Mfg. Co.* 47 N. J. Eq. 193; *Cairns* v. *Chabert*, 3 Edw. Ch. 313. In the latter case a bill in equity was sustained against the life tenant to restrain the disposition of property, and to compel the tenant to keep down assess-

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ing her life, the principal to be paid to the executors at her death and to be distributed according to the will, it was held that the executors were taxable at the present value of the principal. State, Wyckoff, v. Jones, 39 N. J. L. 650.

In Stone v. Littlefield, 151 Mass. 485, a trustee, who received from his predecessor as part of the trust estate a note secured by a mortgage of real estate, foreclosed such mortgage for nonpayment of interest, taxes, and the principal sum, and the question was whether the taxes should be deducted from the principal, or be taken from the income of other and productive investments in the same trust estate, the testator's widow being entitled to the use and income of all the residue. The court held that such payments were to be deducted from the principal, otherwise a loss upon some one investment for which one would be legally responsible might absorb the widow's whole income for a year, or even more, it being more just that such a loss should be held to diminish the *corpus* of the trust estate so that the tenant for life would receive less income and the remaindermen less principal.

In Bidwall v. Greenshield, 2 Abb. N. C. 427, a testator gave and devised to his wife all his real estate to be used, occupied, and enjoyed by her for a term of years from and after the date of his will, with remainder in fee to his children to be equally divided between them, and the widow continued in possession of the premises but dower was never assigned to her, and the children continued to live with her even after the expiration of the term mentioned in the will. It was held upon proceedings for partition, that the widow's dower interest was liable for the taxes which accrued during the continuance of the term, but that with regard to subsequent taxes they were to be paid out of the fund.

Where a testator gave his wife an annuity to be paid half yearly out of his estate, with a direction to his executors to retain in their hands and keep invested, a sum sufficient to pay the same, it was held that they were bound to invest sufficient to pay such annuity clear of all taxes and commissions. *Ex parte* McComb, 4 Bradf. 151.

In *Re* Cushing, 58 Vt. 393, testator directed "the whole interest and income of $6,000 to be paid to [his wife] each and every year during her life," and also that so much of the mentioned sum itself as should be required to support her in a manner becoming her station in life if "said interest and income" were not sufficient, should be so applied, and further provided that his personal estate should be sold and his real estate either sold or rented for the purpose of raising "funds to pay debts, legacies, and expenses." It was held that the income and interest of the widow were not chargeable with taxes or expenses, the testator's intention being clearly to give the widow the whole of the interest and income of the $6,000, during her life for her support without deduction of taxation or expenses.

E. W.

ments and taxes; and upon motion an order was entered for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off the taxes in arrear, unless within forty days from the service of a copy of the order the tenant should show to the satisfaction of the master that the taxes had been paid. This case is cited with approval in *Phelan* v. *Boylan*, 25 Wis. 679. If the life tenant permits the premises to decay for want of repair, and neglects to pay the taxes, subjecting the estate to sale therefor, with accumulated costs and penalties, it must diminish the value of the estate, and thus there is a resulting, lasting damage to the freehold or inheritance, and this constitutes waste. *Stetson* v. *Day*, 51 Me. 434; *Phelan* v. *Boylan*, 25 Wis. 679; 1 Washb. Real Prop. 140. But, although the defendant has been guilty of permissive waste, we do not think that it is such waste as would constitute an absolute forfeiture of the estate, and therefore the action does not come within the provisions of Gen. Stat. 1894, §§ 5882, 5883. But the facts alleged constitute substantial ground for relief in equity, and entitle the plaintiff to protect the inheritance, and, if possible, have it restored to the condition it would be in if the defendant had not been guilty of wrongdoing.

Our conclusion is that, while the plaintiff is not a remainderman or reversioner, so as to entitle it to maintain a common-law action of waste, yet it is entitled to maintain this action for equitable relief; to have a receiver appointed, as prayed for in the complaint; to have an accounting of all rentals received by defendant and taxes paid by plaintiff, as well as the amount of unpaid taxes ascertained, and of the amount necessary to make repairs to save the property from loss to the reversioners; and that, if the same, with necessary expenses, are not paid by the defendant within a reasonable time, to be fixed by the trial court, the life estate of the defendant in the homestead premises described in the complaint may be sold by decree and judgment of the trial court to reimburse the plaintiff for all such necessary disbursements, and to pay the unpaid taxes on said premises and keep them in repair, and to have an injunction against defendant that she be restrained from collecting any more rentals of the premises until the further order therein of the trial court.

The order sustaining the demurrer is overruled, and the cause remanded, with instructions to the trial court to proceed in the matter not inconsistent with the views herein expressed.

PENNSYLVANIA SUPREME COURT.

John W. DEMPSEY
v.
John DOBSON *et al.*, *Appts*

(174 Pa. 122.)

1. **Carpet manufacturers have a right to some record** or register of recipes prepared by a color mixer in their employ, where, instead of entering them in their color book as it was his duty to do, he has, without their knowledge, entered them in a book of his own.
2. **The recipes prepared by a color mixer** for the use of his employers in the manufacture of their carpets belong to them, so far at least as to give them the right to the use of the various colors and shades produced by them.
3. **The value of recipes in color books** owned by a color mixer who entered them therein, instead of entering them in his employers' books as it was his duty to do, cannot be considered in estimating the damages, if any, which he can recover from them for detaining those books, in the supposition that they belonged to them, when he undertook to carry them away.
4. **A letter containing an argumentative presentation** of the writer's view of his rights and of the grievance of which he complains, being a declaration in his own behalf, cannot be admitted in evidence in his own favor when unanswered.

(March 2, 1896.)

APPEAL by defendants from a judgment of the Court of Common Pleas (No. 1) for Philadelphia County in favor of plaintiff in an action to recover damages for defendants' alleged wrongful retention and copying of trade secrets from books belonging to plaintiff. *Reversed.*

Plaintiff was employed by defendants, carpet manufacturers, as color mixer in their mills for a period of nearly twenty years. At the time of entering their employment he brought with him certain books containing recipes for the mixing of colors, and in these books he entered the formula for mixing the various colors which he prepared for making the designs in the carpets which were manufactured by defendants during his employment by them. When he was about to leave their employment defendants forcibly took possession of these formula books and made copies of them, after which they returned his books to him. Defendants claimed that they furnished books to plaintiff for the purpose of having these formula entered in them to be preserved for the use of the mill, and that because of plaintiff's failure to make the copies they were entitled to make them themselves. Plaintiff, on the contrary, claimed that the formula belonged to him and not to the mill and that he was not obliged to enter them in the books of the mill or to give defendants the benefit of them after he severed his connection with the mill.

Further facts appear in the opinion.

NOTE.—For other cases as to property in recipes, see Chadwick v. Covell (Mass.) 6 L. R. A. 839; Watkins v. Landon (Minn.) 19 L. R. A. 236; and Tode v. Gross (N. Y.) 13 L. R. A. 652, with *note* on property in secrets, processes, and recipes; also Fowle v. Park, 131 U. S. 88, 33 L. ed. 67.

See also 38 L. R. A. 200; 40 L. R. A. 550.

Mr. **Richard P. White**, for appellants:

The letter of September 26, 1892, was not admissible.

Bush v. *Ferry*, 7 Phila. 196; *Richards* v. *Frankum*, 9 Car. & P. 221; *Holler* v. *Weiner*, 15 Pa. 244; *Fraley* v. *Bispham*, 10 Pa. 320, 51 Am. Dec. 486; *Allen* v. *Peters*, 4 Phila. 78; *Fearing* v. *Kimball*, 4 Allen, 125, 81 Am. Dec. 690; *Robinson* v. *Fitchburg & W. R. Co.* 7 Gray, 92; *St. Louis, A. & T. H. R. Co.* v. *Thomas*, 85 Ill. 464

A calico printer is entitled, after having discharged his head color man, to the book in which that servant has entered the processes for mixing colors during his service, although many of the processes were the invention of the color man himself.

Makepeace v. *Jackson*, 4 Taunt. 770; Wood, Mast. & S. 2d ed. 202.

Even where an employee uses a patented invention of his own in his employer's business he cannot, when he leaves the employment, deprive the master of its use. The law implies a license to use the invention until the patent expires.

Herman v. *Herman*, 29 Fed. Rep. 92; *Jencks* v. *Langdon Mills*, 27 Fed. Rep. 622; *Barry* v. *Crane Bros. Mfg. Co.* 22 Fed. Rep. 396; *Slemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 248.

That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer.

McAleer v. *United States*, 150 U. S. 424, 37 L. ed. 1130.

The learned judge should have instructed the jury that on all the evidence in the case it was plain that the books belonged to the plaintiff and that there was, therefore, no cause of action.

Exemplary damages are allowed only where the act complained of has been committed wilfully and maliciously, or, in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness.

Philadelphia Traction Co. v. *Orbann*, 119 Pa. 37; *Rose* v. *Story*, 1 Pa. 190, 44 Am. Dec. 121; *Pittsburgh, C. & St. L. R. Co.* v. *Lyon*, 123 Pa. 140, 2 L. R. A. 489; *Herdic* v. *Young*, 55 Pa. 176, 93 Am. Dec. 739; *Keil* v. *Chartiers Valley Gas Co.* 131 Pa. 466; *Stephenson* v. *Brown*, 147 Pa. 300.

Messrs. **George W. Harkins** and **F. Carroll Brewster**, for appellee:

It is a matter of general knowledge in the trade, and to all manufacturers, that color mixers jealously guard the formula devised by them as their trade secrets, and do not permit them to become the property of their employers or give them the right to their use, and it is an equally well known fact that employers have constantly endeavored to obtain possession of them, or the right to use them, on the same plea that defendants advance in justification of their action, *viz.*, that they were produced by the color mixer while in their employment and used in the production of fabrics in their mills, and therefore *ipso facto* their property.

The possession of a letter affords ground for charging the defendants with an implied admission of the statements contained in it.

Fenno v. *Weston*, 31 Vt. 352; *Dutton* v. *Woodman*, 9 Cush. 255, 57 Am. Dec. 46; *Frame* v. *William Penn Coal Co* 97 Pa. 309; *Crossgrove* v. *Himmelrich*, 54 Pa. 203.

Allegations made in a letter responded to by the other party are considered in the light of declarations between the parties, and as such properly admissible in evidence, although written after the commencement of suit.

Holler v. *Weiner*, 15 Pa. 245; *Roe* v. *Day*, 7 Car. & P. 705.

The weight to be given to the testimony is for the jury to determine.

Holler v. *Weiner*, *supra*.

A letter written by a party in his own favor is admissible as evidence of a notice or demand.

Richards v. *Frankum*, 9 Car. & P. 221; *Allen* v. *Peters*, 4 Phila. 78; *Gaskill* v. *Skene*, 14 Q. B. 664; *Draper* v. *Crofts*, 15 Mees. & W. 166.

The plaintiff had property in the recipes and formulas.

Wood, Mast. & S. § 131; Fraser, Mast. & S. 75.

If a servant make an invention whilst in the employ of a master the invention belongs to the servant, and the master cannot take out a patent for it.

Smith, Mast. & S. 164; Robinson, Patents, § 414; *Hapgood* v. *Hewitt*, 11 Biss. 184, Affirmed 119 U. S. 226, 30 L. ed. 369; *Damon* v. *Eastwick*, 14 Fed. Rep. 40; *Shepherd* v. *Conquest*, 17 C. B. 427; *Dice* v. *Joliet Mfg. Co.* 11 Ill. App. 109; *Green* v. *Willard Imp. Barrel Co.* 1 Mo. App. 202.

Persons employed, as much as employers, are entitled to their own independent inventions, and if the suggestions communicated by them constitute the whole substance of the improvement the real invention or discovery belongs to the person who made the suggestions.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 602, 19 L. ed. 181; *Union Collar Co.* v. *Van Deusen*, 90 U. S. 23 Wall. 564, 23 L. ed. 133.

A manufacturing corporation which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect.

Dalzell v. *Dueber Watch Case Mfg. Co.* 149 U. S. 315, 37 L. ed. 749.

Where the nature of a thing converted is of peculiar and special value to the owner, because of its antiquity or association, or unusual composition, no one would seriously contend the market value would be the real measure of damages.

Buxton v. *Lister*, 3 Atk. 384; *Pearne* v. *Lisle*, Ambl. 77; *Earl Macclesfield* v. *Davis*, 3 Ves. & B. 16; *Pusey* v. *Pusey*, 1 Vern. 273; *Duke Somerset* v. *Cookson*, 3 P. Wms. 389; *Lowther* v. *Lowther*, 13 Ves. Jr. 95; *McGowin* v. *Remington*, 12 Pa. 56, 51 Am. Dec. 584.

In actions of tort the value of the property in estimating damages is not always to be determined by its market price.

Suydam v. *Jenkins*, 3 Sandf. 614; *Stickney* v. *Allen*, 10 Gray, 356.

Where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community.

Sedgw. Damages, 554 *et seq.*; *M'Bride* v. *M'Laughlin*, 5 Watts, 376; *Stickney* v. *Allen*, 10 Gray, 352; *Stephenson* v. *Brown*, 147 Pa. 300.

Williams, J., delivered the opinion of the court:

The defendants are extensively engaged in the manufacture of carpets. The value of their products in the market, and the demand for them by purchasers, depend largely upon the artistic character of the patterns or designs upon which they are made, and the harmony and general effect of the shades of color by which they are brought out. The designs are prepared by persons employed for that special purpose. When a new design has been made and adopted by the manufacturers, it is sent to the color room, which is in charge of a color mixer. The duty of the color mixer is to prepare the dyes or colors, so as to reproduce in the carpet all the shades indicated by the design. He submits the results of his work to the designer. When approved, it becomes his duty to enter, in a book kept for that purpose, and called a "color book," the number of the carpet, and the formula by which each shade of color used in its manufacture is produced. He is also required to keep a book, in which a piece of yarn, colored according to the formula, for each shade in the carpet, is preserved, with the number of the carpet to which the shades belong. This is known as the "shade book." When the manufacture of this particular carpet is about to be begun, the color mixer prepares the colors for actual use. When mixed and ready for use, they are put into large pitchers, and on each pitcher is put a label, with the formula or recipe by which the color it contains was prepared, together with the number of the carpet upon which it is used. So that, when a pitcher is emptied, it can be refilled, by any of the employees about the color room, by following the recipe appearing on the label. The designer and the color mixer, like the printer and the weaver, are employed and their wages adjusted with reference to their skill and experience in the department of work to which they are assigned. They are not independent contractors, producing designs or shades of color by a secret process of their own, which they sell, as patterns or colors, to the manufacturer, for a fixed price; but they are employees bringing their skill and experience, in the use of the materials furnished by their employer, into his service, for his benefit in the production of his goods. The designs and receipes so made for him are, as between his employees and himself, his, for the purposes of his own manufacturing business. Even if his employee had obtained letters patent for his formula, protecting himself thereby against the public, still the employer's right to continue its use would be protected by the United States courts. *Solomons* v. *United States*, 137 U. S. 342, 34 L. ed. 667. The same conclusion was reached by this court in *Slemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 248, where we said: "If one employed by another, whilst receiving wages, experiments at the expense of his employer, constructs an invention and permits his employer to use it, without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed." But this case is much stronger than that of one who obtains a patent, as in *Slemmer's Case*, for here the experiments resulting in the receipes were not only made at the expense of the employer, but for him, and with a view to the immediate use of their results in his business. It was the sole and only purpose for which the color mixer was employed and paid. In the manufacture of carpets, the spinning of the yarn is no more a part of the process than is the preparation of the colors to be made use of in working out the pattern. The fact is that the spinner and the weaver, the color mixer and the printer who uses the colors, are all alike in their relation to their common employer. The labors of all are necessary to the production of a carpet, and the results of the labor of all belong to the employer, who pays for the labor. The receipes prepared by the color mixer, for the use of his employers in the manufacture of their carpets, belonged to them, so far, at least, as to give them the right to continue the use of the various colors and shades produced by them. The plaintiff had a right, if he chose so to do, to preserve them for his own use in the future; but his right was not an exclusive one. It was his duty, by virtue of his employment, and by reason of the relation his work bore to his employers' business, to enter all these recipes in his employers' color book; for none of the patterns of carpet manufactured during the twenty years of the plaintiff's service could be reproduced without the use of the same recipes, for the preparation of the colors to be employed, that had been used when the pattern was first produced. This duty, to put it in the mildest form, the plaintiff had improperly neglected. His employers were left under the belief that their color books had been used, and that the books he was attempting to carry away were, in every sense of the word, their own property. Had this been true, their conduct in requiring him to leave them in the mill would have given the plaintiff no cause of action. In respect to this subject the mistake under which they labored was due to the plaintiff's failure in duty as an employee. He had pushed the blanks furnished to him to one side, and had used only his own, and had left his employer in ignorance of his conduct. Now, let it be conceded that the books he was attempting to carry away were his own. It is, nevertheless, true that they contained the only record of the recipes used in the mill for twenty years, and that these recipes were a part of the stock in trade of his employers. Not, perhaps, the particular copy of them which the plaintiff had entered in his own books, but the processes and combinations they represented, belonged, for the purposes of their business, to them; and, as between him and them, they had a right to some record or register of recipes.

If the plaintiff had a right to recover in this action, because of the ownership of the books in which the recipes had been entered, and the manner of their detention, when he attempted to take them away, the jury should have been instructed that the value of the recipes was not to be considered in estimating the damages. As between these parties, as we have already said, the plaintiff had no exclusive right to them. It was his duty, as a color mixer, to enter each formula in his employers' books. They had a clear legal right to the knowledge which such a record would afford them, and the copies they have made from his books should have been made for them by the plaintiff as the several colors were compounded during his long term of service. The plaintiff's claim for damages must rest on the fact that he owned the books that were kept from him. In addition to this, anything in the manner of the detention that shows unnecessary violence or disregard for the sensibilities or the self-respect of the plaintiff may be considered. But the jury should be told, in this connection, that they should also consider the conduct of the plaintiff,—his disregard of his duty and his instructions in making no entries in his employer's color books,—his failure to disclose this fact to them, and leaving them under the honest belief that he was removing from their mill their own color books.

The portions of the charge embraced in the fifth, sixth, and seventh assignments of error, if stated as abstract propositions, would be unobjectionable; but, as applicable to the facts of this case, they were, in the view we have taken of this case, misleading. The plaintiff does not seem to have suffered any special inconvenience or injury because of the detention of his books, and he has no right to complain that the defendants are now in possession of one list or register of their own recipes. They are entitled to such a register, and it should have been made for them by the plaintiff. If he had discharged his whole duty as an employee, the misunderstanding which led to the detention of his books could not have occurred, and this litigation would never had arisen.

The first assignment must also be sustained. The letter written after the plaintiff's color books had been returned to him, demanding that the copy that had been made should be given up to him was inadmissible. It was an argumentative presentation of his view of his rights as an employee, and of the grievance of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally. The point is substantially ruled in *Fraley* v. *Bispham*, 10 Pa. 320, 51 Am. Dec. 486.

The judgment is reversed, for the reasons now given, and a *venire facias de novo* awarded.

SOUTH CAROLINA SUPREME COURT.

J. R. Carson GEORGE, *Respt.*,
v.
AMERICAN GINNING COMPANY, *Appt.*

William C. BROWN, *Respt.*,
v.
AMERICAN GINNING COMPANY, *Appt.*

(.....S. C.....)

No valid service of process upon a foreign corporation can be had by serving the papers upon one of its officers who is himself plaintiff in the action or attorney in fact for the plaintiff.

(March 9, 1896.)

APPEAL by defendant from orders of the Common Pleas Circuit Court for Beaufort County refusing to set aside a service of summons upon defendant, a foreign corporation, and from judgment rendered in favor of plaintiffs. *Reversed.*

The facts are stated in the opinion.

Messrs. **Elliott & Elliott** for appellant.

Mr. **Thomas Talbird,** for respondent:

The affidavit would have to show that the defendant company had no officer or agent in the state upon whom process could be served before plaintiff could get an order of publication. Such an affidavit could not truthfully be made for the reason that W. C. Brown was at the time living in the town of Beaufort and was an officer upon whom, under the statute, process could be served.

Voorhies' Code, p. 170; *Hulbert* v. *Hope Mut. Ins. Co.* 4 How. Pr. 278; *Wortman* v. *Wortman*, 17 Abb. Pr. 66; *Irving Sav. Inst.* v. *Hardman*, 17 Abb. Pr. 67, note.

The corporation under the law is a person. W. C. Brown is another person. The corporation can only act through agents; he was one of its agents. Under the state law he was the proper person upon whom to serve process issued against the corporation, and the sheriff thereupon served him, not in his individual capacity, but as treasurer of the corporation.

McIver, Ch. J., delivered the opinion of the court:

These two cases were heard together, but, while the principles upon which they depend are similar, the facts are not identical in the two cases, and hence it will be more convenient to consider them separately.

In the first-named case, the plaintiff, who resides in the city of New York, by a formally executed power, constituted William C. Brown, a resident of this state, her attorney in fact to commence this action and to take all necessary steps to obtain a warrant of attachment against the property of the defendant company, which is a foreign corporation, doing business in the town of Beaufort, S. C. In pursuance of this power, the said W. C. Brown, on the 30th day of July, 1895, procured a summons and complaint to be issued in the name of the plaintiff against the de-

NOTE.—For the general question as to who may be served with process against a foreign corporation, see *note* to Foster v. Charles Betcher Lumber Co. (S. D.) 23 L. R. A. 490.

fendant company, on a certain note alleged to have been executed by the defendant company in favor of the plaintiff, and on the same day sued out a warrant of attachment, which was levied upon the property of the defendant company, upon the ground that it was a foreign corporation, the power of attorney having been filed before the warrant of attachment was issued. The sheriff returned that he had "served on the above named, the American Ginning Company, the summons and complaint in the action, by delivering copies thereof to W. C. Brown, treasurer, personally, and leaving the same with him." On the 11th of September, 1895, Messrs. Elliott & Elliott, signing themselves "Defendant's Attorneys for the Purpose of This Motion Only," served a notice on Mr. Talbird, as plaintiff's attorney, in which it was expressly stated that they appeared only for the purpose of this motion; that they would move before his honor, Judge Buchanan, at a specified time and place, "to set aside the service of the summons and complaint in this action, upon the grounds: (1) Because the affidavit upon which the attachment was issued was sworn to before the plaintiff's attorney, and the justification of the sureties on the undertaking was made before him; (2) that the service of the summons was irregular, in that it was made on the attorney in fact of the plaintiff, who acted for plaintiff in procuring the issue of the writ of attachment as manager of the defendant corporation." It was admitted at the hearing of this motion "that William C. Brown, upon whom the summons and complaint were served, was the same William C Brown who was the attorney in fact of the plaintiff." The motion was refused by Judge Buchanan, and he, on the same day, rendered judgment by default against the defendant company. From this judgment, as well as from the refusal of the motion to set aside the service of the summons and complaint, and to discharge the attachment, defendant appeals, upon the following ground: "Because the service of the summons upon William C. Brown, as an officer of the defendant corporation, he being at the same time the attorney in fact of the plaintiff for the commencement and prosecution of the action, was not a sufficient service of the summons upon the corporation."

If, as distinctly appears in the "case," William C. Brown was acting as attorney in fact of the plaintiff in commencing this action and suing out the warrant of attachment, he was *pro hac vice* the plaintiff, and therefore the service upon him was practically the same as if the papers had been served upon the plaintiff in her own proper person; for under the express terms of the power of attorney, set out in the case, he, in commencing this action, was acting in the "name, place, and stead" of the plaintiff, and for her, and in her name, he signed, sealed, acknowledged, and delivered "any and all necessary instruments, undertakings, and other writings" for the purpose of attaching the property of the defendant company. The fact that he was the treasurer of the defendant corporation cannot affect the question, for, when he undertook, as the attorney in fact of the plaintiff, to commence this action, he necessarily abandoned, for the time and occasion at least, his position as an officer or agent of the defendant company; for the two positions then became entirely inconsistent and incompatible, involving different and conflicting rights and duties.

The question, then, resolves itself into an inquiry whether a person can legally commence an action against a foreign corporation, of which he happens to be an officer or agent, by serving himself with the process or summons necessary to commence such action So far as we are informed, there is no authority in this state upon the point, and we do not think any is needed, to show that such a proposition, so utterly at variance with any proper conception of the due and orderly administration of justice, cannot for a moment be entertained. To concede such a proposition would open the door to the grossest fraud, which would be a reproach to the administration of justice. Of course, we do not mean to intimate that any fraud was intended in this particular case; but we cannot assent to a proposition which, if established, would afford such an easy mode of perpetrating frauds. Counsel for appellant has, however, cited us to two cases from other states which seem to support fully the view which we have adopted. *Buck* v. *Ashuelot Mfg. Co.* 4 Allen, 357; *Rehm* v. *German Ins. & Sav. Inst.* 125 Ind. 135.

We think, therefore, that the circuit judge erred in refusing the motion to set aside the service of the summons and complaint in this action, and, consequently, that he erred in refusing to vacate the attachment, as well as in rendering judgment for the plaintiff.

In the second case above stated, the plaintiff, W. C. Brown, undertook to commence an action against the defendant company to recover the amount due on two notes which he claimed to hold against said company, by having himself, as treasurer of said company, personally served with copies of the summons and complaint, and, on the same day, procuring a warrant of attachment to be issued, which was levied upon the property of said company. A similar notice of motion was made, in a similar manner, to set aside the service of the summons and complaint and to vacate the attachment. Judge Buchanan granted an order refusing to set aside the service and complaint, but granted the motion to discharge the attachment, and, on the same day, rendered judgment by default in favor of the plaintiff against the defendant. From this judgment, as well as from so much of the order as refused the motion to set aside the service of the summons and complaint, defendant appeals, upon the ground that the service upon said Brown, as an officer of the defendant corporation, he being the plaintiff in the action, was not a sufficient service upon said corporation.

It does not appear from the case as prepared for argument here upon what ground the circuit judge granted the motion to vacate the attachment, and at the same time refused the motion to set aside the service of the summons and complaint, but, as there is no appeal from so much of the order as vacated the attachment, we need not consider that matter further. For the reasons given in considering the appeal in the first case, we think that the circuit judge erred in refusing the motion to set aside the

service of the summons and complaint in this case; and, that being so, it follows that he erred in rendering judgment against a party who had not been properly made a party by legal service of a summons.

The judgment of this court is that, in the case first above stated, the order of the circuit judge refusing the motion to set aside the service of the summons and complaint, and to vacate the attachment, and rendering judgment therein, be *reversed;* and, in the second case above stated, the judgment of this court is that so much of the order of the circuit judge as refused the motion to set aside the service of the summons and complaint, as well as the judgment rendered in the second case, be *reversed.*

PENNSYLVANIA SUPREME COURT

Re ESTATE OF William A. WAGONER.

APPEAL OF Frances S. DORLAN.

(174 Pa. 558.)

1. **A gift made by a bond of the donor including a warrant of attorney for confession of judgment,** when delivered to a third person to be held until the donor's death and then given to the donee, who is informed of the arrangement, constitutes a valid gift to the custodian as trustee, although he by mistake made the bond to bear interest during the donor's life, and this blunder was remedied by his indorsing the interest on the instrument without any payment thereof by the donor's direction.

2. **In the absence of any reservation in a trust to deliver a bond** to a donee upon the donor's death, the secret intention of the donor that it shall be redelivered to him if he survives the donee, and the fact that the trustee would have redelivered it in such case, will not make the gift subject to such a contingency as will defeat it.

(March 30, 1896.)

APPEAL by claimant from a decree of the Orphans' Court for Chester County confirming the report of a master appointed for the distribution of the estate of William A. Wagoner deceased, which disallowed her claim for the amount of a bond in her favor which had been executed by the testator in his lifetime and deposited with a third person for her benefit. *Reversed.*

The facts are stated in the opinion.

Messrs. **J. Carroll Hayes** and **William M. Hayes,** for appellant:

The $2,000 bond was not a mere gratuity, but was the evidence of a debt, and the technical rules as to the delivery of a gift have no application to this case.

A bond, like a check, is presumed to be in payment of a debt or for services rendered.

Flemming v. *McClain,* 13 Pa. 177; *Masser* v. *Bowen,* 29 Pa. 128, 72 Am. Dec. 619; *Huntzinger* v. *Jones,* 60 Pa. 170.

The transaction, then, was not a gift, but a trust founded upon a valuable consideration. The strict rules as to gifts have no application. It then becomes a contract which the court will enforce.

Bispham, Eq. 100.

Any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. It is not necessary that the words "trust" and "trustee" should be used.

Bispham, Eq. 99; *Sharpless* v. *Welsh,* 4 Dall. (Pa.) 279; *Sheets' Estate,* 52 Pa. 266; *Pierce* v. *M'Keehan,* 3 Watts & S. 283.

The true point to consider is not whether decedent might have recalled or revoked the bond, but that he did not in fact do so.

Smith's Estate, 144 Pa. 442; *Dickerson's Appeal,* 115 Pa. 198; *Stone* v. *Hackett,* 12 Gray, 227; *Lines* v. *Lines,* 142 Pa. 167; *Worth* v. *Case,* 42 N. Y. 362; Thornton, Gifts & Advancements, 181; *Stephens* v. *Rinehart,* 72 Pa 434; *Stewart* v. *Stewart,* 5 Conn. 317.

The decedent's direction to mark the interest as paid, each first of April, amounts to the same as a reservation of the interest of the money for his own use during his life. Such reservations are frequently found in valid declarations of trust.

8 Am. & Eng. Enc. Law, p. 1318.

Even if there were no consideration for the bond, the seal would import a consideration, and the transaction even if held to be executory, will be supported on this ground.

Sherk v. *Endress,* 3 Watts & S. 256; *Yard* v. *Patton,* 13 Pa. 285; *Mack's Appeal,* 68 Pa. 263; Bispham, Eq. 101, note; *Candor's Appeal,* 27 Pa. 119; *Burkholder* v. *Plank,* 69 Pa. 225; *Rishel* v. *Crouse,* 162 Pa. 7; *Yard* v. *Patton,* 13 Pa. 285; *Re Campb ll's Estate,* 7 Pa. 100, 47 Am. Dec. 503; *Bond* v. *Bunting,* 78 Pa. 219; *Drysdale's Appeal,* 14 Pa. 531.

Even if considered as a gift, the bond still should be upheld.

Thornton, Gifts & Advancements, 120, 146, 205; *Michener* v. *Dale,* 23 Pa. 59; *Wells* v. *Tucker,* 3 Binn. 366; *Nicholas* v. *Adams,* 2 Wharf. 17; *Barclay's Estate,* 2 W. N. C. 447; *Gourley* v. *Linsenbigler,* 51 Pa. 349; *Wells* v. *Tucker,* 3 Binn. 370; *Gish* v. *Brown,* 171 Pa. 479; *Candor's Appeal,* 27 Pa. 120; *Hummel's Estate,* 161 Pa. 217; 8 Am. & Eng. Enc. Law, p. 1336; *Bond* v. *Bunting, supra; Book* v. *Book,* 104 Pa. 244.

Mr. **Arthur T. Parke,** for appellee:

To constitute a gift, it must have been consummated by delivery. It cannot be made by words *in futuro* or by words *in præsenti,* unaccompanied by such delivery of possession as makes the disposal of the thing irrevocable.

Trough's Estate, 75 Pa. 117; *Waynesburg College's Appeal,* 111 Pa. 130, 56 Am. Rep. 252.

NOTE.—As to judgments entered on warrants of attorney, see *note* to Teel v. Yost (N. Y.) 13 L. R. A. 196.

As to the gift of checks, see *Re* Taylor's Estate (Pa.) 18 L. R. A. 855.

As to a gift by a promissory note, see Richardson v. Richardson (Ill.) 26 L. R. A. 305.

A voluntary bond is both in equity and at law a gift of the money.

Sherk v. *Endress*, 3 Watts & S. 256; *Scott* v. *Lauman*, 104 Pa. 593; *Re Campbell's Estate*, 7 Pa. 101, 47 Am. Dec. 503.

A gift is a contract executed, and must be accompanied with such a delivery of possession as makes the disposal irrevocable.

Fross's Appeal, and *Loomis's Appeal*, 105 Pa. 267; *Withers* v. *Weaver*, 10 Pa. 391; *Goarley* v. *Linsenbigler*, 51 Pa. 345; *Pringle* v. *Pringle*, 59 Pa. 281; *Zimmerman* v. *Streeper*, 75 Pa. 147; *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449; *Scott* v. *Dickson*, 108 Pa. 6, 56 Am. Rep. 192.

An express promise cannot be supported by any consideration, wholly past and executed, from which the law could not imply a promise.

Fross's Appeal, and *Loomis's Appeal*, *supra*.

What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a declaration of trust.

Smith's Estate, 144 Pa. 434.

Dean, J., delivered the opinion of the court:

William A. Wagoner, on the first of April, 1893, being possessed of a considerable estate, both personal and real, died intestate, unmarried, and without issue. There were many collateral relatives, among them a niece, Frances S. Dorlan, this appellant. She had lived in the house of her uncle thirty years; the fifteen preceding his death she was the only member of his family. During the last years of his life, she did the household work, and much other, such as taking care of cows, milking, churning, cleaning stables, and working the garden. About October, 1891, the decedent called on John H. Skiles, a justice of the peace, and asked him to prepare a deed from him to Frances for thirty-two acres of his land. Skiles suggested she might not want the land, and that a severance of this quantity might spoil the farm. He designated a will as the best method of carrying out his purpose towards his niece. The uncle said he would think about it, and left. In about six months, he called again on Skiles, and executed in favor of his niece a bond, dated April 1, 1891, in the sum of $2,000, payable to her absolutely in one year, with interest at rate of 5 per cent, to which was appended the usual warrant of attorney for confession of judgment. This bond, after formal execution, he handed to 'Squire Skiles, to be by him safely kept, and delivered to Frances after his death. Skiles suggested to him that the bond would draw interest during his life, and Wagoner said he, Skiles, should mark the interest as paid on the 1st day of April of each year. On the 1st day of April, 1892, he did indorse the interest as paid for the preceding year. Some time after the bond had been deposited with Skiles, the uncle told his niece that "there was a bond of $2,000 at 'Squire Skiles,' and (she) was to leave it there as long as he lived, and at his death (she) was to go and get it." In a few days after his death she called for the bond, and Skiles gave it to her.

The administrator having filed his account of the personalty, showing a balance, an auditor was appointed to distribute. The niece presented the bond as a debt against her uncle's estate. The other collateral heirs resisted her claim. The auditor, on the facts as stated, was of the opinion (1) there was no actual delivery of the bond to the niece; (2) the deposit of the bond with Skiles was not in trust for her, because the evidence did not show the uncle had parted with his dominion over it. He therefore declined to allow her claim on the bond. She also, evidently in anticipation of an adverse decision in this particular, made a claim for wages for six years preceding her uncle's death on a *quantum meruit*. This, also, the auditor disallowed, because, as the evidence showed, she had been regularly paid at the rate of $50 per year, and, settlements having been made on this basis, there was no implied promise to pay more. In this particular, he was clearly right. Having made his report, and exceptions being filed thereto, the orphan's court overruled the exceptions, and confirmed the report absolutely. From that decree, we have this appeal.

All the errors assigned are resolved by the answer to one question, *viz.*, under the facts, Did a right to the bond pass to the niece? No one will question the correctness, in the abstract, of the legal propositions stated so clearly and concisely by the auditor. "In all gifts a delivery of the thing given is essential to their validity; for although every other step be taken that is essential to the validity of a gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite, without which the gift fails, regardless of the consequences." Thornton, Gifts & Advancements, § 131. "The consummation of every parol gift is delivery. There must be an actual transmutation of possession and property; and the real question in all such cases is whether the donor has parted with his dominion over it." Id. § 134. On these and like authorities, the auditor concludes there was no gift, for there was no delivery; and, as to the argument that the bond was delivered to Skiles, to be by him held in trust for her, the auditor holds: "Delivery of the property in question, with the intent to give, is absolutely necessary to the validity of the gift. The owner must part with his dominion and control of the thing before the gift can take effect. There must be an actual and positive change of possession. Words of gift are not sufficient. They alone convey no title and are not the basis of any action." 8 Am. & Eng. Enc. Law, p. 1314, and other authorities to the same point. The auditor then states the question for his decision thus: "It is clear, from the testimony, that the money represented by the bond for $2,000 was intended by the decedent to be a gift to Frances S. Dorlan, to take effect after his death. The question here raised is whether or not the facts show a sufficient delivery to execute the gift."

It seems to us the undisputed facts found by the auditor do not warrant the inferences drawn from them by him, that the donor had not parted with his control over the bond. Here was an unlearned man disclosing, to one assumed by him to be entirely competent to assist him, his purpose to reward his favored niece by an absolute gift of $2,000, of which

she was to come into the full enjoyment at his death. No other reasonable inference can be drawn from Skiles' testimony. The donor first wants to make her an absolute deed for part of the farm; he is deterred from doing this because of Skiles' suggestion that it might depreciate the value of the whole farm. His mind then turns to the execution of his purpose by delivering the bond to Skiles for her. Skiles then draws the bond, and the donor executes it, and places it in Skiles' possession, to be handed her after his death. If the evidence had gone no further, we think no one could question the creation of a trust in Skiles, to be carried into effect on the happening of the contingency of the uncle's death and her survivorship. The uncle placed in the hands of Skiles an obligation for $2,000, to be delivered to the niece at his death, and then notified the beneficiary that he had created the trust, and of the terms of it. Equity would not lend its aid in the creation of a voluntary, intended trust. But this trust was fully created by the donor. All that remained for equity was to enforce it.

One of the facts from which it is assumed the donor still exercised dominion over the bond is that he authorized Skiles to indorse the interest paid during his lifetime; but this, obviously, was the plan suggested by Skiles' mistake in drawing the instrument. Instead of expressing in it the intention of the obligor that it should be payable at his death, he made it payable in one year, with interest at 5 per cent. Then the very difficulty raised by his own blunder he mentions to the obligor, *viz.*, that it will bear interest in his lifetime. Wagoner, no wiser than he, then suggests that the mistake of expressing what was not meant could be cured by indorsing on the instrument what was not true, to wit, that he had paid, annually, the interest. What he did intend he clearly expressed to the scrivener, who wrote what he did not intend; and then was adopted a clumsy device to avoid the effect of the scrivener's mistake. But in all this there was no intention to retain control over the gift,—only an effort to carry out the intention of the giver. But, did the contingency that the gift was not to take effect except in case of the survivorship of the niece render it void? The gift here was to Skiles as trustee, the trust to be executed by the trustee by delivery to the donee at his death. Then the donor informs the niece of the gift, and that at his death she is to go to Skiles and get the bond. The delivery to the trustee for purposes of the trust was absolute. If the niece survived him, the bond was to be delivered to her. If the remote contingency that the aged uncle survived the niece happened, doubtless it was his secret intention, if that contingency occurred to him, the bond should be redelivered to him. But he annexed no such reservation to the trust. He retained no such control or dominion over it in the meantime. The death of either determined only the duty of the trustee. A chancellor, on Skiles' evidence as to what was said by the donor to him when the bond was put in his possession, and the declaration of the donor to the donee, would have restrained Skiles from delivering it to either during the lifetime of both, and, on the death of the niece first, might have ordered its cancelation, but, if the uncle died first, would have compelled its delivery to the niece. Skiles testifies he would have given the bond back to Wagoner if he had asked him for it. That is wholly immaterial. Skiles' duty as a trustee is not measured by what he would have done, but what he ought to have done under the express terms of his trust, with express notice of it to the beneficiary. The delivery to him was a good delivery to her, as is held in *Stephens* v. *Russ*, 54 Pa. 20, and *Stephens* v. *Rinehart*, 72 Pa. 434. In this last case, deeds for lands had been executed by a grantor and delivered to a third party, to be by him delivered to the grantees after the grantor's death, and they were so delivered. This court (Sharswood, J.), says: "That the delivery of the deed in controversy after the death of the grantor, took effect by relation to the first delivery, seems a point very well settled by the decided cases." Then is quoted, with approval, the opinion in *Foster* v. *Mansfield*, 3 Met. 414, 37 Am. Dec. 154: "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery." And other cases to same effect are cited. There is no distinction in this respect between an instrument constituting the evidence of a gift of land and one evidencing a gift of money. In *Hummel's Estate*, 161 Pa. 215, the donor delivered to a third party three promissory notes under seal, to be delivered to a nephew and niece after his death, all payable after his death. It was held, the present chief justice rendering the opinion, that the delivery was complete as evidence of an existing debt payable in the future, and the gift was irrevocable. In *Candor's Appeal*, 27 Pa. 119, the decedent executed a bond in $2,000, payable ten years after date, or at his death, to his daughter, and delivered it to a trustee to be handed to her. Although he afterwards undertook to revoke the gift by his will, and died before the expiration of the ten years, this court held the gift irrevocable.

We are clearly of the opinion, that this was an express trust by parol, which took effect as soon as created. The enjoyment of the subject of the trust by the beneficiary could be defeated only on the happening of the one contingency, her death before her uncle's. The subject of it having passed completely out of his control, that control could only be resumed by him on the happening of the same contingency. A subsequent event, his survivorship, might, through the interposition of equity, restore to him the bond, but a change of intention on his part never could.

The decree of the court below is reversed, and it is directed that the fund be distributed in accordance with this opinion.

ILLINOIS SUPREME COURT.

Elisha GRAY *et al., Plffs. in Err.*,
v.
Willard D. MERRIAM.

(148 Ill. 179.)

1. **A bank which, according to its custom, receives securities as a special deposit,** is liable for any loss thereof occurring through the want of that degree of care which good business men usually exercise in keeping property of such value.
2. **An erroneous instruction will not cause a reversal** when it affirmatively appears that the defeated party was not injured by the error.
3. **A bank holding United States bonds as collateral security** is liable for their amount if they are stolen by its employee who has access to them, after the managing officer of the bank knows that he is speculating on the board of trade, and accepts his statement that he is using his own money, without knowledge that he has property other than his salary, which is $1,800 a year.
4. **Testimony that bonds stolen from the bank were in its possession as a special deposit,** had been left there as collateral to a loan which was repaid, and that the bank officer had access to them for the purpose of cutting off coupons, is admissible upon the question of the liability of the bank for the loss, as tending to show the relation of the parties to each other and to the property.

(November 29, 1893.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover the value of certain bonds which had been left with defendant and stolen by its employee. *Affirmed.*

Statement by **Magruder, J.**:

The following is a statement of the facts in this case, as made by the appellate court in the opinion rendered by that court:

"This is a suit brought by the defendant in error, Willard D. Merriam, against Elisha Gray, plaintiff in error, and Samuel A. Kean, surviving partners of the firm of Preston, Kean, & Co., to recover the value of fifteen United States 4 per cent bonds for $1,000 each, claimed to have been left with said firm for safe keeping, and lost through the negligence of said firm. The firm of Preston, Kean, & Co. was engaged in the general banking business in Chicago, and Merriam, defendant in error, had for several years prior to 1879 kept a running deposit and check account with them, and had at times borrowed money of them. In February, 1879, Merriam purchased twelve of the lost bonds from, or through the agency of, the firm, and took them to his home in Iowa, and in the spring of the same year purchased, in a like manner, three other like bonds, which he directed the firm to keep for him. In June of the same year he borrowed of the firm $15,000, and sent them the twelve bonds he had at home to hold as collateral security, together with the other three bonds they already held for him. Whatever, if any, other transactions, by way of loans or renewals, may have occurred between the firm and Merriam after that time, and before March, 1881, seem to have been settled, for on March 19 and 24, 1881, the firm wrote Merriam, sending him his canceled notes, and advising him that they 'hold in special deposit, subject to your order, fifteen $1,000 United States 4 per cent

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NOTE.—*Care required of bank in keeping special deposit.*

There are a few cases which were not strictly cases of special deposits, but involved some slight compensation to the bank, and which the courts distinguish from cases of special deposit, and in which they impose a greater liability on that account. While not strictly within the scope of this note, they yet tend to illustrate the limits of the liability, and are therefore mentioned here.

If compensation is offered to the depositary for services rendered in making a loan on the securities deposited, the mere fact that it refuses to take compensation because of the state of accounts between the parties does not make it a gratuitous bailee so as to be liable only for gross negligence. Second Nat. Bank v. Ocean Nat. Bank, 11 Blatchf. 362.

Where a bill which had been forwarded to a bank for collection was lost, the court held that the loss of the bill carried with it the presumption of negligence and want of care; and the burden of rebutting these presumptions was on the bank. Chicopee Bank v. Seventh Nat. Bank, 75 U. S. 8 Wall. 641, 19 L. ed. 422. But that case was not strictly a case of special deposit.

If the deposit consists of securities upon which the bank undertakes to collect dividends for compensation, the deposit is not gratuitous, and the bank will be guilty of gross negligence if it leaves them in the uncontrolled and unwitnessed power of the manager, who misappropriates them. *Re* United Service Co L. R. 6 Ch. 212, Affirming Johnston v. Renton, L. R. 9 Eq. 181.

In case of deposits left as collateral security the expressions as to the care required illustrate the diversity of expression in regard to strictly special deposits.

Deposits left as collateral security for loans demand a higher degree of care than special deposits. Ouderkirk v. Central Nat. Bank, 52 Hun, 1.

If the deposit is made collateral security for a loan, the bank is bound to exercise ordinary care at least, and it does not do so if it leaves the whole management of the bank to one person without even making any examination to determine its condition. Cutting v. Marlor, 78 N. Y. 458.

If the deposit is left as collateral security for a loan the bank is chargeable with the exercise of a high degree of care in its keeping. Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 270.

In case of collateral security the care and diligence ought to be such as is properly adapted to the preservation and protection of the property, and should be proportioned to the consequences likely to arise from any improvidence on the part of the bank. Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35.

In case of collateral securities the bank is liable for want of ordinary care and diligence. Scott v. Crews, 2 S. C. N. S. 522.

Of collateral security the bank is bound to take

bonds,—say $15,000.' It does not appear that Merriam ever had all or any one of said bonds in his actual possession, or that he ever in fact saw them, or either of them, after that time. He did, however, after that time, borrow small sums of the firm,—twice $500, and once $600,—and a part or all of said bonds were, by the terms of the notes, given by him for the money so borrowed, pledged to the firm as collateral security. The record contains a copy of one of the notes for $500, wherein it is recited that Merriam has 'deposited with them, as collateral, ——— United States bonds.' The three notes last referred to appear to have been made and paid in 1881, and subsequent to March of that year, and it does not appear that, at any time subsequent to the year 1881, Merriam was indebted to the firm for borrowed money, or otherwise. The bonds were stolen by Frederick M. Ker in 1882, while Ker was acting as assistant cashier, or assistant manager, of the firm in its banking business. During the time they were held as a special deposit, the bonds were tied together, and kept in one of the safes in the vault of the bank,—the same safe in which the cash of the bank was kept, but in a separate compartment of the safe,—and Ker, Mr. Kean, the managing partner, and Mr. Ware, the cashier, were the only persons who had access to the safe. The quarterly coupons for interest on the bonds, as they matured, were detached and collected by the firm so long as they remained in their possession, and the amount was credited to the general deposit account of Merriam with them, and was either remitted to him, at his request, in New York exchange, or lay subject to his check in the regular course of the firm's banking business. Merriam was also, in fact, credited with and paid by the firm interest which matured on the bonds January 1, 1883,—a date subsequent to the time when they were taken by Ker. Ker testified that he credited Merriam's account in advance with the amount of the coupons maturing on January 1, 1883, knowing at the time that the bonds were not on hand, so as to anticipate any demand that Merriam might make for the coupons. With reference to the coupons which matured October 1, 1882, at which time, according to the testimony of Ker, it was uncertain whether the bonds were on hand or not, the firm wrote Merriam on October 6, 1882: 'Yours received. We credit $150,—coupons. The bonds give us no trouble at all; glad to be of service to you.' Ker had been in the employ of the firm for many years, and had arisen by regular gradations to the responsible position of assistant cashier, assumed by him in November, 1881. Very shortly afterwards, and in December, 1881, or January, 1882, rumors that Ker was speculating on the board of trade reached Mr. Kean, the active managing partner of the firm, and he spoke with Ker about it. Ker admitted that he had been speculating some, but claimed that, as he was operating with his own money, it was not an objectionable practice. There is some contradiction between the testimony of Kean and that of Ker as to the number of conversations between them on the subject of Ker's speculations, and as to what was said, but we fail to find, in the testimony of either, any forbidding by Kean of further speculations by Ker. The nearest approach to it is in the testimony of Kean that he asked Ker if he did not know it was against the rule, but he fails to state that he made any reply after Ker said he would stop if it was against the wishes of the firm."

The verdict and judgment in the trial court were in favor of the plaintiff, and said judgment has been affirmed by the appellate court.

The instructions given for plaintiff by the trial court are as follows: "The jury are instructed that, if you believe from a preponderance of the evidence that the defendants held the bonds of the plaintiff exclusively for the benefit of the plaintiff, then the only obligation resting upon them was to exercise reasonable and ordinary care over the same. What constitutes such reasonable and ordinary care is a question of fact for the jury to determine from all the evidence in the case. It will vary with the nature, value, and situation of the property. The person who holds or has the charge of the property of another under such circumstances is required to exercise the care usually and generally deemed necessary in the community for the security of a similar property under like circumstances, but nothing more. The

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ordinary care only. Jenkins v. National Village Bank, 58 Me. 275.

In regard to deposits held as collateral security, the bank is obliged to exercise that degree of care in their safe keeping which a reasonably prudent and cautious man would exercise in the care of his own property of the same kind. Prather v. Kean, 29 Fed. Rep. 498.

The bank must take the same care of collateral security that good business men or persons of every class ordinarily take of such property. Fleming v. Northampton Nat. Bank, 62 How. Pr. 177.

If the bank does not take any precautions to know whether or not the deposits are safe it will be held liable, at least where the deposit was left as collateral security for loans. Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 270.

Liability of national banks for loss of special deposit.

Some of the courts at first held that it was beyond the power of a national bank to take a special deposit, and that therefore it could not be held liable for the loss of it.

In Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122, it is held that national banks have no power to take special deposits, and that therefore they are not liable for the loss of them, and that ruling was followed in Whitney v. First Nat. Bank, 50 Vt. 388, 28 Am. Rep. 503.

But when the latter case came up the second time the court, in view of National Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, did not adhere to the former decisions but considered the question upon principle, holding that the law required the bank to keep the deposit in good faith, within its safe, with all the safeguards afforded to like property of its own. Whitney v. First Nat. Bank, 55 Vt. 155, 45 Am. Rep. 598.

If a national bank is accustomed to take special deposits, and this is known and acquiesced in by the directors, it will be liable if the deposit is lost by gross negligence. National Bank v. Graham, 100 U. S. 699, 25 L. ed. 750.

want of ordinary and reasonable care is in law termed 'gross negligence.' It is for you to say what the evidence is,—what it proves, tends to prove, or fails to prove; and the court has no right to, and must not be understood to, intimate any opinion as to any questions of fact. If, from all the evidence, you find and believe that the defendants did not exercise, over the bonds of the plaintiff, reasonable and ordinary care, but were guilty of gross negligence in their keeping, and that by reason thereof the bonds were lost to the plaintiff, then you will find the defendants guilty." "If the jury find the defendants guilty, they should assess the damages of plaintiff at the value of the bonds on the 1st day of December, 1882, and may add interest thereon from the 1st day of January, 1883, to the present time, at the rate of 6 per centum per annum."

The instruction given for the defendant is as follows: "If you believe from the evidence in this case that the bonds in question were held by the defendants and said David Preston simply as a special deposit, and while they were so in the possession of the said defendants and said David Preston they were lost or stolen, then you are instructed to find for the defendants herein, unless you further believe from the evidence that they were guilty of gross carelessness or negligence in the care which they took of them while they held possession thereof."

Messrs. **Hoyne, Follansbee, & O'Connor** for plaintiffs in error.

Messrs. **Robert Hervey** and **C. Stuart Beattie,** for defendant in error:

Defendant in error remained a customer of the bank all the time, with a deposit account, showing a balance of something to his credit, until after these securities were taken.

During all this time defendant in error was at liberty to draw upon the bank, and it was willing to honor his drafts; and for any balance of account owing by him to it, while such an understanding existed, it had a lien upon these securities without any special contract.

Fourth Nat. Bank v. *City Nat. Bank,* 68 Ill. 398; *Davis* v. *Bowsher,* 5 T. R. 492.

Defendant in error left the bonds with the bank, knowing that he could get money on them whenever he wished, the bank being willing to loan money, with the bonds as collateral, at any time; and while holding them, applying the money derived from the coupons as a general deposit with it by defendant in error. This being true, the bank was a bailee for hire, although the defendant in error had no indebtedness to the bank when the bonds were lost.

Third Nat. Bank v. *Boyd,* 44 Md. 47, 22 Am. Rep. 35; *Cutting* v. *Marlor,* 78 N. Y. 458; *Preston* v. *Prather,* 137 U. S. 604, 34 L. ed. 788.

Ker's position was one of trust and great importance. His own admission showed that he was not trustworthy for such employment, and it was gross negligence in the defendant not to discharge him or place him in some position of less responsibility.

Prather v. *Kean,* 29 Fed. Rep. 502; *Scott* v. *National Bank,* 72 Pa. 471, 13 Am. Rep. 711; *Third Nat. Bank* v. *Boyd, Cutting* v. *Marlor,* and *Preston* v. *Prather, supra.*

The time has passed in the history of the law of bailments when compensation is the only rule by which liability is measured.

Maury v. *Coyle,* 34 Md. 235; *Pattison* v. *Syracuse Nat. Bank,* 80 N. Y. 82, 36 Am. Rep. 582; *Ganley* v. *Troy City Nat. Bank,* 98 N. Y. 487.

The law requires an error to be to the prejudice of a party before it is a ground for reversal.

Hall v. *Sroufe,* 52 Ill. 421; *Burling* v. *Illinois C. R. Co.* 85 Ill. 18; *Hubner* v. *Feige,* 90 Ill. 212; *United States Rolling Stock Co. v. Wilder,* 116 Ill. 105; *Endsley* v. *Johns,* 120 Ill. 469, 60 Am. Rep. 572.

Magruder, J., delivered the opinion of the court:

The main error assigned is the giving of the first instruction given by the trial court for the plaintiff. It is claimed by plaintiff in error that the defendant bankers were gratuitous bailees, holding the bonds in controversy as a special deposit for safe keeping without reward. The general rule is that a gratuitous bailee is liable only for gross negligence. Story, Bailm. 9th ed. §§ 62, 79; Schouler, Bailm. 2d ed. § 35; *Skelley* v.

A bank which habitually receives special deposits for safe keeping is liable for the value of them if lost through its gross negligence. Chattahoochee Nat. Bank v. Schley, 58 Ga. 369.

But it has been held that if a national bank goes into the hands of a receiver after having lost the deposit by gross negligence, the owner will be entitled only to a ratable dividend with the other creditors of the bank. Turner v. First Nat. Bank, 26 Iowa, 562.

Measure of care required generally.

The theoretical statements as to the measure of care required in keeping a special deposit are quite diverse. They vary all the way from the care supposed to be bestowed by the most inattentive men upon their own property to that exercised by prudent men under like circumstances. One class of cases hold that—

The bank is liable only for the measure of care which the most inattentive and thoughtless men take of their own concerns. First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; First Nat. Bank v. Rex, 89 Pa. 308, 33 Am. Rep. 767; Steffe v. Bank of Conneautville, 22 Pittsb. L. J. 157, 1 Bright. Dig. (Pa.) 215.

The bank is liable only for gross negligence which in its effect on contracts is equivalent to fraud. Lloyd v. West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581.

In the case of a special deposit slight care is sufficient. Merchants Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L. R. A. 322.

In order to hold the bank liable gross carelessness on its part in some respect, affecting the safe custody of the deposit, or which occasioned its loss, must be shown. Smith v. First Nat. Bank, 99 Mass. 605, 47 Am. Dec. 59.

But it will be noticed that in one case holding the rule of gross carelessness, that rule is very little different from the rule announced in other cases apparently requiring a higher degree of care. It is held that a bank is liable only for gross negligence which is equivalent to bad faith. But it is further stated that the degree of care which is

Kahn, 17 Ill. 170. The instructions for both plaintiff and defendants require the jury to find that the defendants were guilty of gross negligence in the keeping of the bonds, as a condition to the right of recovery. But the objection made to plaintiff's instruction is the definition which it gives of gross negligence in the use of the following clause: "The want of ordinary and reasonable care is in law termed 'gross negligence.'" Gross negligence has been defined to be the absence or want of slight care or diligence. Story, Bailm. §§ 62, 64; Schouler, Bailm. §§ 15, 35; *Michigan C. R. Co.* v. *Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Chicago, B. & Q. R. Co.* v. *Johnson*, 103 Ill. 512. But the portions of the instruction which precede and follow said clause are in harmony with much of the language used in the text-books and decisions. Schouler, in his recent work on Bailments and Carriers (§ 35), after announcing that the gratuitous bailee is liable only for slight care and diligence according to the circumstances, and cannot be held for loss or injury unless grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. . . . 'Slight,' 'ordinary,' and 'great,' are terms they [some courts] wish to see discarded, and they prefer judging of each case by its own complexion." The same author states that, in the main, gross negligence is a question of fact upon all the evidence for the jury, and that what constitutes slight diligence or gross negligence will depend in each case upon a variety of circumstances, such as the occupation, habits, skill, and general character of the bailee, and local custom and business usage. Schouler, Bailm. §§ 49, 50. Story, after stating the rule that, when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that in every case good faith requires a bailee without reward to take reasonable care of the deposit; "and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties." Story, Bailm. §§ 23, 63. In *Smith* v. *First Nat. Bank*, 99 Mass. 605, which was an action against a bank for the conversion or loss by gross negligence of valuable articles deposited with it as a bailee without hire, the court said: "This was a gratuitous bailment. The defendants are liable only for want of ordinary care." A deposit is a naked bailment of goods to be kept for the bailor without recompense, and to be returned when the bailor shall require it, while a mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. Story, Bailm. §§ 4, 5. But a mandatary, like a depositary, is said to be bound only to slight diligence, and responsible only for gross neglect. Story, Bailm. § 174. In *Skelley* v. *Kahn*, *supra*, we held that "a mandatary or bailee, who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care." The liability of banks, acting as bailees without reward in the care of special deposits has been recently considered in the case of *Preston* v. *Prather*, 137 U. S. 604, 34 L. ed. 788, and it was there held that such bailees are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; that the exercise of reasonable care is in all such cases the dictate of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. Gross negligence, as applied to gratuitous bailees, is defined in that case to be "nothing more than a failure to bestow the care which the property in its situation demands;" and the court further says: "The omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine."

In the light of these more liberal views as to

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necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses toward his own property of similar kind. Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

In other cases the care required is stated in somewhat stronger terms, holding to the rule of the ordinarily prudent person.

The bank is not bound to resort to special or extraordinary measures to protect the property of the depositor. The owner can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department. First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

The bank is liable for want of ordinary care, which is the same as gross negligence. Lancaster County Nat. Bank v. Smith, 62 Pa. 47.

The bank must use such care as persons of common prudence in its situation and business usually bestow in the custody and keeping of similar property belonging to themselves. Maury v. Coyle, 34 Md. 235.

If the deposit is gratuitous the only obligation resting on the bank is to exercise over the deposit such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. Gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands. Preston v. Prather, 137 U. S. 604, 34 L. ed. 788.

In that case the court says: "The bank must use such measures as will ordinarily secure the property from burglars outside and from thieves within, and must employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars."

The responsibility must not be so lax as to authorize the omission of any care which is indispensable to the proper security of the thing deposited, which may be reasonably acquired according to the usages of men of business. The depositor is entitled to such security as the course of business between

the liabilities of bailees without reward, we think that the clause in question, when considered in connection with the rest of the instructions, could only have been understood by the jury as referring to the want of such ordinary and reasonable care as was designated in the previous part of the instruction; that is to say, the care usually and generally deemed necessary in the community for the security of similar property under like circumstances. The rule that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive cannot be applied to all cases of bailment without reward. When securities are deposited with banks accustomed to receive such deposits, they are liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in keeping property of such value. *First Nat. Bank* v. *Zent*, 39 Ohio St. 105; 16 Am. & Eng. Enc. Law, pp. 160, 206.

But if it be conceded that the definition of gross negligence in the clause above quoted, even when considered in connection with the balance of the instruction, is technically inaccurate, it does not follow that plaintiff in error is entitled to a reversal of the judgment in this case. A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court. *Hall* v. *Sroufe*, 52 Ill. 421; *Burling* v. *Illinois C. R. Co.* 85 Ill. 18; *Hubner* v. *Feige*, 90 Ill. 208; *Chicago, B. & Q. R. Co.* v. *Warner*, 108 Ill 538; *United States Rolling Stock Co.* v. *Wilder*, 116 Ill. 100; *Wheaton* v. *Hadley*, 131 Ill. 640. The defendants in this case did a regular banking business. The plaintiff kept a deposit and check account with them. He borrowed money from them from time to time, and authorized them to hold the bonds in question as collaterals to secure the notes given for such loans. While the bonds were thus held as collaterals, the character of the bailment was changed from a bailment for the exclusive benefit of the bailor to one for the mutual benefit of the bailor and bailee. *Preston* v. *Prather*, *supra*. In ordinary cases of special deposits without reward, the banker has no right to handle or examine the property except so far as its safety may require. But here the bankers had access to the package containing the bonds, and detached the interest coupons when they fell due, and collected the interest and deposited it to the credit of the plaintiff to be checked out by him in the regular course of business. *First Nat. Bank* v. *Graham*, 100 U. S. 699, 25 L. ed. 750; *Whitney* v. *First Nat. Bank*, 55 Vt. 154, 45 Am. Rep. 598. Ker, the assistant cashier of the bank, stole the bonds in the summer of 1882. He had access to these bonds, and to the other special deposits kept by the bank in its vault. About a year before he absconded, Kean, the chief officer of the bank, had his attention called to the fact that Ker was speculating upon the Board of Trade in Chicago, and had a conversation upon the subject with him. Ker was not known to have any other property than his salary of $1,800. He was, however, allowed to retain his position in the bank, and no effort was made to verify the truth of the statements made as to his speculations, and no examination was made to ascertain whether he was using moneys which did not belong to him. About two months before he absconded, the subject of his speculations was again called to the attention of the chief officers of the bank through an anonymous communication, and Kean had a second interview with him in relation to his conduct in this regard. "The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed." *Preston* v. *Prather*, *supra*. The facts thus detailed are undisputed, and are established by the evidence of the defendants themselves. In *Preston* v. *Prather*, *supra*, an action was brought in the circuit court of the United States by parties in Missouri, doing business under the firm name of the Nodaway Valley Bank of Maryville, against the same bankers who are defendants in the present suit, to recover the value of the United States bonds held as a special deposit, and stolen by the said Ker about the same time when he appropriated the bonds in con-

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them and the bank shows to have been mutually intended and expected between them. White v. Commonwealth Nat. Bank, 4 Brewst. (Pa.) 234.

A bank is liable for the loss of a special deposit occurring through want of that degree of care which good business men would exercise in keeping property of such value. First Nat. Bank v. Zent, 39 Ohio St. 105.

The bank is required to exercise only such diligence and care in the preservation of the deposits as a reasonably prudent person generally exercises in the care and preservation of his own property of like nature, and good faith in the selection of the agents to whom they are intrusted. Ray v. Bank of Kentucky, 10 Bush, 344.

In case of a special deposit the bank will be liable for want of the ordinary diligence which men of common prudence ordinarily exercise about their own affairs. Giblin v. McMullen, L. R. 2 P. C. 317, 21 L. T. N. S. 214, 17 Week. Rep. 445, 5 Moore, P. C. C. N. S. 434.

Some of the cases make the criterion the degree of care which the bank bestows upon its own property of like description.

A depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property. Levy v. Pike, 25 La. Ann. 630.

The bank is liable to use, in case of a special deposit, only the same care which it takes of its own funds, and is liable only for gross negligence if it is lost or purloined from it. Marine Bank v. Rushmore, 28 Ill. 463.

With regard to special deposits, neither the bank nor its directors undertake to exercise any greater care in their preservation than that depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description. United Soc. v. Underwood, 9 Bush, 609.

The bank should keep the goods intrusted to it with as much care as it ordinarily keeps its own of the same kind. And it should keep them with such degree of care as is reasonable with reference to the nature of the property and the particular cir-

troversy here. The *Prather Case* was tried by agreement before the Federal circuit judge without a jury, resulting in judgment for the plaintiffs, and was taken afterwards to the Supreme Court of the United States, where the judgment rendered by the circuit judge was affirmed. The evidence in that case established substantially the same facts as are herein set forth. Those facts, which are here undisputed and supported by the testimony of the defendants, were there held by the Federal Supreme Court to constitute such gross negligence as to make the defendants liable for the loss of the bonds; the court saying: "As stated above, the reasonable care which persons should take of property intrusted to them for safe keeping without reward will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and thieves within, and that, whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of these measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court [below] to its conclusion that they were guilty of gross negligence. . . . In this conclusion we fully concur." Inasmuch as the undisputed facts presented to the jury for their consideration on their trial below have been determined by the Supreme Court of the United States to amount to such gross negligence as will fasten liability upon a gratuitous bailee, we are disposed to hold that the verdict of the jury was right, independently of the error in the instruction, and that it ought not to be disturbed. *Scott* v. *National Bank*, 72 Pa. 471, 13 Am. Rep. 711.

It is said that the trial court erred in admitting testimony showing that the bonds had been pledged as collateral security for loans made by the bank to the plaintiff at various times before they were stolen, and that the evidence should have been confined to the character of the bailment at the time of the loss, in the summer or fall of 1882, as at the latter date all previous loans for the security of which the bonds had been pledged had been paid up, and they were then held merely as a special deposit. We think that this testimony, as well as that showing that Ker had access to the bonds for the purpose of cutting the quarterly coupons therefrom as late as October, 1882, after some of them had been abstracted, was competent to show the relation of the parties to each other and to the property. As the reasonable care which the defendants were required to take of the bonds depended upon the situation and the bearing of the surrounding circumstances, and the nature of the custody which they were allowed to exercise over the bonds, the extent to which they were permitted to have access to the bonds under instructions by correspondence from the plaintiff, who lived in Iowa, either for the purpose of holding them as collaterals to notes, or for the purpose of detaching the coupons, had a direct bearing upon the question of their obligation to make examination when advised of the speculations of their assistant cashier.

The judgment of the Appellate Court is affirmed.

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cumstances of the bailment. Griffith v. Zipperwick, 28 Ohio St. 388.

The bank is bound only to keep the deposit with the same care that it keeps its own property of like description. Boyden v. Bank of Cape Fear, 65 N. C. 13.

But another case has held that the standard of the conduct of the bank is not its care with reference to its own property, but the general conduct of the class to which it belongs. Merchants Nat. Bank v. Guilmartin, 93 Ga. 503.

But it has been held that the mere fact that the bank keeps its own property in the inner vault of the bank while it leaves the special deposit in the outer vault, will not render the bank liable for the loss by burglary. Leeds v. Trenton Bank, 1 Stewart's N. J. Dig. 78.

So, the fact that a tin box containing securities left for safe keeping is not placed in the safe at night where the bank places its own security, but is left in the vault outside, is not sufficient of itself to charge the bank in case they are lost while its own property in the safe is undisturbed. Griffith v. Zipperwick, 28 Ohio St. 388.

General rulings.

A special deposit is at the risk of the depositor, and if it is stolen, lost, or destroyed without any fault on the part of the officers of the bank, he must sustain the loss. *Re* Franklin Bank, 1 Paige, 249, 19 Am. Dec. 413.

If the bank takes proper precautions it is not liable. De Haven v. Kensington Nat. Bank, 81 Pa. 95.

If there is no evidence of negligence except the mere fact of loss of the property by robbery there can be no recovery. Wylie v. Northampton Nat. Bank, 119 U. S. 361, 30 L. ed. 455, Affirming 15 Fed. Rep. 428.

The burden of showing the circumstances of the loss rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment he will be held responsible for the breach of his contract to return the property bailed. Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 270.

If no satisfactory solution of the manner in which the deposit was lost can be given by the bank officials, and the circumstances are such as to lead to the conclusion that the loss must have been by the gross negligence of the officials, the bank will be liable. First Nat. Bank v. Graham, 85 Pa. 91, 21 Am. Rep. 49.

The mere showing to a customer of the facilities and securities of a bank does not amount to a rep-

GEORGIA SUPREME COURT.

MERCHANTS' NATIONAL BANK, *Plff. in Err.*,
v.
George B. CARHART.

(95 Ga. 394.)

*1. **Where a special deposit of property for gratuitous safe keeping was made with a bank,** which, through its cashier, issued a receipt for the property, specifying that the same was held subject to the order of the depositor, the cashier being duly authorized to issue such receipt, in an action by the depositor against the bank for the value of the property so deposited a prima facie case for the plaintiff was made out by introducing the receipt in evidence, and proving a failure to deliver to the plaintiff on his demand the property therein described, and the burden was thus cast upon the defendant of showing it had exercised at least slight diligence in the care and keeping of the property.

*2. **Where in such a case it appeared that the property so deposited was stolen by the cashier himself,** the bank, even if it exercised due diligence in selecting him, was not discharged from liability, unless it affirmatively showed, further, that it had not been guilty of gross negligence in retaining the cashier in office after it knew, or ought in the exercise of slight diligence to have known, that he was or had become unworthy of trust; and it does not show this by merely proving that up to a given time, three or more years previous to the discovery of the theft, his reputation was good, and that "he stood in the community for honesty and integrity as high as any man." In view of the fact that he had actually stolen the property in question, it was incumbent upon the bank to show that during the whole term of the bailment it had exercised, at least, a slight supervision of him, and that, in so doing, no indications of dishonesty or other reason for distrusting him had appeared.

*3. **The court was right in refusing by its charge to make the determination of the question** whether or not the bank observed that degree of diligence which was due to the plaintiff dependent upon the question whether or not, under similar circumstances, it trusted its cashier with its own property of like kind. What the bank ought to have done in order to come up to the measure of diligence required by law cannot be arrived at by showing what it actually did in other matters relating to its own affairs.

*4. **The case, upon its substantial merits, is controlled by the propositions above announced.** The requests to charge were, so far as consistent with the law of the case, covered by the general charge. The verdict, under the evidence, was right; and in none of the grounds of the motion for a new trial does cause for a reversal of the judgment below appear.

*Headnotes by LUMPKIN, J.

(February 18, 1895.)

ERROR to the City Court of Savannah to review a judgment in favor of plaintiff in an action brought to hold defendant liable for the loss of a special deposit made with it and embezzled by its cashier. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Erwin, Du Bignon, & Chisholm** and **Barrow & Osborne** for plaintiff in error.

Messrs. **J. R. Saussy** and **C. N. West** for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The case now before us is quite similar to that of *Merchants' Nat. Bank* v. *Guilmartin*, 88 Ga. 797, 17 L. R. A. 322, and 93 Ga. 503, in which this court dealt at length with the duties and liabilities incurred by a bank in accepting from one of its customers a special deposit, under circumstances which, in law, would create a gratuitous bailment. In view

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resentation that in case a special deposit is left with the bank it will be placed in the safest place so as to enhance the obligation of the bank in regard to the deposit so made. Hale v. Rawallie, 8 Kan. 137.

If the safe was so situated as to be accessible from the street, the door being at times open, while there were places inside the bank from which the door of the safe was not visible, the bank may be found guilty of gross negligence in leaving the deposit in the safe so exposed. Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

Delivery to wrong person.

If the bank permits collaterals to be used by a third person without the knowledge of their owner, it may be liable to him for their loss. Hyre v. Central Bank, 48 Mo. App. 434.

If the property is turned over to the husband of the depositor without her consent the bank may be held liable. Ganley v. Troy City Nat. Bank, 98 N. Y. 487.

A bank will be liable for securities left with it on special deposit if, without authority from the owner, it permits her agent to use them as collateral security for loans to the firm of which the agent is a member. Manhattan Bank v. Walker, 130 U. S. 267, 32 L. ed. 959.

But if the contract of deposit provides that the box containing it is to be delivered to the bearer of a deposit ticket, the bank will violate no duty if it delivers it to the bearer of such ticket, especially if such bearer had authority from the person whose name is on the box, although the box was kept in that name for an ulterior purpose, and was in fact the property of the person who deposited it and from whom the card was taken without his knowledge or authority. Fisk v. Germania Nat. Bank, 40 La. Ann. 820.

Misappropriation by bank.

If the deposit is converted to the use of the bank the bank will be liable. Hughes v. First Nat. Bank, 17 W. N. C. 178.

If the bank itself converts the deposit, it will be liable for the amount. First Nat. Bank v. Strong, 28 Ill. App. 325.

Although the deposit was at first left with the cashier, and not with the bank, the bank will be liable for it in case it was pledged for a debt of the bank. Hughes v. First Nat. Bank, 110 Pa. 428.

If the deposit is converted to the use of the bank,

of the elaborate discussion of the subject then entered into, it will not be necessary in this opinion to again cite the numerous authorities in support of the rule that it is incumbent upon a bank, in order to vindicate its diligence where the loss of a special deposit occurs through the negligence or dishonesty of one of its employees, to show reasonable care and circumspection on its part, both as regards the selection of such employee in the first instance, and as to his subsequent retention in a position of trust. Our present endeavor will therefore be simply to show the application of this rule to the facts of the case at bar.

1. The plaintiff having satisfactorily proved authority on the part of the defendant's cashier to receive and receipt for the special deposit in question, a prima facie case was made out by them introducing in evidence the receipt given by the cashier, and proving a failure to deliver the property on demand. Under § 2064 of the Code, the burden would thus be cast upon the defendant of showing it had exercised, at least, slight diligence in the care and keeping of the property.

2. The defendant sought to escape liability on the ground that the loss of plaintiff's property was sustained through no negligence on its part, but was due solely to the wrongful conduct of its defaulting cashier, who had embezzled not only the special deposit of the plaintiff, but also a considerable amount of valuable property belonging to the bank itself. In support of this defense, evidence was introduced to show that all requisite diligence had been observed in the selection of the cashier; that he had remained in the service of the bank many years, and had gained the implicit confidence of its managing officers; and that, up to about three years previous to the discovery of the theft, his reputation was not merely good, but "he stood in the community for honesty and integrity as high as any man." No definite account, however, was given of the cashier, either as to his reputation or conduct, during the three years next preceding the discovery of his defalcation. It does not appear that during this period any effort was made on the part of the officials of the bank to inquire into or even casually scrutinize the conduct or habits of the cashier, and determine for themselves his true character for honesty and integrity, or to exercise even a slight supervision over the important affairs with which he was intrusted. On the contrary, it would seem that they allowed themselves to be lulled into a state of tranquil inactivity by the sense of fancied security they derived from the assumption that, as he had in the past proved faithful to his trust, he must surely remain equally trustworthy in the future.

In the argument before us it was earnestly insisted by counsel for the plaintiff in error that the officials of the bank had done all that could reasonably be expected of them in regard to informing themselves as to the real character of the cashier; for, as it was argued, it having been once definitely ascertained by them that his reputation for honesty and integrity was above suspicion, they had a right to rely upon the presumption of law that he would remain honest and reliable. While this contention is ingenious and was strongly stated, it cannot be accepted as sound. Presumptions of this kind are raised by law as mere rules of evidence, and have no application whatever to the conduct of men in the ordinary affairs of life; being designed merely to expedite and assist judicial investigation, and not being intended to influence or justify the acts or omissions to act, of those upon whom is devolved the performance of legal duties, nor to set up a standard by which their diligence shall be measured and tested. The application of these rules of evidence in the conduct of everyday business affairs would often lead to complete absurdities. For instance, how could it be said that a banker, implicitly relying upon the vague presumption of law that everyone is honest until the contrary is shown, would be justified in piling up money intrusted to his care in the middle of the street, and leaving it there to take care of itself. We cannot reach the conclusion that the showing of diligence made by the defendant in the present case reasonably met the requirements of the law. The rule as laid down by the Supreme Court of the United States in *Preston v. Prather*, 137 U. S. 604, 34 L. ed. 788, and as universally recognized, is, that "persons depositing valuable articles with banks for safe keeping without reward have a right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within; that

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even for the purpose of concealing embezzlements by its cashier, the bank must return it to the owner. First Nat. Bank v. Dunbar, 118 Ill. 625.

If the bank joins with the agent of the depositor in a breach of trust, it is liable. Walker v. Manhattan Bank, 25 Fed. Rep. 247. But that case held that the mere delivery of the securities to the agent, with knowledge that he is about to pledge them to a third person for his own profit, does not make the bank liable, but that doctrine was disproved by the Supreme Court of the United States on appeal.

Misappropriation by officer.

If bonds deposited for safe keeping without compensation are stolen by the teller of the bank, the bank is not liable except in case of gross negligence. Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711, 10 Canada L. J. N. S. 182.

If the deposit is lost by larceny on the part of the cashier, whom the directors have no reason to suspect of dishonesty, the bank will not be liable. Comp v. Carlisle Deposit Bank, 94 Pa. 409.

For liability for loss by theft by officer of bank generally, see *note* to Taylor v. Downey (Mich.) 29 L. R. A. 92.

Retention of dishonest officer.

If a cashier is retained with knowledge that he is speculating in stocks, the bank may be held liable for special deposits misappropriated by him. Merchants Nat. Bank v. Guilmartin, 93 Ga. 503.

It is gross negligence to retain as assistant cashier a person who acknowledges that he has been speculating on the board of trade. Prather v. Kean, 29 Fed. Rep. 498.

Trover.

Trover will lie against the bank if it converts the deposit to its own use. Coffey v. National Bank, 46 Mo. 140, 2 Am. Rep. 488.

But trover will not lie against the bank for a special deposit lost through negligence. Dearbourn v. Union Nat. Bank, 58 Me. 273. H. P. F.

whenever ground for suspicion arises an examination will be made to see that they have not been abstracted or tampered with, that competent men, both as to ability and integrity, for the discharge of these duties will be employed; and that they will be removed whenever found wanting in either of these particulars." The requirement that not only must due diligence be observed in selecting a cashier in the first place, but that some degree of supervision over him, with a view to ascertaining whether he should be retained, ought to be exercised, is by no means a harsh one. Indeed, the rule of diligence applicable to banks is a material modification in their favor of that governing ordinary bailees. Usually, where a bailee is intrusted with valuable property, he cannot shift the responsibility of accounting for it by showing that a wrongful conversion of the property was committed by another person to whom he delegated the duty imposed upon himself alone; for, as a general rule, he would be held to have employed such other person at his own peril, and every act of his agent would, in law, be the act of himself. It is only that the law looks to the intention of the parties, where property is deposited with a bank for safekeeping, that the strict rule as to bailments is relaxed, and a bank is allowed to discharge itself from liability by showing that, although loss occurred through the dishonesty of its agents, it had itself exercised due care and circumspection, both as to their selection in the first place, and as to their retention in office thereafter. A corporation can act only through its agents; and it is evident that, when a person makes a special deposit with a bank, he understands that his property must, of necessity, be placed in the keeping of employees in the service of the corporation. Therefore he is held to tacitly agree that he will not attempt to hold the bank responsible for loss if it in good faith takes all reasonable precautions in having suitable and competent agents to discharge the trusts delegated to it. However, it is not true that in such case the depositor consents that the duty raised by the bailment may be shifted upon the shoulders of persons other than the bailee. This duty remains owing by the bailee alone. The depositor simply assents to the employment by the bailee of agents to aid it in the performance of such duty, the effect of which is merely to change the test of liability resting upon the bailee in case of loss.

The court below fully, but concisely, charged the jury as to the manner in which the defendant could vindicate its diligence in regard to the employment and retention of its cashier. The only possible objection to the charge we have been able to discover is that the judge instructed the jury, in effect, that it was incumbent on the bank to show that, during the whole term of the bailment, it had exercised, at least, a slight supervision over its cashier, and that, in so doing, no indications of dishonesty, or other reason for distrusting him, had appeared. After careful reflection, we feel safe in reaching the conclusion that this was not stating the rule too strongly against the defendant. The duty imposed by law upon a bank to remove from its service an employee who has become wanting either in ability or integrity necessarily comprehends the incidental requirement of maintaining a reasonable surveillance or supervision over such employee; else, how is the bank to know when such duty of removal arises? Certainly, where a bank is called upon to explain its nonobservance, it cannot be deemed a sufficient answer that the bank failed to comply with this duty simply because it was not aware that the time for its observance had arrived, when it was within the power of the bank, by the exercise of but slight diligence, to have fully informed itself that the necessity to act, and to act promptly, was at hand. The duty of a bailee to provide competent agents to care for the property of the bailor may be analogized to the similar obligation resting upon a master to provide suitable coemployees when a servant is expected to work in connection with others. This court recognized that a master's duty in this regard did not cease with simply providing, in the first place, competent fellow servants, when in *McDonald* v. *Eagle & P. Mfg. Co.* 68 Ga. 839, the rule was laid down that 'a principal is not liable for the negligence of a fellow servant in the same job, unless the principal himself was negligent in not using ordinary diligence in selecting the fellow servant, or in retaining him after knowledge of incompetency or negligence." Such is the rule which likewise obtains in many other jurisdictions. Thus, where an agent, competent and skilful at the date of his hiring, subsequently acquires the habit of intoxication, the master is guilty of negligence if he retains such agent with knowledge of that fact. *Lanning* v. *New York C. R. Co.* 49 N. Y. 521; *Chapman* v. *Erie R. Co.* 55 N. Y. 579; *Huntington & B. T. R. & C. Co.* v. *Decker*, 84 Pa. 419; *Ohio & M. R. Co.* v. *Collarn*, 73 Ind. 261, 38 Am Rep. 134. And mere lack of actual knowledge of the servant's unfitness will not necessarily excuse the master. He cannot shut his eyes, and claim exemption from liability, but must use the proper degree of diligence in keeping informed of the servant's habits and conduct. In *Gilman* v. *Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635, it was held: "If the switchman was an habitual drunkard, and this fact was known or ought to have been known to the corporation, and the injury resulted from his intoxication, the corporation is responsible." The same rule was announced in *Chicago & A. R. Co.* v. *Sullivan*, 63 Ill. 293, Scott, J., saying, "Whether O'Keefe was a careful and competent man when he was first employed by the company, is not now a material inquiry. The controlling question is, whether he was an unfit person for his position at the time of the injury to Sullivan, and whether the company knew of his incapacity, or could have known it by the exercise of reasonable diligence." Certainly, it is all-important that a bank should keep a reasonable supervision over such of its employees as occupy positions offering the temptation and the means to do wrong, for, as already intimated, without the maintenance of some surveillance, the duty of removing such employees when they become deficient or unreliable could seldom be known or performed until too late to shield

from loss the persons for whose protection the duty is imposed by law.

3. The fact that the defendant bank intrusted its own money and other property to the safe keeping of its defaulting cashier, and, in consequence, itself suffered a heavy loss through his speculations, is one which the jury might very properly consider in arriving at a conclusion concerning the good faith and diligence observed by the bank's officials. However, this solitary fact could not properly serve as the test upon which the liability of the bank should be made to depend. What the bank ought to have done in order to come up to the full measure of diligence required by the law could not be arrived at by showing simply what it actually did in other matters relating to its own affairs. Indeed, the officials of the bank might have been grossly negligent concerning the care bestowed upon its own property, and it could not excuse its negligence in regard to the duty owing to its customers by showing that it had been equally negligent in failing to properly look after its own affairs. The question is not a new one, but has been repeatedly passed upon by other courts of unquestionably high standing, as came to the notice of the writer when he made a thorough and laborious research of the authorities preparatory to writing an opinion in the *Guilmartin Case*, when it made its first appearance before this court. See 88 Ga. 797, 17 L. R. A. 322. We confidently assume that our ruling upon this question will be readily accepted as correct without further citation of authority.

4. In none of the numerous grounds of the motion for a new trial filed by the plaintiff in error have we discovered error which would require or justify a reversal of the judgment of the court below denying another hearing. We cannot attempt the laborious task of dealing specifically with each of the alleged errors complained of, and have confined this discussion to such questions only as control the case upon its substantial merits. As will have been seen by the foregoing brief but exhaustive statement of the evidence relied upon by the defense to rebut the prima facie case of liability made out by the plaintiff, the defendant bank utterly failed in its attempt to prove due compliance with the requirements of the law as to diligence. Indeed, under the evidence submitted upon this issue, which was the main defense relied on by the bank, the jury would not have been warranted in finding other than they did. As to all other issues involved in the case, the verdict of the jury is amply sustained by the record before us, and could not properly be set aside.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

TENNESSEE SUPREME COURT.

CHISM, CHURCHILL, & COMPANY
v.
FIRST NATIONAL BANK of New York *et al., Appts.*

(.....Tenn.....)

A drawee bank which pays a draft relying on a forged indorsement thereon of the name of a fictitious person to whom the payee indorsed it innocently as the result of a fraud practiced upon him is not thereby relieved from liability to the payee.

(May 23, 1896.)

APPEAL by defendants from a decree of the Chancery Court for Shelby County in favor of plaintiffs in an action brought to recover the amount of a draft drawn by plaintiffs which had been paid to a wrong payee. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Turley & Wright,** for appellants:

The English rule is that if the party issuing the paper knew at the time that the person to whom it was made payable or to whom it was indorsed was a fictitious person, then he is estopped from setting up that fact and the paper is payable to the bearer and a bona fide holder can recover on the same. But if the party issuing the paper was innocent in the matter and did not know that the person to whom it was made payable or to whom it was indorsed was fictitious, there seems a conflict as to whether indorsee can acquire title to the paper as against the true owner thereof.

Some of the American states have followed this doctrine, but the weight of American authorities seems to be that the question of knowledge on the part of the person issuing the paper cuts no figure; that whether he knew or did not know that the party to whom it was made payable was fictitious he is equally estopped from denying that fact, and the paper is to be treated as payable to bearer without regard to the knowledge or innocence of the party issuing it.

1 Dan. Neg. Inst. 3d ed. § 136, note 3, p. 141, §§ 138, 139, 140, and notes; *Blodgett* v. *Jackson*, 40 N. H. 21; *Lane* v. *Krekle*, 22 Iowa, 399; *Kohn* v. *Watkins*, 26 Kan. 691, 40 Am. Rep. 336; *Elliot* v. *Abbot*, 12 N. H. 554, 37 Am. Dec. 227; *Hunt* v. *Aldrich*, 27 N. H. 35; *Phillips* v. *Im Thurn*, 18 C. B. N. S. 694; *Cooper* v. *Meyer*, 10 Barn. & C. 468; *Schultz* v. *Astley*, 2 Bing. N. C. 553; *Pleis* v. *Johnson*, 3 Hill, 115; 1 Randolph, Com. Paper, §§ 161–163.

Messrs. **Scruggs & Henderson,** for appellees:

Every indorser guarantees the preceding indorsements.

Harris v. *Bradley*, 7 Yerg. 311; *Rice* v. *Ragland*, 10 Humph. 549, 53 Am. Dec. 737.

By purchasing the draft on the First National Bank of New York through its correspondent here, complainants had the amount of the draft appropriated to their use or order in the New York bank. A contract relation

NOTE.—The above decision follows Armstrong v. Pomeroy Nat. Bank (Ohio) 6 L. R. A. 625, and Shipman v. Bank of the State (N. Y.) 12 L. R. A. 791, and thereby goes far to settle the law in this country in accordance therewith.

See also 41 L. R. A. 617.

was thus created between the First National Bank of New York and complainants whereby the bank should pay upon order of complainants. This it refuses to do and now complainants sue for the amount remaining in its possession to their credit.

Crawford v. *West Side Bank*, 100 N. Y. 53, 53 Am. Rep. 152; *Corn Exch. Bank* v. *Nassau Bank*, 91 N. Y. 80, 43 Am. Rep. 655; *Bank of British North America* v. *Merchants' Nat. Bank*, 91 N. Y. 106; *First Nat. Bank* v. *Whitman*, 94 U. S. 347, 24 L. ed. 231.

By especially indorsing the draft to H. C. Hamilton, the complainants attempted to draw a check upon the New York bank, payable to the order of this special indorsee. By this check the effort was to appropriate to H. C. Hamilton of their funds in the hands of the New York bank the amount that the draft called for. But there was no payee to whom the check could be paid. Although the complainants did not know that they had been deceived by Weems there was no such person as H. C. Hamilton, so the draft or the check was ineffective because there was no payee and it was impossible to have any money of complainants in the hands of the First National Bank appropriated to anybody.

2 Dan. Neg. Inst. § 1571, and notes under 4; *McIntosh* v. *Lytle*, 26 Minn. 336, 37 Am. Rep. 410; *Merchants' Nat. Bank* v. *State Nat. Bank*, 77 U. S. 10 Wall. 647, 19 L. ed. 1019.

The amount of money originally held by the New York bank has never been paid out according to the order of complainants, therefore it still remains to their credit and should be returned to them on their demand or order.

United States v. *Turner*, 32 U. S. 7 Pet. 135, 8 L. ed. 634; 2 Russell, Crimes, bk. 4, chap. 32, § 1, 2d ed. 327–333, and cases there cited; Id. 470–474; 2 East, P. C. chap. 19, §§ 38, 940; 8 Am. & Eng. Enc. Law, p. 469; 2 Dan. Neg. Inst. 1345; Byles, Bills, § 334; 2 Parsons, Notes & Bills, 584; *Armstrong* v. *National Bank*, 46 Ohio St. 512, 6 L. R. A. 625.

The bank did not pay upon order of H. C. Hamilton; it paid upon the order of E. M. Weems, or rather on forged order of Hamilton by Weems; therefore it is liable to complainants, for it could only pay according to order.

Jackson v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663; *Pickle* v. *Muse*, 88 Tenn. 381, 7 L. R. A. 93; *Ellis* v. *Ohio L. Ins. & T. Co.* 4 Ohio St. 667, 64 Am. Dec. 610; *Hall* v. *Fuller*, 5 Barn. & C. 750; *Johnson* v. *Windle*, 3 Bing. N. C. 225; *Robarts* v. *Tucker*, 16 Q. B. 560.

The complainants are not estopped from suing the New York bank, as one of the essential elements of estoppel, *viz.*, damage to defendant, is lacking, as it has recourse against the mercantile bank.

Corn Exch. Bank v. *Nassau Bank*, 91 N. Y. 80, 43 Am. Rep. 655; *Shipman* v. *Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791; *Armstrong* v. *National Bank*, *supra*.

Authority to receive check does not embrace authority to collect it.

Pickle v. *Muse* and *Jackson* v. *National Bank*, *supra*; *Moore* v. *Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 329, 7 Am. Rep. 341; *Dodge* v. *National Exch. Bank*, 30 Ohio St. 1; 1 Dan. Neg. Inst. § 665; *Crawford* v. *West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152.

The bank should have inquired into the genuineness of the indorsement of the payee.

Pickle v. *Muse*, and *Armstrong* v. *National Bank*, *supra*; *First Nat. Bank* v. *Whitman*, 94 U. S. 343, 24 L. ed. 229; *Morgan* v. *Bank of New York*, 11 N. Y. 404; *Dodge* v. *National Exch. Bank*, and *Robarts* v. *Tucker*, *supra*; Morse, Banks & Banking, § 474; 2 Dan. Neg. Inst. §§ 1618, 1663; *Seventh Nat. Bank* v. *Cook*, 73 Pa. 483, 13 Am. Rep. 751; *Jackson* v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663.

A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement, and if the bank mistake the identity of the payee or pay upon a forged indorsement it is not a payment in pursuance of its authority and it will be responsible.

Morgan v. *Bank of New York*, 11 N. Y. 404; 2 Dan. Neg. Inst. §§ 1618, 1663; *Robarts* v. *Tucker*, 16 Q. B. 560; *Dodge* v. *National Exch. Bank*, *supra*.

A bank is liable to a depositor for the amount of a check made by the latter payable to a certain firm and intended for it, where the indorsement of the name of such firm upon the check was forged.

National Bd. of Marine Underwriters v. *National Bank of the Republic*, 9 Misc. 362; *Indiana Nat. Bank* v. *First Nat. Bank* 9 Ind. App. 185; *Third Nat. Bank* v. *Merchants' Nat. Bank*, 76 Hun, 475.

A bank must ascertain that the party presenting the check is the one entitled to receive payment under penalty of refunding to the party entitled or the drawer.

Thomson v. *Bank of British North America*, 82 N. Y. 1; *Seventh Nat. Bank* v. *Cook*, 73 Pa. 483, 13 Am. Rep. 751; *Millard* v. *National Bank of the Republic*, 3 MacArth. 54; *Hall* v. *Fuller*, 5 Barn. & C. 750; *Johnson* v. *Windel*, 3 Bing. N. C. 225; *Robarts* v. *Tucker*, 16 Q. B. 560; *Ellis* v. *Ohio L. Ins. & T. Co.* 4 Ohio St. 665, 64 Am. Dec. 610.

There was no privity between Hamilton and the bank, and the right of action is in the drawer of the check.

Graves v. *American Exch. Bank*, 17 N. Y. 207; *Talbot* v. *Bank of Rochester*, 1 Hill, 295.

If a check has never passed into the hands of the payee, and the bank makes a payment on a forged indorsement, its liability is to the drawer.

Pickle v. *Muse*, 88 Tenn. 381, 7 L. R. A. 93; Bolles, Banks & Depositors, §§ 48, subs. (*a*), 206, 239; *Atlanta Nat. Bank* v. *Burke*, 81 Ga. 597, 2 L. R. A. 96; *Morgan* v. *Bank of the State*, 11 N. Y. 404; *Graves* v. *American Exch. Bank*, 17 N. Y. 208; *Talbot* v. *Bank of Rochester*, *supra*; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Welsh* v. *German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Coggill* v. *American Exch. Bank*, 1 N. Y. 113, 49 Am. Dec. 310; 2 Dan. Neg. Inst. §§ 1369, 1618, and note 5, § 1663 foot; Randolph, Com. Paper, § 1468, note 9, § 1469; *Jackson* v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663; *Robarts* v. *Tucker*, *supra*; *First Nat. Bank* v. *Whitman*, 94 U. S. 346, 24 L. ed. 231; *First Nat. Bank* v. *Tappan*, 6 Kan. 456, 7 Am. Rep. 568; *Manufacturers' Nat. Bank* v. *Barnes* 65 Ill. 69, 16 Am. Rep.

576; *State Bank* v. *Fearing*, 16 Pick. 534, 28 Am. Dec. 265; 2 Parsons, Notes & Bills, 594.

The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person.

Irving Nat. Bank v. *Alley*, 79 N. Y. 536; *Turnbull* v. *Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *Vagliano Bros.* v. *Bank of England*, L. R. 22 Q. B. Div. 103; *Armstrong* v. *National Bank*, 46 Ohio St. 512, 6 L. R. A. 625; *Minet* v. *Gibson*, 3 T. R. 481.

Beard, J., delivered the opinion of the court:

The complainants are cotton factors in the city of Memphis. On the 13th day of July, 1894, they purchased from the First National Bank of Memphis a draft for $3,000, payable to their order, and drawn on the defendant, the First National Bank of New York. After getting this draft, they indorsed it, "Pay to H. C. Hamilton or order," and then placed it in the hands of one Weems, to be delivered to the indorsee, Hamilton. The drawing, indorsement, and delivery of this draft were the result of a fraudulent scheme which Weems practiced upon complainants. They were induced by him (at that time a man of fine reputation in the community) to think Hamilton was a real person, who had consigned to him as warehouseman, for storage and sale, a large lot of cotton, and this draft represented the advance which complainants agreed to make to the supposed consignor upon this cotton, upon an understanding that they were to sell same and earn the commissions accuring therefrom. It turned out, however, that Hamilton was nonexistent, and that Weems had no such cotton under his charge. But the record discloses that complainants neither knew nor had occasion to suspect such to be the facts, but, believing that Hamilton was a real personage, and with the view of carrying out this agreement with Weems, they purchased this draft, and turned it over to him, indorsed as is stated above, for delivery to their indorsee. Immediately after its receipt, Weems indorsed it to himself or order, using for this purpose the name of Hamilton, and then carried it to the Mercantile Bank of Memphis, and that bank, without any suspicion of the bad faith of the transaction, or of the right of Weems to transfer title, upon his indorsement, paid him full value for it, and then forwarded it to its correspondent in New York, by whom in due time it was presented to the drawee, who, equally ignorant of the want of title in Weems, and in perfect good faith, paid it. Discovering within a few days the fraud practiced upon them, and at the same time that the draft had already been paid, this bill was filed by complainants, the payee, against the drawee, the First National Bank of New York, and the Mercantile Bank of Memphis; against the first upon an assumpsit implied from the wrongful appropriation of the draft and a refusal to account for its proceeds, and against the latter as a garnishee holding funds of the former subject to attachment. Two defenses are made: First, that complainants were guilty of such carelessness in their dealings with Weems as to estop them from setting up the present claim; second, that the indorsement by Chism, Churchill, & Co. of this draft to a fictitious indorsee was in law an indorsement to bearer, and the result was that its payment through the usual channels of trade, without notice of the alleged defect, discharged the drawee.

As to the first of these grounds, it is sufficient to say that the record fails to show any recklessness or carelessness upon the part of complainants in this transaction to prevent a recovery, if for any sound reason this suit is maintainable. It is the second ground, however, upon which the defendants rest largely their defense to this claim. What is the effect of indorsing a bill to a fictitious person, the indorser not knowing that the indorsee was fictitious, but, on the other hand, believing him to be a real person, is a question of first impression in this state. There is no doubt it is true, as a general proposition, that the holder of commercial papers, payable to order, must trace his title through a genuine indorsement, including that of the payee. 2 Randolph, Com. Paper, § 988; 1 Dan. Neg. Inst. § 731; 1 Edwards, Bills & Notes, § 519; *Mead* v. *Young*, 4 T. R. 28–30. And it is equally true that where a banker pays a draft or check drawn upon him, he, at his peril, pays it to anyone but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill under apparent title does not necessarily imply the right to demand or receive payment, and when it is paid to such holder the drawer has put upon him the risk of seeing that the apparent is the real title to the paper; for the banker holds the funds of his depositor under an obligation to pay them to him or to his order, and if he pays them otherwise he cannot treat such a payment as a discharge of his liability. *Shipman* v. *Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791; *Robarts* v. *Tucker*, 16 Q. B. 575; *Dodge* v. *National Exch. Bank*, 30 Ohio St. 1. It is otherwise as to his payment of a check or bill payable to bearer. In such a case, in the absence of knowledge that the party presenting the paper is wrongfully in possession of it, he can safely pay, because in so doing he is complying with the positive demand of his depositor. Tiedeman, Com. Paper, § 312. And it is insisted for the defense that this was the legal effect of the indorsement by Chism, Churchill, & Co. to Hamilton, the fictitious indorser. It seems from a note to Byles, Bills, p. 58, that the controversy over the effect of indorsement of bills to fictitious persons grew out of the bankruptcy of Linsay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. A great many cases grew out of these indorsements in the various courts of England, one of which (*Minet* v. *Gibson*, 3 T. R. 481) was carried to the House of Lords [*Gibson* v. *Minet*], 1 H. Bl. 569. Mr. Chitty, in his work on Bills (p. 178), says: "The result of the discussion seems to be that a bill payable to a fictitious

person or his order is, in effect, a bill payable to bearer, and may be declared on as such in favor of a bona fide holder ignorant of the fact against all the parties knowing that the payee was a fictitious person." In other words, whether such a bill was collectible by the holder, as if payable to bearer, depended upon the fact that the party against whom it was sought to be enforced, at the time he assumed liability upon it, knew that the payee was fictitious. Where he possessed such knowledge he was estopped from saying to a bona fide holder that he was not bound; otherwise he would be a party to the circulation of commercial paper, apparently good, yet with an inherent vice which rendered it worthless, at least as to him, though it fell into the hands of an innocent purchaser. Subsequently the bill of exchange act of 1882 was passed, the effect of which was in fact that a bill might be treated as payable to bearer when the party named as payee was a real person, but has not and was not intended by the drawer to have any right arising out of it. *Bank of England* v. *Vagliano* [1891] A. C. 107. In this country, among the text-writers, Mr. Daniel states the rule as general, and says that, "in the case of a note payable to a fictitious person it appears to be well settled that any bona fide holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such bona fide holder for the maker to set up that he did not know the payee to be fictitious." Mr. Daniel rests the rule upon the ground of estoppel, but Mr. Randolph, in his work on Commercial Paper (vol. 1, § 164, note 4), suggests that the cases cited by him to support his text "apply this rule only where the maker has by his words or conduct raised any estoppel against himself," and this latter author fails in his text, as we understand it, to give the sanction of his approval to the rule as announced by Mr. Daniel.

The questions presented in this case have arisen and been discussed in but few of the American courts, and the conclusions reached by them have been variant. *Blodgett* v. *Jackson*, 40 N. H. 21, relied upon by the defendants in this case, we think is not authority for the rule contended for by them. There a note payable to a firm of Whitney, Shaw, Lent, & Howes was in the possession of Lent, and was sold and transferred by him for value to the plaintiff in the action. The defendant, the maker of the note, denied the genuineness of the indorsement. To the issue made by this denial the court said: "The bare possession of this note by this person was competent evidence to be submitted to the jury, that he (the party transferring) was the Lent named in the note, and of course a member of the firm, and authorized to indorse it in the manner he did." "Here was a note which the evidence tends to show was genuine, payable to Whitney, Shaw, Lent, & Howes; a thing of value, and likely to be in the possession of the owner. Such possession, therefore, raised a presumption of ownership." *Kohn* v. *Watkins*, 26 Kan. 691, 40 Am. Rep. 336, does raise the precise question here presented, and is a direct authority for the contention of defendants. In that case it was held that the drawer of a bill, who makes it payable to a fictitious person, and transmits it to a third person for delivery to the payee, is bound to a bona fide purchaser from that third party who indorses it with the name of the payee, though the drawer, when he issued the bill, believed that the payee was a real person, and intended it to be delivered to him only upon the receipt of a valuable consideration from him. The court rested its opinion on the text of Mr. Daniel, which has already been adverted to, and certain cases which were regarded as authorities, to sustain the rule adopted. *Lane* v. *Krekle*, 22 Iowa, 399, one of these cases, while it contains a *dictum* which is in harmony with the conclusions reached by the court citing it, was confessedly not an authority on the real point in controversy, as in that case the note sued on was payable to bearer. Another of these cases is *Phillips* v. *Im Thurn*, 18 C. B. N. S. 694. There the signature of the drawer, as well as the indorsement, was a forgery, but the acceptor was held liable upon the ground that he had misled the holder. The ground of the decision, as stated by Keating, J., in the final disposition of this case reported in L. R. 1 C. P. 463–472, was that, "upon the facts stated in this special case, it was not competent for the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing." *Forbes* v. *Espy*, 21 Ohio St. 474, was also relied upon in *Kohn* v. *Watkins*, *supra*. In that case E. & Co. issued a bill on New York to the order of C. H. & Co., its purchasers, who indorsed it to one Charles Clark, whose real name, however, was Maro. This was not a case of a fictitious payee, but of a man with an alias, or an assumed name, taking title in this assumed, rather than his real, name. So the court held that the indorsement and delivery of this bill to Clark must be regarded as an affirmation to all persons not otherwise informed that there was such a person as Charles Clark, and that Maro was that person. We do not think, upon these facts, that this case can be said to support the general rule to which it was cited, and this was evidently the view of the supreme court of Ohio in a case to be referred to at length hereafter. Upon the other hand, we have at least two well-considered cases which, in effect, adopt the English rule, to wit, that only such paper as is issued to a fictitious payee or indorsee by the party sought to be bound, with full knowledge of the fact, shall be treated as payable to bearer. In one of these cases,—that of *Armstrong* v. *National Bank*, 46 Ohio St. 512, 6 L. R. A. 625,—after a careful review of the authorities, it is said: "If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words,

why he should not be required to use the same precautions in the one case as in the other, that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a nonexisting person does not increase the liability of the bank to be deceived by the indorsement." The case of *Shipman* v. *Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791, involved over $200,000, was argued by counsel of research and ability, and was determind by a court of deserved reputation. In that case it appeared that the plaintiffs were depositors in the defendant bank. They drew checks for large sums to fictitious payees, supposing them to be real persons. These checks were given to a trusted employee, to be turned over to the respective payees. Instead, however, this employee indorsed the names of the payees upon them, and had them presented to the drawee, when they were paid without inquiry or suspicion of the genuineness of the indorsements. Suits having been instituted by the drawer to recover the sums so paid out, it was resisted upon the ground that these checks were in law payable to bearer. The court, however, speaking through O'Brien, J., says: "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person." We think the rule thus limited is reasonable, while to eliminate the element of knowledge or intent would leave it harsh and unreasonable. In addition, with this limitation, the law of negotiable paper, so far as it involves the question of forgery, is consistent; for it is universally conceded that the payment of a check or a bill drawn to the order of a real person upon a forged indorsement of the payee's name will not protect. In such a case the banker is still liable to the owner for the funds in hand as though no payment had been made. 3 Randolph, Com. Paper, § 1739. And this would be so even if the forger should personate an intended payee of the same name. *Com.* v. *Foster*, 114 Mass. 311, 19 Am. Rep. 353. Then, in a case where the drawer has been guilty of no wrong, but innocently issues or indorses his check or bill to a fictitious person, believing him to be real, and a third party without authority writes the name of this fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, why should the drawee, by payment of such indorsement, discharge himself from liability to the drawer? The writing of the name of the nonexisting payee under such conditions is forgery at common law (4 Bl. Com. p. 247; 2 Whart. Crim. L. § 653) and under Mill. & V. Code, § 5492. In the present case, without fault on the part of the complainants, the drawee has paid upon a forged indorsement, to a party not entitled to collect it, a bill of which Chism, Churchill, & Co. were owners, and which no one had a right to collect save upon their order, and now has it, and declines to account for its value. Under these circumstances, we think the chancellor was right in holding the drawee liable, and *we therefore affirm his decree.*

Wilhelmina SCHMALZRIED, Executrix, etc., of George Schmalzried, Deceased, *et al.*, *Plffs. in Err.*,

v.

C. R. WHITE.

(.....Tenn.....)

1. **The duty of disclosing to a tenant hidden defects** and secret conditions that contribute to make the property unsafe is not imposed upon a landlord who is ignorant of them without fault or negligence on his part.
2. **Fire escapes need not be provided by a landlord** for the safety of a tenant or for anyone on the premises by the latter's invitation or permission, unless this is required by statute or ordinance.
3. **An ordinance requiring fire escapes on buildings of specified kinds,** when it is a subsection of a general ordinance covering the whole subject of erection of buildings within the city, repeals by necessary implication an earlier ordinance which made a different list of the buildings to be provided with fire escapes and placed the control of the matter in the hands of a different officer.
4. **Failure of the owner of a building to comply with the ordinance as to fire escapes,** even if not of itself the ground of an action by a person injured thereby, is at least a matter to be considered in connection with other facts and circumstances on the question of negligence.

(June 13, 1896.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been sustained by plaintiff in consequence of the absence of fire escapes while attempting to escape from defendant's burning building. *Reversed.*

The facts are stated in the opinion.

Messrs. **Turley & Wright,** for plaintiffs in error:

The landlord does not warrant premises to be fit or convenient for the purposes for which they are released, or that they are in good condition or safe. If there is a hidden defect which may be dangerous, and of which he knows, then he is liable for injuries resulting therefrom to the tenant, but upon the ground of fault and deceit. But where the tenant knows or has had equal opportunity of knowing the situation with the landlord, no matter how dangerous the premises may be there can be no recovery in the event the tenant is injured.

Doyle v. *Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223; Taylor, Land & T. § 382; *Bowe* v. *Hunking*, 135 Mass. 380, 44 Am. Rep. 471.

NOTE.—For liability on account of the want of fire escapes on a building, see *note* to Rose v. King (Ohio) 15 L. R. A. 160.

For such liability as to tenant of part of premises, see also *note* to Jones v. Millsaps (Miss.) 23 L. R. A. 157.

See also 40 L. R. A. 411; 43 L. R. A. 185.

No action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit.

Keates v. *Earl Cadogan*, 10 C. B. 591; *Robbins* v. *Jones*, 15 C. B. N. S. 240; *Howard* v. *Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Hight* v. *Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Ward* v. *Hobbs*, L. R. 3 Q. B. Div. 150; Wood, Nuisances, 953–955, notes and authorities cited.

Where there is a common-law and statutory duty imposed upon one party with reference to another, and there is an alleged breach of duty on the part of the person, the violation of the city ordinance bearing upon the question may be read as evidence tending to show such breach, but no case can be found where no such duty exists either at common law or by statute where the obligation may be created in the first instance by the ordinance.

Moore v. *Gadsden*, 93 N. Y. 12; *Philadelphia & R. R. Co.* v. *Erwin*, 89 Pa. 71, 33 Am. Rep. 726; *Heeney* v. *Sprague*, 11 R. I. 456.

Messrs. **Morgan & McFarland** also for plaintiffs in error.

Messrs. **James M. Greer** and **C. D. M. Greer** for defendant in error.

Beard, J., delivered the opinion of the court:

The plaintiffs in error were the owners of a four-story building in Memphis, which was burned in November, 1893. At that time the Young Men's Christian Association occupied the second and third floors, under a contract of subtenancy. The defendant in error was a member of the association, and, when the fire occurred, was on the second floor. In attempting to escape, he leaped to the ground, and was seriously injured. This suit was instituted by him against the owners of the property to recover damages for this injury. The gravamen of his declaration is that the building was negligently constructed, in that, contrary to law and the ordinances of the city, it was not provided with fire escapes, and that this neglect was the proximate cause of his injury. Upon issues properly made, there was a verdict and judgment for the plaintiff below. The case is before us upon assignments of error to the charge of the trial judge. Two of these will be noticed:

1. In his instructions to the jury, he said: "Under the common law, when a landlord leased or rented a house to a tenant he was bound to deal fairly with such tenant. He was required to disclose to the tenant any hidden defects in the construction of the building, or any secret conditions or surroundings that contributed to render the building unsafe to life, limb, health, or property, so that if the landlord fails to make such disclosures as would apprise the tenant of the condition of the premises before he became his tenant, and the failure to make such disclosures caused the tenant, or some one there on his invitation, to be injured or suffer loss, then such act of the landlord was held to be fraudulent, and made him liable for whatever injury resulted." It will be seen that in this paragraph the circuit judge in effect, tells the jury that the common law placed on the landlord the duty of disclosure to the tenant of hidden defects and secret conditions that contribue to make the demised property unsafe and made him liable for any injuries resulting therefrom, not only to his tenant, but to anyone on the premises by the invitation of his tenant, though the landlord was ignorant of these defects and conditions, without fault and negligence on his part. The common law imposes no such responsibility on the landlord. It does not make him an insurer to the tenant. On the contrary, in the ordinary contract of letting, it does not imply any warranty on the part of the landlord that the leased premises are in a safe and habitable condition, since the tenant ordinarily has it in his power to inspect the premises and so accepts them at his own risk. Buswell, Pers. Inj. § 82. In *Edwards* v. *New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, it is said: "It is a universal rule, to which no exception can be found in any case now regarded as authority, that upon the demise of real estate there is no implied warranty that the property is fit for occupation, or suitable for the use or purpose for which it is hired." In *Jaffe* v. *Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, it was held that "a lessor of buildings, in the absence of fraud, or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable, and may be safely and conveniently used for the purposes for which they are apparently intended." In *Francis* v. *Cockrell*, L. R. 5 Q. B. 501, Kelly, C. B., said that there was no implied warranty by the lessor that the demised real estate "shall be reasonably fit, or fit at all, for the purpose for which it is let." And in *Keates* v. *Earl Cadogan*, 10 C. B. 591, the rule is stated to be that no action will lie by a tenant against the landlord on account of the condition of the premises leased, in the absence of an express warranty, or active deceit. In *Bowe* v. *Hunking*, 135 Mass. 380, 44 Am. Rep. 471, the court said: "In the case at bar, there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained, it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase; this duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction, as a ground of liability, between an intentional and an unintentional neglect to perform it; but in such a case as this is, there can be no such duty without knowledge of the defect." The same doctrine is announced in *Viterbo* v. *Friedlander*, 120 U. S. 712, 30 L. ed. 777, and it is elaborated with great research and ability in *Doyle* v. *Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223, it is also recognized by this court in *Banks* v. *White*, 1 Sneed, 614, and *Southern Oil Works* v. *Bickford*, 14 Lea, 657. In laying down, as the rule of the common law, one so widely different from that announced in the foregoing cases, the trial judge was guilty of manifest error, the effect of which was not cured in the subsequent part of his charge. What is here said in discussing this subject is not intended to conflict with the case of *Hines* v. *Wilcox*, 33 S. W. 914, 96 Tenn. ——. In that case it was announced that the landlord was liable, not only for what he knew of the defects in

the premises let, but for what he might have known by the exercise of reasonable care and diligence, while in this, under the instructions of the trial judge, the rule, as announced by him, would make the landlord liable for hidden defects from which injuries were received, without regard to the question of diligence and reasonable care.

2. But the plaintiff below not only rested his right of recovery upon what he claimed was common-law negligence of the owners of the property destroyed, but also upon their violation of certain ordinances, as to fire escapes of the city of Memphis, which were given in evidence. Independent of statute or ordinance, we do not think that the duty is imposed upon the owner of leased property to provide such appliances for the safety of the tenant, or for anyone on the premises by the latter's invitation or permission. It is held that there is no common-law obligation resting on the master to provide means of escape from fire for his employees. *Jones* v. *Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Keith* v. *Granite Mills*, Id. 90, 30 Am. Rep. 666; *Pauley* v. *Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194. And we do not grant that it can be insisted that the common law would place a higher duty upon the landlord, in this regard. There were two ordinances of the city given in evidence to the jury, which the plaintiff contended had been violated. The first of these was passed in 1880, and is as follows: "Sec. 166*a*. The proprietor, lessee, occupant, or person in charge of each and every hotel, theatre, public hall, or public building in the taxing district, or any building where manufactories, dress making, millinery, or any other kind of work whatsoever, in the third story, or any story above the third story of said building, is done, is hereby required to provide safe and sufficient fire escapes from each and every story of the same; to be constructed under the supervision and to the entire satisfaction of the district engineer and the chief of the fire department, and each day's failure to provide the same, or any part thereof, or to keep the same, or any part thereof, in good repair, shall be deemed a distinct and separate offense." In 1890, the municipal authorities of Memphis passed an ordinance entitled "Building Ordinance of the Taxing District of Shelby County" (city of Memphis), consisting of many sections and subsections, in which the whole subject of the erection of private and public buildings within the city limits is provided for and regulated. Subsection 27*i* of this general ordinance is as follows: "Subsec. 27*i*. All buildings now erected, or that may hereafter be erected, three or more stories in height, occupied or built to be occupied by three or more families above the first floor, and every building already erected or that may hereafter be built three or more stories in height, occupied or used as a hotel, lodging house, or boarding house, having more than fifteen rooms, and every factory, mill, office building, manufactory, or workshop, hospital, asylum, or institution for the care or treatment of individuals, and every building in whole or in part occupied or used as a school or place of instruction or assembly, shall be provided with such good and sufficient fire escapes, or other means of egress in case of fire, or shall be directed by the inspector of buildings, and said inspector shall direct such means of egress to be provided in all cases where he shall deem the same necessary." The trial judge gave both in charge to the jury as existing ordinances bearing on the issues in this case. In this he again committed an error, as it is clear that the later ordinance (that is, that of 1890), by necessary implication, repealed the earlier. The ordinance of 1880 was simply directed to the subject of fire escapes, and provided for their construction "under the supervision and to the entire satisfaction of the district engineer and the chief of the fire department," while that of 1890 places the exclusive control of this matter in the hands of the inspector of buildings. To this extent they are inconsistent. In addition, as before stated, the latter is a subjection of a general ordinance covering the whole subject of the erection of buildings within the city, and regulates it down to minute details. It is well settled that a subsequent statute "revising the whole subject-matter of a former one will operate as a repeal of it, though it contains no express words of repeal (1 Beach, Mun. Corp. § 521, and cases cited in note 3), especially if it contains provisions inconsistent with the earlier statute (*Poe* v. *State*, 85 Tenn. 495). And this is so even if material parts of the former statute are omitted. *Terrell* v. *State*, 86 Tenn. 523. See also *State*, *West*, v. *Butcher*, 93 Tenn. 679. And there is no reason why this rule should not apply to city ordinances. 1 Beach, Mun. Corp. § 521; *Providence* v. *Union R. Co.* 12 R. I. 473; *Booth* v. *Carthage*, 67 Ill. 102. But it is insisted that the ordinance of 1890 imposed no duty upon the owners of this building for a breach of which a civil action can be maintained by anyone sustaining an injury from such breach, and that, therefore, the trial judge was in error in letting it go to the jury. It is conceded that for a violation of a general statute a civil action will lie, at the instance of a party injured thereby. *Queen* v. *Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82. But it is insisted that this is not true with regard to a violation of a municipal ordinance. An examination of the authorities will show much diversity of judicial opinion on this question. The cases of *Bott* v. *Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Osborne* v. *McMasters*, 40 Minn. 103; *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, and *Salisbury* v. *Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354,—held that for the violation of a municipal ordinance an action can be maintained by a private individual injured thereby. The cases of *Philadelphia & R. R. Co.* v. *Ervin*, 89 Pa. 71; *Flynn* v. *Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Heeney* v. *Sprague*, 11 R. I. 456, 23 Am. Rep. 502; and *Vandyke* v. *Cincinnati*, 1 Disney (Ohio) 532,—took the contrary view. We do not think we are called upon to settle this question in this case, however. The trial judge simply told the jury that, if they found that plaintiffs in error had failed to comply with the ordinances of the city as to fire escapes, they might look at that fact, "in connection with the other facts and circumstances" shown, on the question of negligence. We do not think that plaintiffs in error can complain of this instruction.

For the errors pointed out *the case must be reversed* and remanded.

TEXAS SUPREME COURT.

M. V. B. CHASE *et al.*, *Plffs. in Err.*,
v.
YORK COUNTY SAVINGS BANK.

(.....Tex.....)

The interest of persons who contribute money to purchase lands conveyed to a trustee who has the absolute title and is a trustee for the purpose only of accounting for the proceeds of sales is not subject to levy under a writ of attachment.

(March 9, 1896.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District reversing a judgment in favor of transferees of the interest of *cestuis que trust* in certain trust property as against attacking creditors of the assignors. *Reversed.*

The facts are stated in the opinion.

Messrs. **R. C. Foster** and **A. E. Wilkinson** for plaintiffs in error.

Messrs **I. N. Standifer** and **Dillard & Muse** for defendant in error

Denman, J., delivered the opinion of the court:

The agreed case in the record shows that W. P. Rice, having furnished $14,000, H. C Young, $6,000, O. D. Baker, $6,000, M. H. French, $6,000, C. N Seidlitz, $3,000, J. M. Ford, $6,000, P. E. Fairbanks, $6,000, J. J. Frey, $2,000, G. B. Weightman, $1,000, J. J. Fairbanks, $3,000, and P. P. Lang, $1,000 of the consideration for the purchase of nine tracts of land, situated near Denison, Texas, caused the same to be conveyed to said P. E. Fairbanks, trustee, by deeds from various parties; that said land was so conveyed to the said P. E. Fairbanks, trustee, for the purpose and with the intention of vesting in him, the said trustee, the absolute title thereto, and in order that the same might be by him disposed of and conveyed without the necessity of the others joining in said conveyances, and without intending in the use of the word "trustee" in the deed made to him any limitations of the titles to said lands in the said P. E. Fairbanks, or his absolute right to sell the same, or any part thereof, he to be trustee, as between himself and parties furnishing the money, "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands, or any part thereof;" that, in consideration of $1, paid by said Fairbanks to each of the parties furnishing said consideration, they "did severally remise, release, and convey unto him, the said P. E. Fairbanks, and to his successors and assigns forever, all and singular their right, title, and interest in and to said lands, and every part thereof, to have and to hold the premises above described, together with, all and singular, the rights and appurtenances thereto in any way belonging unto the said Fairbanks, his successors and assigns;" that it was agreed that, as between the parties furnishing the consideration and said Fairbanks, trustee, he "should not be released from his personal obligation to account to each of them, and to their assigns, for the proceeds of any sale or sales of said lands, or any part thereof, according to their respective interests in such proceeds;" that thereafter, with the consent of all said parties, said trustee caused a large portion of said lands to be laid off and platted into lots, blocks, streets, avenues, and alleys, such plats and maps being duly recorded, said lands not being within the corporate limits of the city of Denison, but adjoining and designated and platted, as above stated, as an addition thereto, the streets and alleys of said city being extended and duly opened and dedicated through said addition to the public use; that said trustee, after said subdivision was made, conveyed to different parties portions of said lands, the deeds thereto being recorded, but the quantity of lands and the number of purchasers and prices paid are not stated. The York County Savings Bank caused an attachment to be levied on said lands as the property of French and Rice, who had transferred their respective interests in said trust to other parties, of which transfers the bank had no notice at the time of the levy. In a proceeding to wind up said trust, and divide the proceeds and unsold property among the parties entitled, the bank claimed the interest of French and Rice under said attachment proceedings, and their said transferees claimed the same by virtue of said transfers It is unnecessary to state the circumstances showing how the question arose in the court below, but it will suffice to say that the principal and only question we deem it necessary to determine is whether the respective interests of French and Rice in said trust were subject to levy under a writ of attachment. The trial court decided the question in the negative, and rendered judgment in favor of said transferees, but the court of civil appeals decided in the affirmative, and reversed the judgment of the trial court, and rendered judgment for the bank. The transferees assign as error here this ruling of the court of civil appeals.

Article 200, Rev. Stat. 1895, provides that "the writ of attachment may be levied on such property, and none other, as is or may be by law subject to levy under the writ of execution." In order, therefore, to determine whether the interest of French and Rice in the trust was subject to levy under the attachment, we must ascertain whether it was subject to execution. That equitable interests were not subject to execution at common law is elementary. In order to enable creditors to subject to the payment of their debts such interests of their debtors in lands as were held by others in trust for them, the statute of 29 Car. II., chap. 3, provided "that . . . it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, . . upon any judgment," etc., "to do, make, and

NOTE.—For contingent interests in real property on which levy can be made, see *note* to Young v. Young (Va.) 23 L. R. A. 642.

deliver execution unto the party in that behalf suing, of all such lands, tenements," etc., "as any other person or persons . . . shall be seised or possessed in trust for him against whom execution is so sued," etc. In *Doe, Hull,* v. *Greenhill,* 4 Barn. & Ald. 684, Abbott, Ch. J., in construing this statute, said: "This statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be, merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor." In construing the same statute, enacted in New York, Spencer, Ch. J. (*Bogert* v. *Perry,* 17 Johns. 351, 8 Am. Dec. 411), said: "It cannot admit of a doubt that the statute embraces those cases only where the entire estate out of which the use arises, vests in the *cestui que use,* in consequence of his having paid the whole consideration money; and I have met with no case or *dictum* countenancing the doctrine of a divided use, vested in the vendor and vendee;" and held that the interest of the vendee in a contract for the sale of land, who had paid only a part of the purchase money, was not subject to execution.

In *Lynch* v. *Utica Ins. Co.* 18 Wend. 236, Lynch devised his estate to executors in trust: (1) To pay debts; (2) to raise $60,000, and invest same in securities, and out of the income thereof to pay his wife an annuity of $300,000, and reinvest the surplus; (3) to raise $10,000, to be divided between two persons named; (4) to divide the residue, real and personal, equally between his son, James Lynch, and seven others. In passing upon the same statute, Nelson, Ch. J., said: "I do not entertain a doubt that the estate of Lynch under the will, is an interest that could not have been sold on execution within the statute. It is settled according to several authorities, and one of them in this court, that the statute only extends to clear and simple trusts for the benefit of the debtor. *Bogert* v. *Perry,* 17 Johns. 351, 8 Am. Dec. 411, 1 Johns. Ch. 52; *Doe, Hull,* v. *Greenhill,* 4 Barn. & Ald. 684, 4 Bing. 96. In *Bogert* v. *Perry,* Spencer, Ch. J., said that it was intended to subject to execution the real estate or hereditaments of a person having the entire interest therein, but which was nominally and formally vested in another person. The case in Bingham is not unlike the present one. There the lands were vested in trustees in trust for the judgment debtor, subject to £10,000 to be raised for another, and which had not yet been raised. The court held that the interest of the *cestui que trust* was not liable within the statute, as it was not simply the debtor's, but held jointly with another,"—the person entitled to the portion of £10,000.

In *Bristow* v. *McCall* (1881) 16 S. C. 545, the testator devised his real estate to executors in trust for his son and daughter, stating: "I hereby direct my executors, hereinafter named, to divide my lands equally between my son, E., and daughter, D., and permit each to use, possess, and enjoy his or her half in severalty during his or her natural life, and, after the death of either, that they divide the share of each among his or her children equally." The executors divided the land as directed, between E. and D., and each went into possession of the share thus allotted. Thereafter E.'s interest was levied upon and sold under execution. The court held that the purchaser took no title by such sale, under a statute similar to the one above quoted, saying: "The trust interest referred to, it is true, is not very distinctly defined in the act, nor is it clearly pointed out in the decisions. But it is conceded that it must be a clear and simple trust and for the benefit of the debtor alone, the object of the statute being merely to remove the technical objection arising from the interest in the land being legally vested in another person, where it is so vested for the benefit of the debtor. *Doe, Hull,* v. *Greenhill, supra; White* v. *Kavanagh,* 8 Rich. L. 395. A simple trust is said by the authorities to be (Lewin, Tr. 21; Bouvier, Inst. § 1900) 'a trust corresponding with the ancient use; and it exists where property is simply vested in one person for the use of another and the nature of the trust not being qualified by the letter is left to the construction of the law.' A trust of this kind, for the benefit of the debtor alone, and not jointly with others, would fall under this section, but if others were interested, that fact would exclude the application of the statute."

In *Love* v. *Smathers* (1880) 82 N. C. 369, A, having paid part purchase money for lands, gave his note for the balance, with B and C as sureties, and had the title made to B, who agreed to pay the balance purchase money. It was held that A's interest was not, under a statute similar to the ones above, a pure trust, subject to execution, but was mixed with the interest of B; the court saying: "A trust estate of a debtor in land could not be levied on and sold under execution until the act of 1812, nor under that act, if it was to be raised by construction of a court of equity by reason of fraud, or being an express or implied trust in an honest transaction, unless the debtor, at the time of the sale, was in such situation as to have the legal title deereed to him if he were to sue for it." See Freem. Executions, 2d ed. §§ 187, 188; *McIlvaine* v. *Smith,* 97 Am. Dec., and notes 303 to 315.

We have no statute in Texas similar to the ones discussed in the above cases expressly authorizing the sale of trust estates under execution. Our statute in reference to executions, however, does provide that "when a sale has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim which the defendant in execution had in and to the property sold." Rev. Stat. 1895, art. 2375. In construing this statute in 1854, in the case of *Daugherty* v. *Cox,* 13 Tex. 209, this court, through Lipscomb, Justice, says: "They insist that under the broad terms used, of 'interest' and 'claim,' an equitable interest would be included. This may be correct in part; it may be that an equitable claim to title, or a resulting trust, may sometimes be subject to sale by execution, and yet every

equity not subject to sale. If, for instance, a purchaser had paid for the land and taken a bond for title, the land would be subject to execution against the purchaser, because there would be nothing uncertain, nothing to be done on the part of the purchaser, nor on the part of the vendor, but to make the title. If, however, other things were to be done by the parties,—as in this case, a selection was to be made out of a particular but large tract,—until these things were done, there would be no such equity to any particular land as would make it subject to the levy of an execution against the holder of such equity. . . . (*Bogert* v *Perry*, *supra*). It could not be contended that our statute in the article cited went further than the statute 29 Car. II., in subjecting equitable and trust estates to execution; and perhaps its terms would go so far, but that would not be far enough to subject such an equity as the one claimed to be subjected to execution in this case."

In *Hendricks* v. *Snediker*, 30 Tex. 307, this court questioned the validity of an execution sale of the equitable interest of a person in lands, growing out of a right to specific performance of a voluntary agreement to convey, followed by valuable improvements made relying upon such agreement; saying, through Moore, Ch. J.: "Would the equitable rights of the party making improvements under such circumstances be subject to levy and sale under execution? The rights of such a party are more or less indefinite and uncertain until they have been fixed by the decree of the court. They seem much more in the nature of an uncertain and undetermined claim or demand against the holder of the title to the land, by enforcing which he may acquire an interest in the land, than a title or interest directly in it. If uncertain interests of the sort are the subject of sale under execution, evidently they must be made at ruinous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors. The position of such party is not like that of one holding under a contract with specific and definite conditions and stipulations. The right to a decree in each case of this kind must depend on its own peculiar circumstances. An equitable interest in lands may, no doubt, be the subject of execution sale, but this is not the case in respect to every equitable interest." On the authority of this case, a similar sale was held void in *Edwards* v. *Norton*, 55 Tex. 410.

In *Moser* v. *Tucker*, 87 Tex. 94, this court, through Stayton, Ch. J., says: "It is not, however, every interest in property a debtor may have right to, or to acquire, that may be subjected to sale under execution, or otherwise, for payment of his debts; for in many instances his right is so remote and contingent that it is deemed more likely to subserve the ends of justice not so to subject it, than to take the risk of sacrifice of contingent right by procedure which will most likely be of no practical benefit to the creditor or may be ruinous to the debtor."

Thus we see that this court, being called upon at an early day to determine whether our statute authorized the levy of an execution upon all the equitable interests in land, held in *Daugherty* v. *Cox*, *supra*, that it did not, and that it went no further than the English statute. This is in accord with the construction placed upon a similar provision elsewhere. *Goodwin* v. *Anderson*, 5 Smedes & M. 730. While this court has never undertaken to lay down any general rule by which it might be determined whether a given equity could, under the statute, be subjected to execution, it is believed that its decisions of the particular cases which have come before it are in harmony with the current of authority elsewhere, unless it be different in allowing the interest of a purchaser under a contract for sale of land, where only a part of the purchase money has been paid, to be thus subjected. *Mooring* v. *McBride*, 62 Tex. 309; *Bogert* v *Perry*, 17 Johns. 351, 8 Am. Dec. 411; *Hopkins* v. *Carey*, 23 Miss. 59; *Hinsdale* v. *Thornton*, 74 N. C. 167. The principle upon which the decisions limiting the operation of the statute to "a clear and simple trust for the benefit of the debtor" rest is fully recognized by our decisions, and is thus well stated by Chief Justice Moore in the case above cited: "If uncertain interests of this sort are the subject of sale under execution, evidently they must be made at ruinous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors."

According to the agreed case before us, the parties furnishing the money to purchase the land, in the exercise of their legal rights to make such contracts and disposition of their property as they deemed proper, there being no claim of an intent to injure creditors in the creation of the trust, caused to be vested in the trustee, Fairbanks, the "absolute title" to the property, with full power of sale, and provided that the word "trustee," used in the deed, with reference to him, should not have the ordinary effect of limiting his title or right to sell, but that he was to be trustee "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands, or any part thereof," and that he "should not be released from his personal obligations to account to each of them, and to their assigns, for the proceeds of any sale or sales of said lands, or any part thereof, according to their respective interests in such proceeds." It is clear that if it was the intention of all parties to so place the entire title, legal and equitable, to the land in the trustee that it would be absolutely beyond the control of either of the *cestuis que trustent*, such *cestuis que trustent* to have only the right to demand an accounting of the trustee. The legal effect of the arrangement was to leave in each *cestui que trust*, not any title, legal or equitable, in the land, but a mere right in equity to demand an accounting of the proceeds of the sales of the land. Doubtless a court of equity would, in certain contingencies not contemplated by, or provided for in, the agreement of the parties,—such as fraud on the part of the trustees, or a total failure of the objects contemplated by the trust, such as inability to sell the land for sufficient to defray probable expenses, or any other state of facts justifying the dissolution of the trust,—treat this mere equitable right of demanding an accounting under the agreement as entitling each *cestui que trust* to a participation in the division of

the trust property itself upon such dissolution; but, in the absence of such a contingency, equity could not recognize the *cestui que trust* as having any interest in the land, as such, without doing violence to the lawful agreement by which the *cestuis que trust* and the trustee, respectively, restricted and regulated the rights of each party interested in the trust, and without which it probably would not have been created. We have found no case holding such an interest subject to execution, and to so hold would be going beyond the authorities. It is not claimed that any such contingency had arisen at the time of the levy. We are therefore of the opinion that the equitable interests of French and Rice in the trust were not subject to the levy, and that they could have been reached only by an equitable proceeding for that purpose. *Hinsdale* v. *Thornton*, 75 N. C. 382; *McIlvaine* v. *Smith*, 42 Mo. 45, 97 Am. Dec. 295, and note. We are not called upon to determine whether the levy would have been valid if such a contingency as would have justified a court of equity in dissolving the trust had arisen before the time of the levy. We have only considered the case presented. We regard article 2291, Rev. Stat. 1879, as restricting the right of levy on such trusts as would be otherwise liable, and not as granting any additional rights to levy.

The judgment of the Court of Civil Appeals will be reversed, and the judgment of the trial court will be affirmed.

Brown, J., did not sit.

VERMONT SUPREME COURT.

FORSYTH & INGRAM
v.
MANN BROTHERS.

(68 Vt. 116.)

1. **A contract to manufacture a monument is not within the statute of frauds,** although there is no agreement to bestow personal skill and labor upon it, or anything to prevent the contractor from purchasing it elsewhere in whole or in part, instead of manufacturing it from his own quarry and in his own shop.
2. **The difficulty and extra expense of procuring the stock for a monument in winter months** and the limited time available, where a contractor who had agreed to furnish it in the spring repudiated the agreement late in December, may constitute elements of damages for breach of contract, when the other party was also bound to furnish it to a third party.
3. **Change of stock in the top die of a monument** which is procured elsewhere after breach of a contract to furnish it does not affect the right to recover damages for such breach, if the substituted stock costs no more than that called for by the contract.

(March 14, 1896.)

EXCEPTIONS by defendants to rulings of the Washington County Court made during the trial of an action to recover damages for an alleged breach of contract which resulted in a judgment in plaintiff's favor. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John W. Gordon** and **George W. Wing,** for defendants:

The contract was clearly within the statute of frauds. If the contract is intended to result in transferring for a price from B to A a chattel in which A had no previous property it is a contract for the sale of a chattel and is within the statute.

Benjamin, Sales, Bennett's ed. § 102; *Lee* v. *Griffin*, 1 Best & S. 272; *Pawelski* v. *Hargreaves*, 47 N. J. L. 334, 54 Am. Rep. 162; *Cooke* v. *Millard*, 65 N. Y. 352, 22 Am. Rep. 623.

The test is in Massachusetts whether the article is produced "in the ordinary course of business."

Mixer v. *Howarth*, 21 Pick. 207, 32 Am. Dec. 256; *Goddard* v. *Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Gardner* v. *Joy*, 9 Met. 177; *Lamb* v. *Crafts*, 12 Met. 356; *Clark* v. *Nichols*, 107 Mass. 547.

The Massachusetts rule is simply a method of determining the intention of the parties and has never been recognized in our state. If the contract is essentially a contract for the article manufactured or to be manufactured, the statute applies to it, but if it is for the manufacture, for the work, labor, and skill to be bestowed in producing the article, the statute does not apply.

Browne, Stat. Fr. 5th ed. § 308; *Hight* v. *Ripley*, 19 Me. 139; *Pitkin* v. *Noyes*, 48 N. H. 294, 2 Am. Rep. 218, 97 Am. Dec. 615; *Prescott* v. *Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Pawelski* v. *Hargreaves*, *supra*; *Atwater* v. *Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Ide* v. *Stanton*, 15 Vt. 685, 40 Am. Dec. 698; 3 Parsons, Cont. 8th ed. *54; Benjamin, Sales, Bennett's ed. §§ 104–106, 109.

Our court has rejected the New York doctrine.

Ide v. *Stanton*, *supra*; *Gorham* v. *Fisher*, 30 Vt. 428; *Ellison* v. *Brigham*, 38 Vt. 64; *Smith* v. *Surman*, 9 Barn. & C. 561; *Edgerton* v. *Hodge*, 41 Vt. 676.

If the proposal is not accepted according to its terms it is not binding.

1 Parsons, Cont. *475, and notes.

The writing does not in itself nor by reference to some other writing sufficiently describe the subject-matter of the contract.

Buck v. *Pickwell*, 27 Vt. 166; *Ide* v. *Stanton* and *Edgerton* v. *Hodge*, *supra*; 1 Greenl. Ev. § 268; Browne, Stat. Fr. §§ 384, 385.

If a paper referred to contains other matter than what is embraced in the contract it is inadmissible.

Browne, Stat. Fr. § 347; *Brodie* v. *St. Paul*, 1 Ves. Jr. 326; *Fortescue* v. *Crawford*, 105 N.

NOTE.—As to the distinction between sales of personalty and agreements for work and labor, see *note* to Flynn v. Dougherty (Cal.) 14 L. R. A. 230; also the case of Heintz v. Burkhard (Or.) 31 L. R. A. 508, 32 L. R. A.

C. 29; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Boydell* v. *Drummond*, 11 East, 142.

The form of the memorandum cannot be material, but it must state the contract with reasonable certainty so that the substance of it can be made to appear and be understood from the writing itself without having recourse to parol proof.

Bailey v. *Ogden*, 3 Johns. 399, 3 Am. Dec. 509; Anson, Cont. 2d ed. *241; *Abeel* v. *Radcliff*, 13 Johns. 297, 7 Am. Dec. 377; 1 Greenl. Ev. 14th ed. § 258; *North* v. *Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Smith* v. *Jones*, 66 Ga. 338, 42 Am. Rep. 72; *Johnson* v. *Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Munday* v. *Asprey*, L. R. 13 Ch. Div. 855, 37 Eng. Rep. 10; *O'Donnell* v. *Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Boardman* v. *Spooner*, 13 Allen, 353, 90 Am. Dec. 196; *Schafer* v. *Farmers' & M. Bank*, 59 Pa. 144, 98 Am. Dec. 323; *Scarritt* v. *St. John's M. E. Church*, 7 Mo. App. 174; *Mumford* v. *M'Pherson*, 1 Johns. 414, 3 Am. Dec. 339; Browne, Stat. Fr. §§ 349-351; *Grafton* v. *Cummings*, 99 U. S. 100, 25 L. ed. 366.

The memorandum itself, and not the parol evidence, must describe the subject-matter.

1 Greenl. Ev. 268; Browne, Stat. Fr. 385, cases in note 1; *Pipkin* v. *James*, 1 Humph. 325, 34 Am. Dec. 652; *Watt* v. *Wisconsin Cranberry Co.* 63 Iowa, 730.

If a part is without the statute of frauds the whole contract is without.

1 Parsons, Cont. 455; 3 Parsons, Cont. 17; *Atwater* v. *Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Pitkin* v. *Noyes*, 48 N. H. 300, 2 Am. Rep. 218, 97 Am. Dec. 615; Browne, Stat. Fr. § 140.

Contracts within the statute of frauds cannot be orally varied.

Bishop, Cont. 771.

Executory parol agreements to vary or modify the terms of a written contract are not operative to produce that effect.

Adams v. *Nichols*, 19 Pick. 275, 31 Am. Dec. 137, note; *Hunt* v. *Barfield*, 19 Ala. 120; *Walker* v. *Greene*, 22 Ala. 680; *Haynes* v. *Fuller*, 40 Me. 170; *Pratt* v. *Morrow*, 45 Mo. 404, 100 Am. Dec. 381; *Cummings* v. *Arnold*, 3 Met. 486, 37 Am. Dec. 155; *Grandin* v. *United States*, 89 U. S. 22 Wall. 496, 22 L. ed. 858; *Thurston* v. *Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 328.

A party has no right to change a written contract and if he does so he can never claim under it unless he shows that the other party consents to the change, which the defendants did not do in this case.

Master v. *Miller*, 4 T. R. 320, 1 Smith, Lead. Cas. *465; 1 Greenl. Ev. § 565; *Cutler* v. *Dix*, 67 Vt. 347; *Lewis* v. *Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Bliss* v. *McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Booth* v. *Powers*, 56 N. Y. 22; *Waring* v. *Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299, note; *Herrick* v. *Malin*, 22 Wend. 388; *Inglish* v. *Breneman*, 5 Ark. 377, 41 Am. Dec. 96.

If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from such a contract (a contract with the third party) which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances so known and communicated.

Griffin v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hadley* v. *Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398; *Booth* v. *Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *Grébert Borgnis* v. *Nugent*, L. R. 15 Q. B. Div. 85; *Horne* v. *Midland R. Co.* L. R. 8 C. P. 131; Anson, Cont. 2d Am. ed. *312; *Howe Mach. Co.* v. *Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *Snell* v. *Cottingham*, 72 Ill. 161; *McKinnon* v. *McEwan*, 48 Mich. 106, 42 Am. Rep. 462.

The subcontract, in order to be admissible, must be known. The mere fact that the plaintiff buys for resale being known is not sufficient.

Thol v. *Henderson*, L. R. 8 Q. B. Div. 457, 36 Eng. Rep. 339.

And the special damages resulting from subcontracts should be expressly stipulated for.

McKinnon v. *McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Masterton* v. *Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Clare* v. *Maynard*, 6 Ad. & El. 519; *Cox* v. *Walker*, in note to last case; *Walker* v. *Moore*, 10 Barn & C. 416; *Cary* v. *Gruman*, 4 Hill, 627, 40 Am. Dec. 299; Chitty, Cont. 458, 870; *Story* v. *New York & H. R. Co.* 6 N. Y. 87; *Devlin* v. *New York*, 63 N. Y. 26.

Messrs. **William A. Lord** and **Dillingham, Huse, & Howland,** for plaintiffs:

The contract was one that was valid in the condition of affairs proved by the testimony and found by the court.

Ellison v. *Brigham*, 38 Vt. 64.

Rowell, J., delivered the opinion of the court:

The plaintiffs carried on a wholesale granite business, and the defendants quarried and manufactured granite. The plaintiffs, having agreed to furnish a monument for the state of Minnesota, to be erected at Gettysburg, contracted with the defendants therefor at and for the price of $4,100. The court says that it did not find that the defendants were to bestow their personal skill and labor upon the monument, nor that there was anything in the understanding or agreement that would have prevented them from purchasing it elsewhere, in whole or in parts, instead of manufacturing it from their quarry, and at their shop. The defendant's original offer in the premises was in writing, but was so modified by verbal changes before acceptance that the contract must be regarded as resting wholly in parol; and the principal question is whether it is within the statute of frauds.

The cases on the subject are conflicting and irreconcilable, but capable of a somewhat accurate classification. *Clay* v. *Yates*, 1 Hurlst. & N. 73, was for printing a book and finding materials, and was discussed as if the question was quite new and without authority. The contract was held not to be within the statute of frauds. The true criterion was said to be whether work is the essence of the contract, or whether it is the materials supplied. Pollock, C. B., said that his impression was that, in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labor is of the highest description, and the material is of no importance compared with the labor, the price could be recovered as

work, labor, and materials; that, no doubt, in such cases, it is a chattel that is bargained for, and, if delivered, could be recovered for as goods sold and delivered, but still it could also be recovered for as work, labor, and materials. It is said, in *Lee* v. *Griffin*, 1 Best & S. 272, that this case is *sui generis*, and the test there adopted is rejected, though the court said they should be bound to follow it in a case precisely similar in its circumstances. *Lee* v. *Griffin* is an extreme case. It was brought by a dentist to recover twenty-one pounds for artificial teeth made for a lady who died before she took them, and of whose will the defendant was executor, and was held to be within the statute of frauds as being a contract for the sale of goods. Crompton, J., says: "The teeth are the principal subject-matter, and the case is near that of a tailor, who measures for a garment and afterwards supplies the article fitted." And he lays down this test: "When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, the cause of action is goods sold and delivered." Hill, J., states the test thus: "When the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor." Blackburn, J., thus: "If the contract be such that when carried out it would result in the sale of a chattel" the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner that the result would not be anything that could properly be said to be the subject of sale, then an action for work and labor is the proper remedy. He said he did not think that the relative value of the labor and the materials on which it was bestowed can in any case be the test of what is the cause of action; that, if a sculptor contracts to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would, nevertheless, be for the sale of a chattel. This case is said to have settled the law in England, and from it Mr. Benjamin deduces this rule: "If the contract is intended to result in transferring for a price from A to B, a chattel in which A had no previous property, it is a contract for the sale of a chattel, and unless that be the case, there can be no sale." 1 Benjamin, Sales, Corbin's ed. § 102, p. 121. Mr. Browne says that all the cases under this head of the statute have been cases of contracts that, when carried out, resulted in the sale of a chattel; that the very question has always been whether, notwithstanding that fact, the particular contract should be regarded as for, not the resulting chattel, but the labor or the technical or artistic skill of which the purchaser was to receive the benefit; and that the case of *Lee* v. *Griffin* seems to reject rather than to illustrate this difficult distinction, which a long course of authority has introduced into the law of the construction of the statute. Browne, Stat. Fr. 5th ed. § 309*a*. In New York they go to the other extreme, and hold that an agreement for the sale of a thing not in existence at the time, but which the contractor is to manufacture, or to put into condition to be delivered, is not a contract of sale, and so not within the statute. The difference between their rule and the English rule is this: One looks to the time at which the contract was made; the other to the time at which it is to be performed, and if, then, it is a chattel, it is a sale. *Cooke* v. *Millard*, 65 N. Y. 352, 22 Am. Rep. 619. Some of the states follow the New York rule more or less closely, while others do not, and also reject the English rule as settled in *Lee* v. *Griffin*. In Massachusetts they have avoided both of these extremes, and hold that a contract for the sale of articles in existence, or for such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies; but that, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. It is said to be true that, in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise, yet that there is no ground for saying that there is any uncertainty in the rule itself, and that its correctness and justice are clearly implied or expressly affirmed in all their decisions upon the subject. *Goddard* v. *Binney*, 115 Mass. 450, 15 Am. Rep. 112, which was this: The plaintiff agreed to build a buggy for the defendant and to deliver it at such a time. The defendant gave directions as to the style and finish, and it was built accordingly, and marked with his monogram. It was destroyed by fire before delivery, and the plaintiff sued for the price. *Lee* v. *Griffin* was pressed upon the attention of the court, and it was asked to overrule *Mixer* v. *Howarth*, 21 Pick. 205, 32 Am. Dec. 256. But the court said that the case before it was a much stronger case than *Mixer* v. *Howarth*, for the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials, and that it was neither intended nor adapted for the general market, and that, as they were by no means prepared to overrule that case, they must hold that the statute did not apply to the contract.

Under this rule the test is, not the nonexistence of the article at the time of the bargain, as in New York, nor whether the contract will result in the sale of a chattel, as in England, but whether the goods are such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, or whether they are manufactured especially for the vendee, and on his special order, and not for the general market, and for which they are neither intended nor adapted. The equity of this rule is expressly recognized by the supreme court of New Hampshire in *Pitkin* v. *Noyes*, 48 N. H. 294, 2 Am. Rep 218, 97 Am. Dec. 615. In *Cason* v. *Cheely*, 6 Ga. 554, it is said that, *ex æquo et bono*, a man who agrees to bestow his labor in the manufacture of goods for a price, and which price he must lose unless the goods are received by him who ordered them, ought to be paid, and that a statute that would protect the purchaser from liability in such a case would be alike impolitic and unjust. It is no answer to say that the vendor may protect himself, in such a case, by a memo-

randum of the contract, for the question is whether the contract comes within the statute. This court said, in *Ellison* v. *Brigham*, 38 Vt. 64, that the fact that work and labor are to be performed upon the subject of the contract before delivery does not necessarily take the contract out of the statute; that to take it out, the contract must require the performance thereon of such work and labor as will materially change the character of the property, and make it, when to be delivered, essentially different from what it was when the contract was made,—in short, that the contract must be one for manufacture, or, in other words, for work and labor. Whether the rule as there stated needs modification to make it entirely accurate need not be considered, for it is certainly accurate in embracing, as it does, contracts for the manufacture of goods on special orders, without which they would not be manufactured at all, and for a special purpose, for which alone they are adapted, and for which alone they have value, which is the case with the monument in question. This comes clearly within the Massachusetts rule, which we regard preferable, in this particular, at all events, as avoiding the extremes we have noticed, and as best according with the law as understood and administered in this state. But it is said that as the defendants were not bound to bestow their personal skill and labor upon the monument, but were at liberty to get others to make it for them,—it is a contract of sale, and not for work and labor. But that makes no difference, as was said in *Bird* v. *Muhlinbrink*, 1 Rich. L. 199, 44 Am. Dec. 247. It is not necessary that personal skill and labor should be stipulated for in order to make a contract one for manufacture. It is sufficient if the work and labor requisite to such a contract are to be performed by the contractor, or by his procurement, and at his expense. The latter would be work and labor done by him, in the eye of the law, and could be declared for as such. We hold, therefore, that the contract in question is not within the statute.

This leaves no other question that merits consideration except that of damages, and whether the change of stock that plaintiffs made in the top die of the monument defeats recovery. In the first place, the monument was to be completed by the defendants during the fall of 1892; but, owing to a strike of granite cutters in May of that year, the time was extended to the spring of 1893. On December 8, 1892, the defendants, claiming that they had failed to get a contract with the plaintiffs for the monument, notified them that they had concluded to stop cutting, and should take no order for dressed work after that date. The plaintiffs replied, on December 22, claiming a contract, and insisting upon its performance; and, after waiting a reasonable time for a reply, but receiving none, proceeded to purchase stock and have the monument cut. Owing to the difficulty and extra expense of procuring the stock in the winter months, and the limited time after December 22 that plaintiffs had in which to finish the monument in season for delivery in the spring of 1893,—the time fixed by their contract with the state of Minnesota,—they necessarily expended, in and about the business, the sum of $5,034.95, and could not have procured the monument for a less sum. Of said sum, $200 were for plaintiffs' personal services in getting stock, having it cut, and superintending the work. If the stock had been procured in warm weather, and the work prosecuted in the usual and ordinary way of doing such work to the best advantage, the monument could have been built and placed on the cars within five months from the time it was commenced, and at an expense not exceeding $4,100. As built, the monument was substantially the same as the defendants were to build, except that the top die was dark stock instead of good, clean, medium stock; but the plaintiffs paid no more for it than the market value of good, clean, medium stock. The court allowed, as damages, the cost of the monument in excess of the contract price, namely, $934.95, with interest thereon. The defendants object that this excess is not recoverable, because, they say, it was occasioned by the limitation of time for the completion of the monument under the plaintiffs' contract with the state of Minnesota, of which time they had no knowledge, and therefore cannot be said to have contracted with reference to it, and hence that such excess is not chargeable to them. It is not quite certain whether the defendants had the spring, or only to the spring, to finish the monument. But if they had the spring, the plaintiffs also had the spring in which to fulfil their contract with Minnesota; and if they had the monument ready for delivery on the 1st of April, which the case does not really show, it does not appear that it cost any more than it would had the plaintiffs taken the whole spring far the work, which was the longest time defendants had. Hence it does not appear that said excess was occasioned as claimed, but rather that it resulted from the defendants' breach of contract; for, as to them, the plaintiffs had a right to complete the monument by the time they were to complete it, and if plaintiffs did it sooner, but at no greater cost than if they had taken the whole time, the defendants cannot complain that they did not know what time the plaintiffs had, for they are not harmed by it. Defendants further object that nothing should have been allowed for the plaintiffs' personal services. But under the findings this was a necessary expense, and therefore recoverable, the same as though they had paid others for performing the service. The change of stock in the top die, above mentioned, does not defeat recovery, as claimed, because, if for no other reason, the stock substituted cost no more than that called for by the contract would have cost.

Judgment affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

E. H. BALL *et al.*, Exrs., etc., of D. F. Connell, Deceased, *Plffs. in Err.*,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY *et al.*

(.....Va.....)

Amending a declaration under leave granted on sustaining a demurrer thereto prevents any objection to that ruling upon appeal.

2. The murder of a passenger when asleep in a sleeping car by some intruder, stranger, or fellow passenger, does not render the carrier liable, if the carrier or its employees did not know of any impending danger and there were no circumstances to arouse their suspicions.

(April 9, 1896.)

ERROR to the Circuit Court for the City of Richmond to review a judgment in favor of defendants in an action brought to recover damages for the death of plaintiff's intestate, who was killed while a passenger on defendant's train by a gun-shot wound inflicted by a third person, which defendants were alleged to have negligently permitted. *Affirmed.*

Statement by **Keith, P.**:

The executors of D. F. Connell, in an action of trespass on the case brought in the circuit court of the city of Richmond, complain of the Chesapeake & Ohio Railway Company and the Pullman Palace Car Company, defendants, and set out the following cause of action: That on the 1st of August, 1891, their testator was a passenger upon a sleeping car owned by the Pullman Palace-Car Company, which was attached to and made a part of the train running upon the tracks of the Chesapeake & Ohio Railway Company, and that it became the duty of the defendants to use due and proper care that he should be safely and securely carried on said railway, as aforesaid, and protected from violence and injury while on the train; that the defendants did not use due and proper care in that behalf, but by their negligence, carelessness, and default, at or near Waynesboro, or between Waynesboro and Basic City, on the line of said railway, some person to the plaintiffs unknown, armed with a deadly weapon, was allowed by the defendants to enter the car or coach owned or controlled and run by the defendants, in which plaintiffs' testator was then riding, with the intent to rob or murder him, and who did, without default on his part, shoot him in the abdomen with a ball fired then and there from a gun or pistol, without any attempt being made by the defendants, or their servants or agents, to protect him, inflicting thereby a deadly wound, hurt, and injury; and that, as the result and direct consequence of the wound and injury thus inflicted, their testator died on the 4th of August, 1891. The second count alleges that, being a passenger on the Chesapeake & Ohio Railway their testator, out of extra precaution and for the purpose of obtaining greater security and protection, took passage on the sleeping car or lodging coach owned or leased by the defendants, and lost his life, substantially as described in the first count. The third count avers that he was shot while asleep in his bed or berth. The fourth count charges negligence upon the part of the defendants in failing to perform their duty reasonably to guard and protect the plaintiff's testator, while a passenger, against violence from any person on said coach or car. And the fifth count avers that, while occupying a berth in the sleeping car, the defendants and their servants carelessly and negligently conducted and behaved themselves in not keeping proper care and watch, so as to reasonably protect plaintiff's testator from violence from any person on or in said sleeping car; and that, by and through their negligence, carelessness, and default, some person unknown to the plaintiffs, armed with a deadly weapon, was allowed to go to the berth in which their testator was sleeping, with the intent to rob or murder him, and inflicted the wound before described. To this declaration, and to each one of its five counts, which, while varying somewhat as to the mode of stating the plaintiffs' case, present substantially the same question of law, the defendants filed their demurrer. The circuit court sustained the demurrer, and permitted the plaintiffs to amend their declaration; and an amended declaration was accordingly filed. To this declaration, and to each count thereof, the defendants also demurred, and the court sustained this demurrer; and thereupon the plaintiffs applied to one of the judges of this court for a writ of error, which was allowed.

Messrs. **Cabell & Cabell,** for plaintiffs in error:

From the fact that the company notifies you to lie down and shut your eyes and go to sleep, and thus become helpless, it is its duty to take care of you while you do sleep.

Pullman Palace Car Co. v. *Gardner* (Pa.) 18 Cent. L. J. 15; *Pullman Palace Car Co.* v. *Matthews*, 74 Tex. 654; *Carpenter* v. *New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759; *Pittsbury & C. R. Co.* v. *Pillow*, 76 Pa. 510; *Britton* v. *Atlanta & C. Air Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749; *Chicago & A. R. Co.* v. *Pillsbury*, 123 Ill. 9.

The negligent act here was the failure of the appellees to perform a distinct duty which rested upon them, and the very result happened which this duty, if performed, would have prevented and was intended to prevent.

A carrier of passengers is held to exercise the utmost vigilance and care to guard passengers from violence from whatever source arising, and is liable for his negligence in exemplary damages.

Flint v. *Norwich & N. Y. Transp. Co.* 34 Conn. 554; *New Orleans, St. L. & C. R. Co.* v. *Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Pitts-*

NOTE.—The above case is believed to be one of first impression.

As to the liability of a carrier in general for assaults upon passengers, see *note* to Davis v. Houghtelin (Neb.) 14 L. R. A. 737.

32 L. R. A.

See also 44 L. R. A. 790; 45 L. R. A. 767.

burgh, Ft. W. & C. R. Co. v. *Hinds*, 53 Pa. 512; *Philadelphia & R. R. Co.* v. *Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *Pennsylvania R. Co.* v. *Vandiver*, 42 Pa. 365, 82 Am. Dec. 520.

It is the duty of the sleeping car company to establish and maintain a watch in its car, at least during the night, continuous and vigilant, and sufficient to guard against or detect any ordinary attempt to do injury to a guest or his property.

Carpenter v. *New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759; *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 135; *Scaling* v. *Pullman's Palace Car Co.* 24 Mo. App. 29; *Woodruff Sleeping & P. Coach Co.* v. *Diehl*, 84 Ind. 474; *Pullman Palace Car Co.* v. *Pollock*, 69 Tex. 120; *Pullman Palace Car Co.* v. *Gardner* (Pa.) 18 Cent. L. J. 14; *Bevis* v. *Baltimore & O. R. Co.* 26 Mo. App. 26; *Root* v. *New York C. Sleeping Car Co.* 28 Mo. App. 199; *Blum* v. *Southern Pullman Palace Car Co.* 1 Flipp. 505; *Palmeter* v. *Wagner*, 11 Alb. L J. 149; *New Orleans, St. L. & C. R. Co.* v. *Burke*, *supra*.

Messrs. **William J. Robertson, H. T. Wickham,** and **Henry Tayler,** Jr., for defendants in error:

The duty of the carrier of passengers, in a case of this kind, is to use all such reasonable precautions as human care and foresight are capable of to protect the passenger from the violence of strangers or copassengers, when, from the circumstances surrounding the carrier and the passenger, the carrier sees, or in the exercise of a proper degree of care should see, that there is any reasonable ground to apprehend injury or insult from strangers or copassengers.

Ray, Negligence of Imposed Duties, Passenger Carriers, 220; 2 Wood, Railroads, 2d ed. § 314.

Its duty is fully observed, when, after it becomes aware of the danger of the passenger, or in the exercise of care should become aware that danger is threatened, it exercises every care possible to prevent injury to him.

19 Am. & Eng. Enc. Law, p. 301; *Mire* v. *East Louisiana R. Co.* 42 La Ann. 385; Weeks, Damnum Absque Injuria, § 115; *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Louisiana Mut. Ins. Co.* v. *Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256.

The maxim *Causa, proxima, non remota, spectatur* applies "as well to contracts of common carriers as to others, and governs their liabilities in like manner."

Memphis & C. R. Co. v. *Reeves*, 77 U. S. 10 Wall. 190, 19 L. ed. 913; *Morrison* v. *Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny* v. *New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645.

It is not the duty of railroad companies to furnish their trains with police forces adequate to such emergencies.

Pittsburgh, Ft W. & C. R. Co. v. *Hinds*, 53 Pa. 512; *New Orleans, St. L. & C. R. Co.* v. *Burke*, 53 Miss. 200, 24 Am. Rep. 689; *East Tennessee, V. & G. R. Co.* v. *Kane*, 92 Ga. 187, 22 L. R. A. 315; *Kerley* v. *Erie R. Co.* 47 How. Pr. 256; *Flint* v. *Norwich & N. Y. Transp. Co.* 34 Conn. 554; *Britton* v. *Atlantic & C. Air Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749; *Batton* v. *South & North Ala. R. Co.* 77 Ala. 591, 54 Am. Rep. 80; *Putnam* v. *Broadway & S. A. R. Co* 55 N. Y. 108, 14 Am. Rep. 190; *McGrew* v. *Stone*, 53 Pa. 436; *Sharp* v. *Powell*, L. R. 7 C. P. 253.

The law ordinarily looks only to the proximate cause of an injury, not holding the wrongdoer liable to an action; and if the damage is not the probable consequences of a wrongful act, it is not the proximate cause so as to make the wrongdoer liable.

Marsdon v. *City & County Assur. Co.* L. R. 1 C. P. 232; *Bigelow* v. *Reed*, 51 Me. 325; *Memphis & C. R. Co.* v. *Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Baldwin* v. *United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Boyle* v. *Brandon*, 13 Mees. & W. 738.

Keith, P., delivered the opinion of the court:

The first ground of error assigned here is to the action of the court in sustaining the demurrer to the original declaration. This position cannot be maintained; this court having held that, where a demurrer is sustained with leave to amend, if the plaintiffs exercise that privilege, they cannot afterwards be heard to object to the judgment upon the original declaration. See *Hopkins* v. *Richardson*, 9 Gratt., at page 487; *Darracott* v. *Chesapeake & O. R. Co.* 83 Va. 288.

The demurrer to the amended declaration presents a question of novelty and interest, which, it is believed, has seldom arisen, and which certainly has never been passed upon by this court. Railways engaged as carriers of passengers, while not insurers against all injuries except by the act of God or of public enemies, as are the carriers of goods, are yet bound to carry safely those whom they take into their coaches, in so far as human care and foresight can provide,—that is to say, are bound to use the utmost care and diligence of very cautious persons; and they will be held liable for the slightest negligence which human care, skill, and foresight could have foreseen and guarded against. See *Farish* v. *Reigle*, 11 Gratt. 697, 62 Am. Dec. 666. A passenger who sustains an injury growing out of the negligence of the carrier's servants or agents, or because of any defect in machinery, coaches, roadway, or other appliance connected with its transportation of passengers, is presumed, until the contrary is shown, to have been injured through the negligence of the carrier; and, upon proof of the injury, he has a prima facie case, which, in the absence of proof to the contrary, entitles him to recover damages for the wrong. The injury here, however, is not the result of any defect in the instrumentalities used by the defendants. The negligence averred is in the failure to observe such care and to take such precautions as would effectually protect a passenger asleep, in the nighttime, upon a Pullman coach, constituting a part of the train of the Chesapeake & Ohio Railway Company, from an assault made upon him by some unknown person, a passenger or intruder, as the declaration alleges, who was permitted to enter the Pullman car with intent to commit murder or robbery, and who did inflict upon the plaintiffs' testator injuries from which he died. It is not averred that the defendants or their employees knew that any

danger impended over the testator of the plaintiffs in error, or that there was any circumstance to arouse their suspicion, however watchful and alert they may have been.

Counsel for the plaintiffs in error have brought to the attention of the court a number of adjudged cases which, upon investigation, turn out to be suits brought to recover damages for the loss of property upon sleeping cars by robbery or larceny. These cases establish a very high degree of duty from sleeping-car companies to their patrons, and language is used which would go far to sustain the contention of the plaintiffs in error were the facts under investigation in those cases at all similar to those under consideration here. In the case of *Carpenter* v. *New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759, the court says that "a traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed." And, again, in the same case, it is said: They are "bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers." In that case a passenger was robbed while asleep, and the court held that the company had been negligent in failing to keep a continual watch upon the interior of the car, and was liable. There is a strong array of cases of a like character; but, as all of them deal with the liability of carriers for the property of passengers which had been lost or stolen, an extended discussion of them would be unprofitable.

On the part of the defendants it is claimed, among other grounds of defense, that no responsibility for a wrong attaches wherever there intervenes the independent act of a third person between defendant's negligence and the injury sustained, which affects and is the immediate cause of the injury. This proposition is, without doubt, sustained by a convincing weight of authority; but we do not think it applies to this case, because the very negligence alleged consists in permitting the intrusion into the car of the third person whose independent act was the immediate cause of the injury. It will be necessary, therefore, to inquire what, upon principle, should be deemed the measure of the duty which the defendants owed to the injured person in this case, and what degree of negligence in the performance of that duty will render them responsible for the injury sustained.

Under no circumstances is a carrier of passengers for hire held as an insurer of their safety, though the highest degree of care and diligence in guarding their safety is required, and the slightest imputation of negligence against which human care and skill can provide will make them responsible for any defect in machinery, or for any negligence upon the part of their servants; but the negligence complained of must stand as the proximate cause of the injury sustained,—that is, it must be the direct and efficient cause of the injury. As was said by Justice Miller in *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070: "To warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." In this quotation is to be found the principle upon which this case should be decided,—a principle which goes far to reconcile the seeming conflict between the authorities cited on behalf of the plaintiffs and the defendants in error. The cases relied by the plaintiffs in error are actions to recover the value of goods which passengers have lost while occupying berths upon sleeping cars. Robbery is of frequent occurrence, and larceny yet more frequent; and to invite a passenger to enter a sleeping car with his property, and to go to sleep, in the confidence that his person and property will be shielded and protected by those who have undertaken that duty, imposes a very high degree of watchfulness and care upon the sleeping-car company. Passengers are invited to enter and to sleep. They are thereby disarmed and incapacitated for self-protection. Carriers are paid to preserve watch and ward over their sleeping guests, and they are rightfully held to a due and faithful discharge of the obligations thus assumed. Experience teaches us that, when property is exposed to theft, it is apt to be stolen; but murder is of infrequent occurrence. When, therefore, a sleeping car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented. It cannot be deemed to have anticipated or be expected to guard and protect him against a crime so horrid, and happily so rare, as that of murder. There is no causal connection between the negligence pleaded and the injury sustained. In a peaceful community, in a law-abiding and Christian land, a car of the defendant company is invaded in the night-time by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, the defendants were guilty of negligence, when to hold them negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their acts of omission or commission. This view does not seem to have prevailed in those cases in which injuries to the person, and not to the property, of passengers, have been the subject of investigation.

In the case of *Putnam* v. *Broadway & S. A. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190, the subject is very fully considered and the court says that "the conductor was only called upon to act upon improprieties or offenses witnessed by him, or made known to him in some other way, and the company can only be charged for neglect of some duty arising from circumstances

of which the conductor was cognizant, or of which he ought, in the discharge of his duties as conductor, to have been cognizant. . . . The law ordinarily looks only to the proximate cause of an injury in holding the wrongdoer liable to an action; and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrongdoer liable." In *McGrew* v. *Stone*, 53 Pa. 436, the rule is declared to be "that a man is answerable for the consequences of a fault, which are natural and probable . . . while it is true that if his fault happen to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable." In the case of *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 Pa. 512 (one of the leading cases upon this subject), it is said: "There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondeat superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action—it can rest upon no other." In that case a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist them. They commenced to fight in the car in which the plaintiff was injured. Three causes of error were assigned: First, "the evidence shows that the conductor did not do his duty by allowing improper persons to get on the cars; secondly, he allowed more persons than were proper, under the circumstances, to get on the train, and remain upon it; third, he did not do what he could and ought to have done to put a stop to the fight upon the train, which resulted in the plaintiff's injury." In discussing these errors, the court said that it had been left to the jury to "determine whether the disorderly character of the men who came upon the train had fallen under the conductor's observation, so as to induce a reasonable man to apprehend danger to the safety of the passengers." The plain meaning of this is that the liability depended upon the fact that the disorderly character of the men who were permitted to enter the train had come under the conductor's observation, and was such as to induce a reasonable man to apprehend danger to the safety of the passengers. The liability was made to rest upon the express or implied notice to the conductor of the dangerous character of those entering the train. In the case of *New Orleans, St. L. & C. R. Co.* v. *Burke*, 53 Miss. 200, 24 Am. Rep. 689, four or five persons were co-passengers with the plaintiff on a special train. They were riding together in a baggage car, and rudely deprived the plaintiff of his hat. The plaintiff sent to the conductor and informed him of the injury. The conductor asked them to return the hat. They became insulting, and a fight ensued, in which the plaintiff was shot. He sued, and recovered damages; the court holding that it is the duty of the conductor of a passenger train to preserve order, to protect passengers from insult and injury from their fellow passengers, and, if necessary to the discharge of this duty, he should stop the train and summon to his aid his fellow employees and such passengers as might be willing to assist, and eject the disorderly persons from the train. Failure to discharge this duty as far as he has the means and power renders the railroad company liable in damages to the injured or insulted passenger. In the course of its opinion the court says: "The liability of the carrier arises, not from the fact that the passenger has been injured, but from the failure of the officials to afford protection. It will be necessary, therefore, in each case to bring home to the conductor (or other agent or officer of the company) knowledge or opportunity to know that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it." In the case of *Britton* v. *Atlanta & C. Air Lin R. Co.* 88 N. C. 536, 43 Am. Rep. 749, it is held that it is the duty of the company to protect every passenger from the violence and assault of his fellow passengers or of intruders, and that it will be held responsible for its own or its servants' negligence in the premises when the same might have been foreseen and prevented by the exercise of proper care. "The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent."

In the case of *Batton* v. *South & North Ala. R. Co.* 77 Ala. 591, 54 Am. Rep. 80, it was held that while it was the duty of a railroad company, as a common carrier, to protect its passengers against violence or disorderly conduct on the part of its own agents or other passengers and strangers when such violence or misconduct may be reasonably expected and prevented, yet that it is not liable to an action for damages for a wrong when it is not shown that the company had notice of any facts which justified the expectation that a wrong would be committed. And the court, in its opinion, says that all the cases upon the subject impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur." These cases seem to stand upon a safe middle ground between the English classes which declare that a passenger is only entitled to protection at the hands of the carrier and its servants against such injuries as might reasonably be considered as within the contemplation of the parties at the time the ticket was purchased, which is the evidence of the contract of carriage (See *Pounder* v. *North Eastern R. Co.* [1892] 1 Q. B., at page 390), and the cases relied upon by the plaintiffs in error, in which the liability of sleeping-car companies as to the property of passengers is enforced, and in which there are expressions which seem to support the contention as to liability for injuries to their persons. As we have seen, the responsibility of the carrier does not flow directly from the injuries sustained, but rests upon the principle that it is the duty of railroad and sleeping car companies to convey their passengers and guests in comfort and safety; and,

while not directly responsible to a passenger for a wrong inflicted by an intruder or stranger or fellow passenger, they are responsible for such injury if it appear that the companies knew, or ought to have known, that danger existed or was reasonably to be apprehended, and that they could, by the use of the agencies at their disposal, have prevented the mischief. It is better that the carrier should be held responsible to a passenger for injuries received at the hands of an intruder, a stranger, or a fellow passenger only in those cases where its agents or employees knew, or, in the light of surrounding circumstances ought to have known, that danger threatened or was to be apprehended, and then failed to use their authority and power to protect him from the impending peril, than that the hitherto recognized limits of responsibility for negligent acts should be enlarged, and the carrier be held to answer for a casualty wholly unforeseen, and of which this declaration contains the only recorded instance.

In this case, notice to the company or its agents is not charged, and no circumstance is alleged which could have put the company or its agents upon inquiry, or have excited the apprehension of the most careful and cautious. The wrong itself was not only unusual, but it is believed to be wholly without precedent. Certainly, the diligence of counsel and the labors of the court have failed to discover any similar case. Under such circumstances we think it would be harsh and oppressive to impose a liability upon the defendants.

The court did not err in sustaining the demurrer, and its *judgment is affirmed.*

WASHINGTON SUPREME COURT.

Eva SWASH, *Respt.*,
v.
B. L. SHARPSTEIN, Exr., etc., of Orley Hull, Deceased, *Appt.*

(.....Wash.....)

A parol agreement to convey real estate by will, made in settlement of a lawsuit, is not valid under the statute of frauds, although the intended devisee in consequence thereof gives up valuable rights.

(April 17, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Walla Walla County in favor of plaintiff in an action to compel specific performance of an agreement to convey property by will. *Reversed.*

The facts are stated in the opinion.

Messrs. **John L. Sharpstein** and **Wellington Clark,** for appellant:

A parol contract to make a will whereby real estate shall be devised cannot be enforced.

Browne, Stat. Fr. § 266; *Gould* v. *Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Ellis* v. *Cary*, 74 Wis. 176, 4 L. R. A. 55; *Hale* v. *Hale*, 90 Va. 728; *Pond* v. *Sheean*, 132 Ill. 312, 8 L. R. A. 414; *Devinney* v. *Corey*, 23 N. Y. S. R. 308; *Johns* v. *Johns*, 67 Ind. 440; *Manning* v. *Pippen*, 86 Ala. 357; *Arnold* v. *Stephenson*, 79 Ind. 126.

The fact that it includes personal as well as real estate does not take it out of the statute even as to such personal property.

Clark v. *Davidson*, 53 Wis. 317; *Ellis* v. *Cary*, and *Hale* v. *Hale*, *supra*; *Crawford* v. *Morrell*, 8 Johns. 255; *VanAlstine* v. *Wimple*, 5 Cow. 162; *Hall* v. *Loomis*, 63 Mich. 709.

Even though divisible, being for personal property over the value of $50, as well as real estate, it cannot be enforced.

Austin v. *Davis*, 128 Ind. 472, 12 L. R. A. 120; *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222.

NOTE.—For agreement to pay money or give property on the death of the promisor, see *note* to Krell v. Codman (Mass.) 14 L. R. A. 860.

32 L. R. A.

See also 43 L. R. A. 427.

The measure of damages on breach of contract to make a will is the value of that with which the party has parted, whether in money or services.

Rhodes v. *Rhodes*, 3 Sandf. Ch. 279.

Specific performance will not be granted when the legal remedy is sufficient.

Pom. Spec. Perf. Cont. § 47.

The complaint does not allege that the decedent devised or otherwise disposed of all his estate by will, or that he placed the same by will or otherwise beyond the reach of respondent; and it appears from the complaint that as an heir at law of decedent she can secure all the rights to which she is by law entitled without the aid of a court of equity.

Purcell v. *Coleman*, 71 U. S. 4 Wall. 513, 18 L. ed. 435.

The proof must show that the consideration has been paid or tendered, or that there has been such part performance of the contract that its rescission would be a fraud on the other party, which could not be compensated by the recovery of damages.

Browne, Stat. Fr. §§ 452–454; *Williams* v. *Morris*, 95 U. S. 444, 24 L. ed. 360.

It is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill.

Williams v. *Morris*, *supra*; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Chesapeake & O. Canal Co.* v. *Young*, 3 Md. 480; *Beard* v. *Linthicum*, 1 Md. Ch. 345; *Grant* v. *Craigmiles*, 1 Bibb, 203; *Rathbun* v. *Rathbun*, 6 Barb. 98; *German* v. *Machin*, 6 Paige, 293; *Parkhurst* v. *Van Cortlandt*, 1 Johns Ch. 273; *Carlisle* v. *Fleming*, 1 Harr. (Del.) 421.

The acts of part performance must be such as are referable to the contract as alleged, and consistent with it.

Wintermute v. *Carner*, 8 Wash. 585; *Williams* v. *Morris*, *supra*; Woodfall, Land. & T. 9th ed. 942; *Price* v. *Salusbury*, 32 Beav. 446; *Tomkinson* v. *Staight*, 17 C. B. 697; Chitty, Cont. 10th ed. 60; 2 Story, Eq. Jur. § 761; Pom. Spec. Perf. Cont. §§ 108, 323; *Burling*

v. *King*, 66 Barb. 633; *Poland* v *O'Connor*, 1 Neb. 50, 93 Am. Dec. 327; *Aday* v *Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Hennessey* v. *Woolworth*, 128 U. S. 438, 32 L. ed. 500, *Lanz* v. *McLaughlin*, 14 Minn. 72; *Waters* v. *Howard*, 1 Md. Ch. 112; *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336, 4 L. ed. 253; *Cooth* v. *Jackson*, 6 Ves. Jr. 12; *Buckmaster* v *Harrop*, 7 Ves. Jr. 341; *O'Reilly* v. *Thompson*, 2 Cox, Ch. 271; *Brennan* v. *Bolton*, 2 Dru. & W. 349; *Meynell* v. *Surtees*, 3 Smale & G. 101; *Boone* v. *Missouri Iron Co.* 58 U. S. 17 How. 340, 15 L. ed. 171; Browne, Stat. Fr. § 492.

Messrs. **Blandford & Gose** for respondent.

Scott, J., delivered the opinion of the court:

The plaintiff brought this action against the defendant, as executor of the last will of one Orley Hull, deceased, to compel said executor to perform an alleged parol agreement entered into between the plaintiff and said Hull, whereby he agreed to devise to her one fourth of his estate at the time of his death. Said Orley Hull and one Mary Hull were husband and wife, and plaintiff was their daughter. Mary Hull died intestate on the 11th day of December, 1886, at which time said parties were the owners of a large and valuable estate, situated in the territory of Washington, and mostly in Walla Walla county, all of which was community property. No attempt was made to administer upon the estate of said Mary Hull until March, 1890, at which time the plaintiff and one of her sisters, a Mrs. Swezea, petitioned for the appointment of an administrator. The estate at that time was, and from the death of Mary Hull had been, in the possession of the husband. A contest over the appointment of an administrator was had, which resulted in the appointment of one Winans, and an appraisement of the estate was made and returned to the superior court of Walla Walla county, which showed her estate to be worth less than $3,000. Upon the return thereof the plaintiff and her said sister began proceedings to have a large amount of other property, including the homestead upon which said Hull and wife resided, and other real estate, added to the inventory of said estate. While these proceedings were pending, said Orley Hull began a suit against this plaintiff and her said sister in the superior court of Walla Walla county, for the purpose of having said homestead, which had been obtained under the United States homestead laws, declared his separate property. A decree was rendered in his favor, whereupon this plaintiff and her said sister gave notice of an appeal to the supreme court. While they were perfecting the same it is claimed that the parol agreement in question was entered into between the parties, which the plaintiff contends was substantially performed by her. Said Orley Hull died on the 21st day of April, 1892, leaving a will in which he bequeathed to this plaintiff the sum of $500, and no more, of his estate, which was of the value then of $40,000 or more, and consisted of both real and personal property. He had taken a second wife, to whom he left one fourth of his estate, and the remainder of it was devised to two other daughters, one of whom was Mrs. Swezea, who had joined with the plaintiff in the previous litigation against him; said three daughters being his only surviving children. This action was first tried to a referee in the superior court of Walla Walla county, who found against the plaintiff, but his findings were set aside by the judge of said court and decree was rendered in her favor, from which this appeal is prosecuted by the defendant. Several sets of briefs have been filed herein, and the cause has been twice argued to this court. A number of difficult questions have been presented and ably argued on both sides, but we have not found it necessary to discuss all of them in arriving at a determination, owing to the view we have finally taken of the law applicable to the case.

The making and terms of said contract, as alleged by the plaintiff, were as follows: That during the pendency of the proceedings aforesaid upon the part of plaintiff and Mrs. Swezea to have the other property added to the inventory of their mother's estate, and of their appeal to the supreme court from the action brought by their father to have the homestead declared his separate property, her father proposed to her and Mrs. Swezea that if they would discontinue all further proceedings in the prosecution of said appeal, and all further proceedings to have said other property added to the inventory of her mother's estate, and would agree to a settlement and termination of the administration of said estate and the discharge of the administrator, and would give and turn over to their father all the right, title, and interest which they, and each of them, had in and to the estate of their said mother, with the full custody and management, control, and power of alienation thereof, and in no way interfere with or obstruct his full and complete management and control of the same, he would, on his part, devise and bequeath to the plaintiff and to Mrs. Swezea, each, by his last will and testament, a one-fourth interest in his whole estate at the time of his death; and acceptance and performance of this agreement by the plaintiff and Mrs. Swezea are alleged. It appears, however, that the only direct act performed was the signing of a stipulation by said parties to discharge the administrator, and terminate the administration of the estate of Mary Hull. But it appears that nothing further was done by either the plaintiff or Mrs. Swezea in the prosecution of the appeal from the judgment rendered in the action aforesaid, and that plaintiff lost her rights therein by reason of the lapse of time, and that thereby the decree which had been rendered in the superior court became final, and settled the title to the homestead tract in her father. It is conceded that neither the plaintiff nor Mrs. Swezea gave, or offered to give, their father a deed of their interest in and to any of the lands, and it does not appear that he ever asked for one. The record title to all of said lands stood in his name, and he at all times after the decease of their mother was in full and

exclusive possession thereof. It also appears that several tracts of the remaining lands other than the homestead, and a large amount of personal property, were at various times sold by him, and the proceeds of one 80-acre tract were divided between the plaintiff and Mrs. Swezea; and it is contended by the plaintiff that by reason of her acquiescence in the sale of said personal and real property and a failure to object thereto, and by reason of the lapse of time, etc., the title so attempted to be conveyed by her father became perfected in the respective grantees, and therefore no other conveyance relating thereto can at this time be held to be necessary. It appears, however, that one tract, known as the "Eureka Flat Farm," which was also owned by her father and mother as community property, still remains and is a part of the property of said estate. As to this it is contended by the plaintiff that it was never understood by any of the parties that a deed from the plaintiff and Mrs. Swezea to her father was necessary to vest the complete title to any of these lands in him, and that, as he had never asked for one, and had always had the full and exclusive management and control of said real estate, and dealt with it as his own, the failure to execute such a deed, if one was necessary, should not bar her of her right to a performance of the contract upon his part at this time; and, furthermore, that if the court should hold that such a deed is necessary, she asks to be permitted to give one at this time. It does not appear that Mrs. Swezea is willing to give such a deed, but, if the contract can be regarded as a severable one so far as plaintiff is concerned, and has been sufficiently established in law, we could see no objection, under the circumstances of this case, to her giving such a deed now.

The making of this contract is disputed by the defendant, but little or no testimony was introduced to contradict the testimony upon the part of the plaintiff. The attack of the defendant was mainly directed against the validity of the contract under the statute of frauds re-enacted here, and the important question to be determined is whether there had been a sufficient performance of it, conceding that it was entered into, to entitle plaintiff to a specific performance thereof. The proof upon the part of the plaintiff was clear and explicit as to the terms of this contract, but the only performance of it upon her part was in signing the stipulation to discharge the administrator and terminating the administration of her mother's estate, and in allowing her appeal from the action aforesaid to lapse. It does not appear that her father did anything towards the performance of said contract, and under its terms there was nothing for him to do except to devise to the plaintiff and Mrs. Swezea one fourth of the estate of which he died seised. Upon the termination of the administration of her mother's estate, it appears that certain of the personal property was divided between the parties, of which the plaintiff received a portion; but the division of this personal property, and the further division between plaintiff and Mrs. Swezea of the proceeds of the 80-acre tract afterwards sold by their father, cannot be considered as a part performance of the contract, for by the terms thereof he was to have all of said property, both real and personal; and such division was, in fact, inconsistent with the contract. Nor were these matters claimed by the plaintiff to be a part performance. She claimed that the same was a gift to her, and that the expressed purpose of her father in giving said property to Mrs. Swezea and herself was to place them upon an equal footing with the other sister, to whom he had previously given property.

It satisfactorily appears to all the members of this court who sat upon the trial of the cause that some kind of a contract was entered into between the parties at the time alleged. The parties were at that time relying upon their legal rights, and undertaking to maintain their claims in the courts, and were proceeding adversely to each other; but upon the making of this agreement all of these proceedings were discontinued, and peace and harmony were established between them. By allowing said appeal to lapse, plaintiff lost valuable rights, for, while the question was then undetermined, under recent decisions of this court it has been held that a homestead acquired under the United States homestead laws is the community property of the husband and wife; and, if the testimony offered by the plaintiff in support of this contract could be considered as legally sufficient, or would show enough done to authorize its enforcement, a majority of the members of the court who sat upon the trial could not agree to set aside the contract, or find it otherwise than as testified to by the witnesses for the plaintiff, which would result in an affirmance of the judgment. One of the strongest circumstances in support of the making of the contract as alleged is the fact that Mrs. Swezea, whose interests were directly and adversely affected by it, if a valid one was entered into, was not called by the defendant to dispute it, or testify in relation thereto. The circumstances connected therewith all go to show that one was entered into, and that the plaintiff is acting in good faith in the transaction, for, if advocating a false claim, she would probably have fixed a different time for the making of the contract, and not one when Mrs. Swezea was present and participated therein; and, considered only from the standpoint of the apparent truthfulness of the testimony, the claim made by the plaintiff appeals to the court so strongly that relief would be gladly extended were we authorized to do so under the law. But it must be remembered that a just claim cannot always be enforced by the courts, and, furthermore, that it was the plaintiff's father who undertook to make this unequal and seemingly unfair disposition of his property, and the law recognizes such a right, generally, in the parent. The reasons which led thereto in this instance are unknown to us, and, of course, are none of our concern.

But, conceding that the contract was entered into as testified to by the plaintiff's witnesses, was there a sufficient part performance to avoid the statute of frauds? If not,

and conceding, also, that there was a substantial performance upon the part of the plaintiff, it is difficult to conceive what more could have been done during the lifetime of the father to give it effect against the statute, unless the making of the will would have relieved it of the objection, even if afterwards revoked. But no definite time was fixed for the making of such will, and there was no proof that any will was made other than the one probated. The law is well settled that a party may enter into a valid contract to make a will in favor of another party, and also that a parol contract to make such a will may be sufficiently performed during the lifetime of the parties, so that a court of equity will compel a specific performance. But there is a conflict in the cases where the kind and degree of part performance necessary for such a purpose is considered. Some of the cases cited by the plaintiff directly support her contention that there was a sufficient part performance to avoid the statute of frauds. One of the strongest is probably that of *Johnson* v. *Hubbell* (decided in New Jersey in 1855), 10 N. J. Eq. 332, 66 Am. Dec. 773; although the facts in that case showed a greater degree of part performance than appears in this, for there deeds were executed, and the father obtained title to a tract of land by a conveyance from his daughter, which his son had conveyed to the daughter in pursuance of the contract to make the will. But while the relief asked was not granted in that case, the opinion holds that: "If one party to a parol agreement has wholly or partially performed it on his part, so that a nonfulfillment by the other party is a fraud, the court will compel a performance." It will be observed, however, that of the numerous cases to which attention is called in the opinion none are cited in support of this proposition. *Vanduyne* v. *Vreeland*, 12 N. J. Eq. 142, decided in 1858, also supports the contention of the plaintiff, although the court in that case found that there had been a partial performance of the contract by the other party. Another case is that of *Maddox* v. *Rowe*, 23 Ga. 431, where a father agreed with his son that, if the son would convey to him a lot of land, he would devise to the son two other lots of land. The court decreed a specific performance of the contract. In that case, however, the father undertook to give effect to the contract by executing a will which was held to be void. But the court considered it as evidence in support of the contract. We shall not undertake to review the cases cited by the plaintiff, but content ourselves with saying that none of the others to which our attention has been called are as nearly in point as the ones above mentioned. Many of them make use of the same general expression that a court of equity will decree a performance where a nonperformance will result in a fraud upon the other party, and that the statute of frauds was designed to prevent frauds, and not to facilitate them; and, so far as these general statements are concerned, they, in a measure, support the plaintiff's case as contended, for it appears that under this contract she has lost valuable rights beyond recovery, if the contract cannot be enforced; yet none of the other cases, when considered with reference to the facts involved, would support a case like this one. In many of them the action was founded upon a written agreement, and in others the contract was to convey specific property of which possession had been given during the lifetime of the testator, as in *Bird* v. *Pope*, 73 Mich. 483. The cases cited that do support the plaintiff's contention are overborne by the weight of authority, and the rule seems to be well settled that to enforce a parol contract to make a will there must have been at least some substantial thing done by the testator in his lifetime in pursuance of that contract. This seems to be required for the purpose of placing the proof of the contract beyond all legitimate controversy, and bears directly upon the question of the proof. The fraud to be prevented is the danger of the fraudulent establishment of such contracts, and this is the purpose of the provision of the statute; and the cases which hold that a performance upon the part of one party alone is sufficient seem to lose sight of this fact, and assume that the contract can as well be established by the acts of one party alone, against the statute, although the case of *Vanduyne* v. *Vreeland*, *supra*, holds that the defendant may admit the making of the contract, and yet make use of the statute to defeat it. If the contract is void as to the real estate, the plaintiff cannot enforce it as to the personalty either, for, being void in part, it is void as a whole. *Ellis* v. *Cary*, 74 Wis. 176, 4 L. R. A. 55; *Pond* v. *Sheean*, 132 Ill. 312, 8 L. R. A. 414; *Gould* v. *Mansfield*, 103 Mass. 408.

Some of the courts at different times have expressed a regret that the exceptions to the rules laid down by the statute of frauds have been established, and the disposition at the present time is very general against any further relaxation. By the weight of authority at this time the rule seems to be settled that, in order to enforce specific performance of a parol contract to convey land, possession must have been transferred. The Supreme Court of the United States in *Purcell* v. *Coleman*, 71 U. S. 4 Wall. 513. 18 L. ed. 435, decided in 1866, strongly supports this doctrine. *Pond* v. *Sheean*, *supra*, decided by the supreme court of Illinois in 1890, holds that delivery is essential. Many other cases are cited in the opinion there rendered. *Johns* v. *Johns*, 67 Ind. 440, holds likewise; and the supreme court of Pennsylvania, in the case of *Pugh* v. *Good*, 3 Watts & S. 56, holds that delivery of possession pursuant to the contract is the test of part performance. We shall not call attention to all of the cases so holding, but there is another line which, while not directly passing upon this question, holds that a part performance by one of the parties is not sufficient, and that there must have been a part performance by the other party also. Some of them are *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222; *Austin* v. *Davis*, 128 Ind. 472, 12 L. R. A. 120, and *Ellis* v. *Cary*, *supra*. That payment and acceptance of the purchase price is not a sufficient part performance is now well settled

by the later cases. Pom. Spec. Perf. Cont. § 112, and cases there cited. See also *Gould* v. *Mansfield*, *supra*, and *Hale* v. *Hale*, 90 Va. 728, in relation to parol agreements to make mutual wills, holding such contracts invalid where wills were made accordingly, but were subsequently revoked on one side. In this case nothing was done by Hull in pursuance of this contract. The possession of no property was transferred thereunder to any of the parties. He had actual possession of all of it except much the smaller part of the personalty, which was in the hands of the administrator, and in which Hull had an interest. This was amicably divided between the parties as aforesaid. But, as seen, such division and transfer were no part performance of the contract alleged by the plaintiff, for the terms of the contract did not call for it. If the making of a previous will in pursuance of the contract would not have been a sufficient part performance by Hull, then the nature of this contract was such that it would not admit of a sufficient part performance to make it valid, for there was nothing else for him to do in the premises. Conceding all that the plaintiff claims with reference to the proof, we are still forced to the conclusion, under the authorities, that she is not entitled to a decree for a specific performance, for we are not disposed to add to or extend the exceptions to the rule established by the statute to meet the seeming hardships of a particular case. The fault rests with the parties in not putting their contracts in writing. The rule should not be infringed as freely after the death of one of the parties as in cases where the contract was to be performed during his lifetime. If a period of years had been fixed by the contract for the conveyance of this property by Hull to the plaintiff, instead of a devise, and the parties were all living, under the overwhelming weight of authority there was not a sufficient part performance to authorize its specific enforcement. Why should the case be different, or more liberally viewed as to alleged parol contracts to convey by will? The party seeking to enforce it should be in no more favorable position certainly than where the conveyance was to be by deed, for in the latter case the claim generally could be more easily met and disputed.

Reversed.

Hoyt, Ch. J., and **Gordon**, J., concur. **Dunbar**, J., dissents.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Thomas MAPEL
v.
Lemuel N. JOHN, *Plff. in Err.*

(.....W. Va.....)

*1. **Section 7 of chapter 79 of the Code** is as follows: "No owner or tenant of any land containing coal shall open, or sink, or dig, excavate, or work in any coal mine or shaft, on such land, within 5 feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands in possession, reversion, or remainder, or of the guardians of any such persons as may be infants, If any person shall violate this section, he shall forfeit $500 to any person injured thereby who may sue for the same." This statute is constitutional, and by the term "injury" means the wrong done the party by the violation of the statute.

2. **The penalty prescribed** may be recovered by the person injured in an action of trespass on the case in the form set forth in the opinion.

3. **Plaintiff or defendant may demur** to the evidence, and the demurrant must set out the whole evidence: and the court, unless it be plainly against the demurrant, and appears to be resorted to only for delay, should compel the other party to join in the demurrer without requiring the demurrant to make on the record any admission of inferences of fact: but it is for the court to deduce all inferences fairly deducible from the evidence demurred to.

4. **By demurring to evidence** the demurrant is now, under § 9 of chap. 131, not held to waive any part of his competent evidence; but where it conflicts with that of the other party it will be regarded as overborne, unless it manifestly appears to be clearly and decidedly preponderant. He admits the credit of the evidence demurred to, and all inferences of fact that may be fairly deducible from the evidence, but only such facts as are fairly deducible; and refers it to the court to deduce such fair inferences.

5. **It is not necessary for the jury to find any hypothetical verdict** for damages where, as in a case like this, the action is on a statute, and only for a forfeiture or penalty definitely prescribed thereby.

6. **Where, as in this case, the statute prescribes the penalty** or the sum to be forfeited, but not the form of action, debt will lie; or the form of action may be such as the particular nature of the wrong or injury may require.

7. **Any person injured by the violation of a statute** may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of damages. Code, chap. 103, § 7.

*Headnotes by HOLT, P.

(April 1, 1896.)

ERROR to the Circuit Court for Monongalia County to review a judgment in favor of plaintiff in an action brought to recover the statutory penalty and damages for mining coal within 5 feet of the division line between plaintiff's and defendant's land. *Affirmed.*

NOTE.—Statutory regulations of mining, so far as they are for the protection and safety of workmen, are the subject of a *note* to Consolidated Coal & M. Co. v. Clay (Ohio) 25 L. R. A. 848.

The facts are stated in the opinion.

Messrs. **Okey Johnson** and **L. V. Keck,** for plaintiff in error:

Where an indictment can be maintained or a civil action brought only by force of the statute, the substance of the statute must be set out in the indictment or declaration.

Crookham v. *State*, 5 W. Va. 510; *State* v. *Riffe*, 10 W. Va. 794; *Com.* v. *Hampton*, 3 Gratt. 592.

There was absolutely no proof of any injury done to the plaintiff, and the statute does not permit the plaintiff to recover any damages unless he has been injured by a violation of the statute.

If the statute had been well pleaded it would have no application in this case, because according to the very terms of the statute the defendant had the necessary consent in writing to go across the line for coal, because the very deed under which the plaintiff claims gives the defendant the right to take coal from the very bank which the defendant was about to enter from his own land, to save him the trouble of draining the old entrance, which was full of water.

The said act of the legislature is clearly unconstitutional. Every man is entitled, not only to his own property, but to the free use and enjoyment of it, except where the public good requires that it or a part of it should be devoted to public use in which case just compensation must be made to the owner, or where the public good requires that the owner should be restricted in the use of his own property. It cannot come under the police power because that can never be exercised except for the public good.

There are certain vital principles in our free government which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof the government was established.

Calder v. *Bull*, 3 U. S. 3 Dall. 386, 1 L. ed. 648.

The right of everyone to use his own property as he pleases for all the purposes to which such property is usually applied is unlimited and unqualified up to the point where the particular use becomes a nuisance.

Fisher v. *Clark*, 41 Barb. 329; *Beckley* v. *Skroh*, 19 Mo. App. 75; *Pennsylvania R. Co.* v. *Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1; *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *People, Manhattan Sav. Inst.*, v. *Otis*, 90 N. Y. 48; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

This act of the legislature which invades our sacred right of private property cannot possibly be held valid as an exercise of the police power of the state because it does not pretend, and it could not be pretended, that it was enacted for the benefit of the public under the police power. Its object is merely for a private purpose in which the public is not at all interested.

Varner v. *Martin*, 21 W. Va. 534; *Pittsburg, W. & K. R. Co.* v. *Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385.

The determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Smith* v. *Bivens*, 56 Fed. Rep. 352; *Fort* v. *Goodwin*, 36 S. C. 445; *Utsy* v. *Hiott*, 30 S. C. 360; *Sanders* v. *Venning*, 38 S. C. 502.

The police power of the state can never be exercised except for the public good, to which private rights must yield; but under all circumstances, when the public good does not demand it, no legislature can invade the right of private property, either to take it or to deprive the citizen of the use of it or any part of it.

State v. *Marshall*, 64 N. H. 549, 1 L. R. A. 51; *Carthage* v. *Frederick*, 122 N. Y. 268, 10 L. R. A. 178; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *State* v. *Lowe*, 21 W. Va. 782, 45 Am. Rep. 570.

Messrs. **George C. Sturgiss** and **Cox & Baker,** for defendant in error:

A declaration for a statutory injury is sufficient if it charges every circumstance necessary to show a violation of the statute and charges the same as *contra formam statuti*.

1 Chitty, Pl. 12th Am. ed. p. 96, note 3; *Vail* v. *Lewis*, 4 Johns. 457, 458, 4 Am. Dec. 300.

The basis of this action is a tort entitling the plaintiff to damages at common law and also to a statutory damage or penalty. Wherever a statute prohibits an injury to an individual or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of remedy, case, or, in some instances, debt, may be supported.

1 Chity, Pl. 12th Am. ed. p. 142; 1 Elliott, Gen. Pr. § 300; Pom. Rem. & Rem. Rights, § 568; *Vasse* v. *Smith*, 10 U. S. 6 Cranch, 226, 3 L. ed. 207; *Leach* v. *Leach*, 58 N. Y. 630; *Goodenow* v. *Snyder*, 3 G. Greene, 599; *Halleck* v. *Mixer*, 16 Cal. 574; *Sanders* v. *Hamilton*, 3 Dana, 550.

The presumption is always in favor of the constitutionality of any act of the legislature.

Osburn v. *Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *State* v. *Workman*, 35 W. Va. 367, 14 L. R. A. 600.

In the absence of necessary legislation by Congress the local legislature of any state or territory may provide rules for working mines involving easements, drainage, and other necessary means to complete their development.

15 Am. & Eng. Enc. Law, p. 585, § 4.

Coal mining is affected with a public purpose so that it may be regulated by law.

Daniels v. *Hilgard*, 77 Ill. 640; *Com.* v. *Conyngham*, 66 Pa. 99.

To deny the right to enact this law is to deny the right of the political community to prosper and advance.

Cooley, Const. Lim. 3d ed. top p. 358.

A natural liberty or right can only be enjoyed when it does not interfere with an equal exercise of the same right by others.

1 Bl. Com. 125; Lieber, Civ. Liberty & Self Gov. quoted by Cooley, 394; *Com.* v. *Alger*, 7 Cush. 84; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625.

Regulations requiring adjacent land owners to fence their lands upon the dividing line and railroads to do the same have been sustained as a constitutional exercise of the police powers.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 156, 62 Am. Dec. 625.

Also regulating grades and crossings and apportioning expenses.

Fitchburg R. Co. v. *Grand Junction R. & D. Co.* 1 Allen, 552, 4 Allen, 198.

Laws relating to the liquor traffic, destroying the value of property invested therein without compensation, have been upheld.

Cooley, Const. Lim. 583.

Forbidding the growing of rice within the city was held valid upon the ground that it was injurious to the health.

Green v. *Savannah*, 6 Ga. 1.

Levees have been required to be constructed by riparian land owners at their own costs for the common good.

Crowley v. *Copley*, 2 La. Ann. 329.

Fire limits controlling materials to be used in buildings so burdensome as almost to amount to a confiscation have been sustained upon constitutional grounds.

Respublica v. *Duquet*, 2 Yeates, 493; *Brady* v. *North Western Ins. Co.* 11 Mich. 425.

Wharf lines have been established and upheld.

Com. v. *Alger*, 7 Cush. 53.

So a prohibition to the owner to remove gravel, sand, etc., from the beach.

Com. v. *Tewksbury*, 11 Met. 55.

Regulating the transportation of natural gas does not impair vested rights.

Ind. Act 1891; *Jamieson* v. *Indiana Natural Gas & O. Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613.

Compelling the removal of electric wires and poles from streets is not unconstitutional.

United States Illum. Co. v. *Hess*, 19 N. Y. S. R. 883; *American Rapid Teleg. Co.* v. *Hess*, 35 N. Y. S. R. 606.

A building regulation limiting the height of buildings is valid.

People, Kemp, v. *D'Oench*, 111 N. Y. 359.

Holt, P., delivered the opinion of the court:

This is a writ of error by defendant, John, to a judgment rendered in an action of trespass on the case against him by the circuit court of Monongalia county on the 20th day of June, 1894, in favor of plaintiff, Mapel, on his demurrer to the evidence for the penalty of $500 as prescribed by the following statute: "No owner or tenant of any land containing coal shall open or sink, or dig, excavate, or work in any coal mine or shaft, on such land, within 5 feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands in possession, reversion, or remainder, or of the guardians of any such persons as may be infants. If any person shall violate this section, he shall forfeit $500 to any person injured thereby who may sue for the same." Code 1891, p. 668, chap. 79, § 7.

The defendant, by counsel, assigns the following errors: "(1) The overruling the demurrer to the original and amended declaration. (2) In refusing to require the plaintiff to elect whether he would proceed for common law or statutory damages. (3) In refusing to set aside the verdict and grant a new trial. (4) In refusing to arrest said judgment because the declaration contained no count under the statute for the forfeiture. (5) In entering a judgment for plaintiff on said demurrer to evidence."

As the declaration demurred to is based upon a statute of great practical interest in this state, therefore it may answer a useful purpose to give the last count in full, which is as follows: "And for that the plaintiff heretofore, to wit, on the 1st day of January, 1892, at the county aforesaid, was possessed and the owner in fee simple of a certain other tract of land in Cass district, in said county, containing —— acres, more or less, and under and upon which there was and is a large and valuable vein of bituminous coal; and the said defendant during all the time aforesaid was and still is possessed and the owner in fee simple of a certain tract of land in said county and district, and adjoining the said tract of the said plaintiff, and under and upon which said last-mentioned tract the said vein of coal continues and thereunder remains along and under the boundary and division line between the said tracts; and the plaintiff and defendant being so respectively possessed of the said tracts, the said defendant, to wit, on the 1st day of April, 1892, opened the said vein of coal on his said tract, near to the boundary and division line between the said tracts, and then and there unlawfully, wrongfully, and contrary to the statute in such cases made and provided, did open, dig, excavate, work, and remove the said vein of coal up to the said boundary and division line between said tracts without the consent of the plaintiff in writing or otherwise; by reason of which wrongful and unlawful act of the said defendant the plaintiff was injured and damaged $500, and the said defendant thereby became and was and is liable to plaintiff in the said sum of $500 and to the damage of the plaintiff $500; and therefore he sues," etc.

The declaration contained three counts. The first one may be said to be a common-law count in trespass on the case for the damages sustained, case being used instead of trespass, as authorized by statute (§ 8, chap. 103). The second count is like the third count given above, with the additional averment that the opening was extended across the dividing line. By the statute sued on the penalty of $500 is given to the party injured. No part of it goes to the state, so that the action would not be in the name of the state. See Code, chap. 36. The first act was passed on the 3d day of March, 1834. The action of debt was prescribed. Acts 1833–34, p. 82. No specific mode of recovery is provided by the statute sued on, and therefore an action of debt lies, being the usual remedy. *West* v. *Rawson*, 40 W. Va. 480; *Sims* v. *Alderson*, 8 Leigh, 479; 1 Chitty, Pl. 16th Am. ed. top p. 125, and cases cited. But in such case, where the statute gives a right of action without prescribing the form, the action is to be adapted to the nature of the case, and modeled according to the distinctions of the common law. It may be an action of debt, assumpsit, trespass, or case, as the particular

nature of the wrong or injury may require. *Bullard* v. *Bell*, 1 Mason, 243, 290, Fed. Cas. No. 2,121; Com. Dig.; 3 Rob. Pr. 383. Any person injured by the violation of a statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of damages. Code, chap. 103, § 7. This, however, does not of itself give the right of joining a suit for such damages with a count for the penalty. But in this case the court virtually instructed the jury to disregard the first count, and, judgment being given only for the penalty, the question of the addition of the first or faulty count does not arise. Code, chap. 131, § 13.

The court did not err in refusing to require plaintiff to elect between the two counts, for the reason already given. Such election could not be made, as the court instructed the jury to disregard the first count, and to find conditionally the penalty fixed by the statute. In this case, therefore, there was no occasion for the jury to find any verdict at all. All that was needed was for the evidence on each side to be set forth in the demurrer, as it is required to be certified under § 9 of chapter 131; and the court, in deciding the demurrer, would give judgment for defendant or for plaintiff, and, if for the latter, it would be for the penalty of $500 fixed by the statute. Generally, where the damages are to be assessed, the jury is not discharged, but find a verdict subject to the decision of the court on the demurrer. Either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be required to join therein, unless the case be plainly against the demurrant, and his object in demurring clearly seems to be nothing else but delay. If the court, in considering the demurrer, is of the opinion that the plaintiff has cause of action, but that the damages are excessive, the verdict may be set aside, and a writ of inquiry be awarded; and so in every case, where the court, if it followed the hypothetical verdict, must render what the evidence contained in the demurrer shows to be an unjust judgment, it may set the verdict aside, and call another jury to ascertain the *quantum* of recovery (see 4 Minor, Inst. pt. 1, pp. 831, 832 and cases cited); or it may, for good cause, set aside the conditional verdict and award a new trial. I think the practice with us is to treat the party demurring with common fairness; not to draw any unreasonable or farfetched inferences against him, or for his adversary, nor to restrict him to what may be called "necessary inferences" in his favor. See *Hansbrough* v. *Thom*, 3 Leigh, 147. Of course, in a case of conflict, the fact must be taken against him, unless overthrown by a clear and decided preponderance of evidence; but, thus treated, he assumes no risk but what is fair in such a case, and what he ought in reason to anticipate; nor is it more than he assumes on a motion for a new trial. It tends to promote the fair and speedy administration of justice without being subject to the charge of encroaching upon the province of the jury; for it is as old as jury trial itself.

3. It so happened in this action for the recovery of the one definite penalty prescribed by the statute in the given case that there was no room for the verdict of a jury. Such verdict was wholly useless. But, as they followed the statute, it could do no harm; therefore there was nothing for the court to set aside, and there could be no substantial error to the prejudice of either party in refusing to set it aside; yet the court, on proper showing, might have awarded a trial *de novo*. The question whether the plaintiff had sustained any injury in the sense in which the term "injury" is used in the statute could not, in the nature of things, have been submitted to or found by the jury. It was a matter of evidence, with which, in this particular case, they had nothing to do. Moreover, the term "injury," as used in the statute, is used to indicate that the person whose right has thus been violated is the proper one to sue for the penalty; not that the amount of damages is to be ascertained by a jury, for the statute itself fixes the sum forfeited at $500, and means in this case the violation of his right by reason of the violation of the statute.

But it is argued by defendant's counsel that the act is an infringement of the right of private property, transcending the legislature's constitutional power. If the defendant has the right to use his own land and coal mine for all the purposes to which such property is usually applied when, where, and how he may see fit, without limitation or restriction, his neighbor, the plaintiff, has an equal right in his adjoining tract. Upon each one is therefore imposed the correlative duty of so using his own land as not to injure his neighbor's or be hurtful to the commonwealth (see *Haigh* v. *Bell* [W. Va.] 31 L. R. A. 131); for government is instituted for the common benefit, protection, and security of the people, nation, or community. Const. art. 3, § 3. The state claims to reserve the exclusive regulation of its own internal government and police, and such power is properly exercised by the legislature. Is this statute a reasonable exercise of the police power? (1) It is intended to secure private right by enforcing the correlative duty of so using your own land as not to injure that of your neighbor. (2) To preserve dividing lines and underground landmarks, and thus avoid uncertainty and confusion of boundaries in coal lands and the disquieting of titles. See chapter 60 on fences and § 27 of chapter 145. (3) It tends to prevent strife and litigation. (4) To provide for the safety of those working in coal mines by sufficient pillars of support. Under this head see the many provisions in the coal mine law (Appendix to Code, pp. 991 *et seq.*). This is no undue assumption of the right to apply the police power to a subject which does not fall within it, for regulations on all these subjects have long been recognized as wholesome and reasonable, and as fit subjects for the exercise of the police power, as tending to preserve the rights of the citizen and to promote the welfare of the commonwealth. The mining of coal is one of the largest industries carried on in the state. In mining, proper support and ventilation are necessary, and an ample supply of fresh air is stringently exacted by our law on the subject. See coal mine law (Code, pp. 994, 995, §§ 9–11). This is necessary for the health and safety of the miner engaged in a dangerous employment,

and for that reason the public welfare requires it; but no proper system of ventilation can be maintained by any mine owner unless the area to be worked by him is isolated or bounded by a zone or rib of coal thick enough to support the roof, and to be thick enough to prevent the escape of the air, with no passways down through his dividing line which may prevent the due circulation of the air, and render due ventilation very difficult. The same may be said of keeping his mine properly drained as required by law, and impervious to water from adjoining mines and lands. The act of 1834 fixed this bounding zone between adjoining land owners at 50 feet, the present act at 10 feet. Thus we see that this rib of solid coal not to be mined into by either of the adjoining owners was to be contributed by each in equal parts, for the mutual benefit of each, for the protection of the surface, to secure independent systems of ventilation, drainage and workings, and in aid of an industry so great and widely diffused that the state as a whole is interested therein. Besides, the importance of having these unbroken ribs of support throughout the mining region is being realized as a state affair more and more as the mining of coal goes on. This regulation works no hardship on one for the benefit of the other, but is impartial, just, and reasonable, imposing a common burden for the benefit of all such owners. This regulation, in substance, has been in force for more than sixty years without complaint. This is a high degree of evidence that it is not an unconstitutional exercise of police power to require this natural boundary wall to be preserved intact. See 15 Am. & Eng. Enc. Law, pp. 593 *et seq.;* Cooley, Const. Lim. 3d ed. top p. 578.

This brings us to the evidence. Joshua M. Ross sold and conveyed to Jesse Everly, by deed dated 16th February, 1860, the land now owned by plaintiff, Mapel. In it he makes this reservation: "The said Ross excepts the privilege of coal for his part of the farm at the bank now in use." What Ross did not then sell, which he calls "his part of the farm," is the land now owned by defendant, John. As to the nature and extent of defendant's right to mine coal on plaintiff's land it is enough for our present purpose to say that the privilege to mine coal at the bank then in use was an easement annexed to defendant's land; the dominant tenement, to mine coal at that open mine on plaintiff's land, the servient tenement, which was only a privilege to take coal at a particular place for a particular purpose; that the dominant tenement does not adjoin the servient tenement where the defendant was driving his new entry, but it was out of other land of defendant, which adjoined the servient tenement at that point. This, in my view, is wholly immaterial. Defendant was warned by plaintiff not to excavate or dig into or through this stone coal division fence, this underground party wall, created and established by law; but he persisted until he had dug across the dividing line and 18 inches into the 5 feet left standing on the other side, requiring, as it appears, an injunction to stop him. If we are not mistaken in some of the leading objects to be accomplished which moved the legislature to enact this statute, then defendant was prohibited from mining coal in and through this neutral zone both by the spirit and the letter of the act. (1) By the letter, for the place where defendant had a right to mine coal was an open mine then in use; and if for any reason he had the right to drive a new entry into the coal, it could only be on the land of plaintiff. He had no right to break through the dividing line, the party wall between his land and the land of the plaintiff. Defendant was not the sole owner of the coal on plaintiff's land, was not the owner of, or one having title to, such coal in the sense in which these terms are used in the statute. He was interested in Mapel's coal bank to the extent of the privilege already mentioned, which, so far from constituting any consent in writing given by anyone for him to dig through the 10-foot dividing fence of coal, negatives any such right by confining his right of entry and mining to plaintiff's side of the dividing line. (2) By the spirit of the act, for they were two separate, distinct tracts containing a vein of the Pittsburg seam of coal 10 feet thick, shown to be quite valuable on plaintiff's land. And defendant shows no pretext or color of right to destroy its integrity as a coal property by digging away the dividing wall, and making it one mining property with his own, so far as drainage, ventilation, propping, ingress, and egress, etc., are concerned, to the very serious damages of plaintiff's land as a distinct coal plant. Such a seam of coal at such a place may be worth $500 an acre, and in such a case the penalty fixed by the statute cannot by any means be regarded as a harsh one. But with that we have nothing to do, for we find the law thus written.

The judgment for plaintiff on his demurrer to evidence was right, and is affirmed.

OHIO SUPREME COURT.

Elizabeth C. ESTABROOK, *Plf. in Err.*,
v.
J. C. ROYON, Guardian, etc., of Coral Willie Henderson.

(52 Ohio St. 318.)

***No forfeiture of the estate of a life tenant** accrues, under § 2852, Rev. Stat., from the failure of the tenant to pay the taxes on the land, in consequence of which the land is sold at delinquent tax sale, where, by reason of errors or irregularities in levying the tax or in making the sale, no valid deed can be made by the auditor to the purchaser at the tax sale.

(Williams and Bradbury, JJ., dissent.)

*Headnote by the COURT.

(February 5, 1895.)

ERROR to the Circuit Court for Shelby County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in a proceeding brought to procure the partition of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. **S. L. Wicoff,** for plaintiff in error:

Courts are liberal in construing transactions in favor of the avoidance of a forfeiture. Forfeitures are abhorred in equity, and are never favored in law.

Manhattan L. Ins. Co. v. *Smith,* 44 Ohio St. 167, 58 Am. Rep. 806.

This pretended tax sale on January 18, 1887, was absolutely void.

NOTE.—*Effect of tax sale on land held by life tenant.*

I. *General rule.*
II. *Tenant in dower.*
III. *Tenant by curtesy.*
IV. *Devisee for life.*
V. *Position of purchaser.*
VI. *The statute of limitations.*
VII. *Decisions under state statutes.*

As to the duty of a life tenant to pay taxes, see *note* to St. Paul Trust Co. v. Mintzer (Minn.) and Defreese v. Lake (Mich.) *ante*, 744.

I. *General rule.*

The general rule of law is that the party in possession of the rents and profits of real estate, being legally and morally bound to pay the taxes thereon, will not be allowed to acquire title thereto by refusing or neglecting to pay the same and purchasing the premises at a tax sale, or subsequently acquire them from a purchaser at such sale. And this rule applies to all estates in land whether held for life, in tail, in fee simple, whether acquired by purchase or descent. Pleasants v. Scott, 21 Ark. 370, 76 Am. Dec. 403; Guynn v. McCauley, 32 Ark. 97, 111; Moss v. Shear, 25 Cal. 38, 45, 85 Am. Dec. 94; McMinn v. Whelan, 27 Cal. 300; Coppinger v. Rice, 33 Cal. 408, 425; Bernal v. Lynch, 36 Cal. 135, 146; Voris v. Thomas, 12 Ill. 442; Busch v. Huston, 75 Ill. 343; Stears v. Hollenbeck, 38 Iowa, 550; Bowman v. Cockrill, 6 Kan. 331; Carithers v. Weaver, 7 Kan. 110, 122; Leppo v. Gilbert, 26 Kan. 138, 140; Duffitt v. Tuhan, 28 Kan. 292; Douglas v. Dangerfield, 10 Ohio, 152; Willard v. Strong, 14 Vt. 532, 534, 39 Am. Dec. 240; Williamson v. Russell, 18 W. Va. 612, 624; Perkins v. Wilkinson, 86 Wis. 538, 547; Smith v. Lewis, 20 Wis. 351; Avery v. Judd, 21 Wis. 264; Bassett v. Welch, 22 Wis. 175; Whitney v. Gunderson, 31 Wis. 379; Fallass v. Pierce, 30 Wis. 443; Newton v. Marshall, 62 Wis. 8.

The rule is well settled that the burden of paying current taxes is upon the life tenant rather than upon the remainderman, and therefore the life tenant cannot, by paying taxes or by redeeming from tax sales, where he has allowed the land to be sold for taxes, create a claim which he can enforce against the remainderman. Hagan v. Varney, 147 Ill. 281, 292.

A tenant for life cannot acquire a tax title to the defeat of the remaindermen. Stewart v. Matheny, 66 Miss. 21, 26.

So, he cannot acquire a tax title to defeat those entitled in reversion. Olleman v. Kelgore, 52 Iowa, 38.

He can acquire no right to the estate against the owner in fee simple. Prettyman v. Walston, 34 Ill. 175, 192; Varney v. Stevens, 22 Me. 331; Hughes v. Young, 5 Gill & J. 67; McMillan v. Robbins, 5 Ohio, 28; Cairns v. Chabert, 3 Edw. Ch. 312; Burhans v. Van Zandt, 7 N. Y. 523; Elmira v. Dunn, 22 Barb. 402; Defreese v. Lake, *ante*, 744; Jones v. Merrill, 69 Miss. 747, 752.

So, if a tenant for life suffers the land to be sold for taxes, and subsequently receives a release of the title acquired under the tax sale, such release extinguishes the title, and gives him no right whatever against the reversioner. Dunn v. Snell, 74 Me. 22, 24.

And his neglect cannot, under any circumstances, vest in him a title in fee against the reversioner after the termination of his life estate by forfeiture or otherwise, and thus enable him to take advantage of his own wrong. Patrick v. Sherwood, 4 Blatchf. 112, 113.

So, one who accepts the life estate takes it charged with the disability of destroying the estate in remainder to the same extent that the original tenant for life was so disqualified. Jones v. Merrill, *supra.*

The owner of the life estate cannot acquire an adverse right against the owner of the fee in and through his forfeiture to pay the taxes. Chaplin v. United States, 29 Ct. Cl. 231, 233.

In the above case the government was the purchaser at the tax sale, and the tenant for life subsequently repurchased from the government.

And a purchase by the tenant, or title acquired by him in pursuance of such tax charge, will inure to the benefit of the reversioner as well as himself. Phelan v. Boylan, 25 Wis. 679, 681, in which case the taxes were due before the commencement of the life tenancy.

It is the general proposition that if a trustee, mortgagee, or tenant for life, being in possession, purchases an outstanding title or encumbrance, he cannot apply it to his own benefit, but it in general inures to the benefit of him under whom he entered, or is considered as held in trust for the *cestui que trust*, mortgagee, or him in reversion or remainder. Phelan v. Boylan, *supra;* Bowling v. Dobyns, 5 Dana, 434; Morgan v. Boone, 4 T. B. Mon. 297, 16 Am. Dec. 153.

The established doctrine is that a tenant for life in possession so purchases for the benefit of himself and the remainderman or reversioner, and cannot hold it for his own exclusive benefit. Phelan v. Boylan, *supra;* Daviess v. Myers, 13 B. Mon. 513.

He can acquire no right or title to the land by a neglect of such duty which will defeat the owner of the fee. Stears v. Hollenbeck, 38 Iowa, 550; Anson v. Anson, 20 Iowa, 56, 89 Am. Dec. 514.

And the laches of the tenant for life will not af-

Stambaugh v. *Carlin*, 35 Ohio St. 209; *Younglove* v. *Hackman*, 45 Ohio St. 69.

By the plain language of the section the sale of the lands is essential to work the forfeiture.

These lands were listed in several tracts, and must have been offered for sale in separate tracts, but only a portion of any tract was sold for the alleged tax against such tract.

Is it not clear that under such a sale there can be no forfeiture of the life estate in the part not sold?

Is any kind of a tax sufficient to furnish the basis for a forfeiture of a life estate? Will an absolutely void sale be sufficient?

It is regarded by our courts as a valuable right to the owner of land that the delinquent record shall show the delinquency, and it must show it correctly, or any sale made of the land for such tax is void.

Nye v. *Denny*, 18 Ohio St. 246, 98 Am. Dec. 118; *Kemper* v. *McClelland*, 19 Ohio St. 308; *Woodward* v. *Sloan*, 27 Ohio St. 592; *Younglove* v. *Hackman*, *supra*.

In *Jones* v. *Devore*, 8 Ohio St. 434, the court holds that the sale must have been a valid sale in order that the deed shall pass title.

Lands cannot be claimed as forfeited to the state for the nonpayment of taxes without a strict compliance with the statute authorizing the forfeiture.

Woodward v. *Sloan*, *supra*.

Messrs. **Royon & Hess** and **C. M. Hughes** for defendant in error.

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fect the party entitled to remainder. Jackson, Hardenberg, v. Schoonmaker, 4 Johns. 390, 402.

The reason why an owner of land is disqualified from purchasing it at a tax sale is that permitting him to become such purchaser would enable him to take advantage of, and reap a benefit from, his own neglect of a legal duty. Oswald v. Wolf, 129 Ill. 200.

One can acquire no rights against another by a neglect of a duty which he owes to such other person. Foley v. Kirk, 33 N. J. Eq. 170, 178.

In such a case the vendee's deed will be treated as void from the beginning. Dunn v. Snell, 74 Me. 22, 24; Duffitt v. Tuhan, 28 Kan. 292.

Where it is made to appear that it was the duty of the party to pay the taxes on the land, the disqualification at once attaches and a purchaser will not be permitted to derive an advantage from that which it was his plain duty under the law to do. Lewis v. Ward, 99 Ill. 525, 527.

If a tenant for life, after a sale of the property for taxes, obtains a release to himself of the right thus acquired, he takes under such release according to his title, and the remaindermen according to theirs. Allen v. De Groodt, 98 Mo. 159.

Having purchased the land for the benefit of, not only himself, but in law for the owner of the remainder, the purchase is equivalent to a purchase by the remainderman, and subjects the rights of the party to that provision of the statute which prevents a recovery where the land had been redeemed or purchased by the owner, and, the owner of the life estate purchasing the lands, the purchase inures to the benefit of the remainderman and entitles him to the same estate on the land which he had before the sale. Chaplin v. United States, 29 Ct. Cl. 231, 233.

Any sale which may be made of the estate for taxes, which it was the duty of the life tenant to pay, will only reach the life estate. Stovall v. Austin, 16 Lea, 700, 709; Nashville v. Cowan, 10 Lea, 209, 213.

So, one entitled to a life estate cannot, during the continuance of such estate, acquire an adverse title as against the owners of the reversion by such a purchase. Menger v. Carruthers (Kan.) 44 Pac. 1096; Watkins v. Green, 101 Mich. 493, 498; Austin v. Stevens, 24 Me. 520, 526.

Neglecting to pay the taxes for the purpose of causing a sale of the estate to enable the tenant for life to destroy the rights of the reversioners, would be to commit a fraud upon their rights, and if he purchases at such a sale he cannot thereby establish any title as a disseisor against the reversioner. Varney v. Stevens, 2 Me. 331, 334.

And when he receives a release of the title he will be considered as intending to discharge his duty by releasing the estate from the encumbrance. *Ibid.*

One who redeems land forfeited for the nonpayment of taxes acquires thereby no additional title, and one who buys land at a tax sale to which he claims title, which was encumbered with taxes, acquires no additional title but only removes such encumbrance. Jacks v. Dyer, 31 Ark. 334, 344.

A purchase by a tenant for life at a tax sale merely extinguishes the tax. Foley v. Kirk, 33 N. J. Eq. 170, 177.

The purchase operates, not as a valid purchase, but as a payment only. Johnston v. Smith, 70 Ala. 108, 118.

The purchase is but a mode of paying the taxes legally chargeable against him. Choteau v. Jones, 11 Ill. 300, 322, 50 Am. Dec. 460.

And the rule admits of no exception that a purchase by one whose duty it is to pay the taxes operates as payment and nothing more. Lewis v. Ward, 99 Ill. 525, 527.

Such a proceeding is but an indirect mode of paying the tax which it was his duty to pay without suit, and the law will not tolerate the acquisition of the title of another in this method by his own wrong. Le Roy v. Reeves, 5 Sawy. 102, 106.

And the transaction is regarded as equivalent to a payment, and equity will relieve as against the deed conveying such interest to him as a cloud upon the title. Chaplin v. United States, 29 Ct. Cl. 231, 233.

The rule would appear to be well settled that all persons who, by reason of their ownership of lands or otherwise, are under a legal or perhaps a moral obligation to pay taxes and assessments thereon, are precluded by the policy of the law from becoming purchasers of such lands at a tax sale, and in case of a purchase such party obtains no independent title, the purchase being deemed in law only a mode of paying the taxes. Oswald v. Wolf, 129 Ill. 200.

The purchase gives him no rights as against a third party by a neglect of such duty as he owed. Williamson v. Russell, 18 W. Va. 612, 624.

The turning point in all the cases is the obligation of the party setting up the tax title to pay the taxes. Oswald v. Wolf, *supra*.

An action for damages will lie by the remainderman against the tenant for life, for the recovery of damages sustained by him by reason of the life tenant's neglect to pay taxes. Wade v. Malloy, 16 Hun, 226.

By neglecting to pay the taxes during his tenancy the life tenant commits a wrong against the reversioner, and, if by so doing he renders the estate subject to a sale, the reversioner may have an action of waste for the recovery of the property wasted, and the damages occasioned thereby, or he may proceed by way of action on the case, in the nature of waste, for damages only. Stetson v. Day, 51 Me. 434.

Equity will interfere at the instance of a remainderman, or the party entitled in reversion as against the life tenant, to prevent the sale by him

Minshall, J., delivered the opinion of the court:

The action below was a suit in partition, brought by Royon as guardian of Coral W. Henderson, a minor, claiming his ward to be tenant in common with the defendant of the undivided one half of the premises described in the petition. The defendant answered that she is the widow of William Line, deceased, who died seised of the property, and, by his will, devised the same to her for life, or during widowhood, and at her death or remarriage, to their children; that she is in possession of the property under the will, having accepted its provisions; and that the plaintiff's interest in the property is simply as heir of one of the deceased children of the testator. The averments of the answer are not denied, but, by way of avoidance, the plaintiff replied, that being in possession as such life tenant, the defendant had neglected to pay the taxes on the land for so long that, on January 18, 1887, they were, on due advertisement, sold by the auditor of the county for the taxes delinquent thereon for the years 1885 and 1886, and did not redeem them in the time prescribed by law (Rev. Stat. § 2852), whereby her life estate in the land became forfeited to the next in estate. But the reply also states that on March 30, 1888 (over a year after the sale), the defendant deposited with the treasurer of the county, upon the warrant of the auditor, the sum of $269.10, and that Royon, the holder of the certificates of purchase at the tax sale, received

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of lands acquired by him at a tax sale, where there is reason to believe that such lands will be lost to the reversioners by reason of want of notice in the purchaser. Phelan v. Boylan, 25 Wis. 679, 681.

In Stansbury v. Inglehart, 9 Mackey, 134, where an estate was limited to one for life with remainder over, it was held that there was no jurisdiction in equity to decree a sale of the fee simple in order to pay taxes accruing during the continuance of the life estate.

The mere fact that the reversioner mortgaged his reversion, and in the mortgage covenanted to pay the taxes, is not of itself a release of the duty imposed upon the tenant for life. Jenks v. Horton, 96 Mich. 13, 16.

For the purpose of redeeming the land and of keeping down taxes, life tenants will be permitted to fell timber in such quantities and at such places as not seriously to impair the value of the inheritance. Cannon v. Barry, 59 Miss. 289, 304.

In proceedings to set aside a tax deed obtained by a tenant for life, which deed he has fraudulently refused to record, he should be required to place the same on record. Phelan v. Boylan, 25 Wis. 679, 681.

In case of the neglect of the maker of a trust deed or of the trustee thereunder to pay the taxes, any beneficiary may pay the same and seek contribution from the other beneficiaries, or claim reimbursements out of the trust fund, but he cannot permit the lands to be sold for taxes and acquire a valid legal title by purchasing in the certificates of sale. Frierson v. Branch, 30 Ark. 453, 464; Pettus v. Wallace, 29 Ark. 476.

Where a tenant for life neglected to pay the taxes and purchased at a tax sale, it was held that, after the termination of such life estate, the fee could not be claimed as against the reversioner. Patrick v. Sherwood, 4 Blatchf. 112.

And where the grantee of land under a tax deed, which was executed to him before the time allowed for redemption had expired, had a subsequent warranty deed executed to him by the tenant for life, it was held that the conveyance by such grantee merely transferred his life interest in the property. Little v. Edwards, 84 Wis. 649, 651.

So, where the tax suit was brought against the tenant for life alone, and the remaindermen were not made parties and did not claim under him, but by an independent title created by deed, it was held that the judgment in the tax suit bound only the life tenants, and not the remaindermen. Allen v. De Groodt, 98 Mo. 159.

In Burhans v. Van Zandt, 7 N. Y. 523, a tenant for life obtained by voluntary purchase the interest of one of the *cestuis que trust*, and became a cotenant with others in equity in a remainder secured to them upon a deed of settlement, and himself became the purchaser of the estate sold for municipal assessments and sought to hold the same for his exclusive benefit. The court held he was not so entitled, as he was bound to protect those who stood in the same relation with himself to the property, and that the sale inured for the common benefit of all.

Although it is the duty of the tenant for life to protect the property by the payment of taxes of all kinds assessed upon it by any authority, yet the law does not protect the estate of remaindermen or reversioners from the consequence of a forfeiture of the land to the state in case of a sale for taxes. Chaplin v. United States, 29 Ct. Cl. 231, 233.

Where a tenant for life allowed the lands to be sold for the nonpayment of taxes, and the government became the purchaser at a tax sale and afterwards resold to the tenant for life, it was held that no action would lie against the government under the statutes of March 2, 1891, 26 Stat. at L. 822. *Ibid.*

Where the assessments were mostly on unimproved property, and as to the productive property were for purposes which conferred as much benefit on the future estate as on the then present life estate, the court ordered so much of the property as was required therefor to be sold, and the proceeds applied to the payment of the assessments and costs of the suit, with a reference to inquire and report what amount was necessary, the sale being ordered under N. Y. Laws 1855, chap. 327. Norsworthy v. Bergh, 16 How. Pr. 315, 321.

But the rule is otherwise where the party is under no legal obligation to pay. Pleasants v. Scott, 21 Ark. 370, 76 Am. Dec. 403.

If, therefore, the party in possession is not bound to pay taxes either legally or morally, he is not precluded from purchasing at a tax sale. Bowman v. Cockrill, 6 Kan. 331.

Where there is no legal or moral obligation cast upon such purchaser to pay the taxes, there is no principle of law or equity which precludes him from purchasing at the sale, even though he may be in possession at the time the assessment is made or when the land is sold. Moss v. Shear, 25 Cal. 38, 45, 85 Am. Dec. 94.

II. *Tenant in dower.*

A tax title acquired at a tax sale by one whose legal duty it was to pay such taxes, as a tenant in dower, will be set aside. Fitzgerald v. Spain, 30 Ark. 95, 100.

Where the property was listed as that of the widow, it was held that all that the purchaser obtained at a tax sale was the dower interest of the widow. Payne v. Arthur, 16 Ky. L. Rep. 784.

So, where a widow executed a warranty deed to a grantee under a tax deed, it was held that such deed did not convey more than her life estate, and charged the purchaser with the payment of the taxes and operated as a redemption from or extin-

the money and surrendered the certificates to the auditor.

A trial was had and judgment rendered for the plaintiff, which was affirmed by the circuit court. After the determination of the case in the common pleas, defendant, Elizabeth Line, intermarried with one Estabrook; hence the change that appears in her name. On the trial a bill of exceptions was taken set ing forth all the evidence. From this it appears that the defendant had on February 16, 1889, become the owner in fee simple of the undivided one half of the land by purchase from the heirs of the other children, and that the plaintiff at the termination of the life estate of the defendant, would be the owner and entitled to the possession of the other half; that the land was in three separate tracts, and had been so listed for taxation in the name of William Line, no change having been made at his death; that only a part of each of these tracts had in fact been sold for the taxes delinquent on each,—that is to say, 7 acres out of a tract of 20 acres, 10 acres out of a tract of 40 acres, and 10 acres out of a tract of 41 acres. And it also appears that there were a number of irregularities in the listing and sale of the land. The south half of one of the tracts had not been returned as delinquent in any sum by the treasurer; and his return showed no reasons why the taxes on any of the tracts had not been collected, as required by § 1043,

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guishment of his tax lien. Little v. Edwards, 84 Wis. 649, 651.

In the above case the purchaser at the tax sale had acquired the interest of a widow entitled to dower in the premises, and the grantees' interests were held to expire upon the death of the widow. *Ibid.*

The pre-existing right of dower, no matter whether inchoate or perfect, will be barred by a valid sale and conveyance by a county auditor for the nonpayment of taxes. Jones v. Devore, 8 Ohio St. 430, 431.

Where the plaintiffs, who were the heirs at law of a decedent, claimed the land under title from their ancestor, and the defendant, who was the purchaser of the land at a tax sale occasioned by the neglect of the widow to pay the taxes, also claimed title under the ancestor, it was held that the plaintiffs required no proof of their title in order to compel a cancelation of the deed conveying the land to the defendant. Payne v. Arthur, *supra.*

Where land was conveyed to one in trust for his bodily heirs "to have and to hold . . . to the only proper use of [grantee] during his life," and was not to be conveyed or disposed of by him, "but enjoyed by him [and] firmly and faithfully held in trust for the sole use of his bodily heirs forever," it was held that the purchaser under a sale for taxes of the land which was forfeited under the Ohio statute for the nonpayment thereof, held free of the widow's right to dower, and that the subsequent sale by such purchaser to the heirs of the tenant for life did not reinstate the widow's possession so as to give her a title to dower in the premises as against the children. Tullis v. Pierano, 9 Ohio C. C. 647.

Where a widow, tenant for life of her deceased husband's land, failed to pay the taxes, and the land was sold, and the tax deed executed to the defendant, which was recorded four years afterwards, such widow having the right to redeem from such tax sale at any time within five years thereafter, under §§ 1181, 1191, 1208, Wis. Rev. Stat., it was held that the tax deed so executed by the purchaser gave him no title or constructive possession as against such widow, the five years given her for redemption not having then expired, and its legal effect as to her amounted to nothing more than a tax certificate of such sale. Little v. Edwards, 84 Wis. 649, 651.

In Walsh v. Wilson, 130 Mass. 124, it was held that the widow's right to dower in land mortgaged by her husband during his lifetime, and redeemed by the mortgagee, remained unaffected by the tax sale under which the mortgagee took a deed of release and quitclaim from the city.

A widow who occupies her deceased husband's residence with his children, some of whom are of age, is not bound to pay taxes which accrue subsequent to the husband's death and before the assignment to her of dower, and therefore if she purchases the property at a tax sale made after the assignment of dower, such sale will not, in the absence of actual fraud, be ordered to be set aside at the instance of his creditors. Branson v. Yancy, 1 Dev. Eq. 77.

In the above case, however, there was a dissenting opinion by Henderson, J., holding the widow liable as a life tenant and occupant.

In Blodgett v. Brent, 3 Cranch, C. C. 394, it was held that a widow would not be barred of her dower by a tax sale, either by virtue of the act of Congress laying a direct tax, or for county taxes, or by sale under a decree in the lifetime of the husband; and that the purchaser at a tax sale acquired only the interest of the person in whose name the assessment was made.

See also Linden v. Graham, 34 Barb. 316, 319, *infra*, VII.

III. *Tenant by curtesy.*

Under the Connecticut statute it has been held that it is the exclusive duty of the tenant by the curtesy to pay all taxes assessed upon real estate, and that he alone is personally liable therefor, and that only his property can be taken or subjected to a lien therefor, and that consequently the remainderman has no right or interest which can be injuriously affected by any such assessment, the statute imposing a lien for the taxes only upon such estate as the party has in the land, and not upon the estate which another may have in the same land. White v. Portland, 67 Conn. 272.

IV. *Devisee for life.*

A devisee under a will who owns a life estate in real property cannot acquire a tax title so as to defeat the claim of those who are entitled in reversion or remainder. Olleman v. Kelgore, 52 Iowa, 38, 40.

Where a foreign will devised an estate for life and such will was not probated in the state, and the devisee permitted the land to be sold for taxes and purchased at such tax sale, it was held that he acquired no title which would defeat that of those entitled in reversion or remainder. *Ibid.*

V. *Position of purchaser.*

Where the owner of a life estate neglects to pay the taxes assessed upon the land, and it is sold for valid taxes and under valid proceedings, the title passes to the grantee, and the only remedy of the remainderman is against the life owner. Watkins v. Green, 101 Mich. 493, 498.

If the heirs or those entitled in remainder fail to enforce the duty on the life tenant to pay the taxes, and the property is sold for the taxes, and a stranger bids it off, such stranger is not in any way concerned, nor is his title affected under the tax sale. Newby v. Brownlee, 23 Fed. Rep. 320, 322.

Where it was objected that at the time the lands were sold for taxes, and at the time of the assignment to the tenant for life of the certificate of purchase, she was the tenant of said lands for life

Rev. Stat. The advertisement as to the amount due did not correspond in amount with the delinquencies returned by the treasurer, being greater; it included a delinquency on a ditch tax, which was not in the return of the treasurer; and a large part of the entire delinquency embraced an assessment for a turnpike, an equitable part of which should have been paid by the remaindermen. Rev. Stat. § 2768. In fact the sale is admitted to have been void, and, as a consequence, no valid deed could have been made the purchaser at the tax sale by the auditor. The admission may be regarded as compelled by the course of decisions in this state. *Stambaugh* v. *Carlin*, 35 Ohio St. 209; *Younglove* v. *Hackman*, 43 Ohio St. 69; *Nye* v. *Denny*, 18 Ohio St. 246, 98 Am. Dec. 118; *Woodward* v. *Sloan*, 27 Ohio St. 592; *Kemper* v. *McClelland*, 19 Ohio St. 308. Forfeitures are a matter of strict right, and can only be claimed where the requirements of the law have been strictly complied with.

We see no reason why the same strictness should not be required to work a forfeiture of a life estate for the nonpayment of taxes, under the provisions of § 2852, Rev. Stat. as is required to work a forfeiture to the state, or to support a title acquired on a sale of delinquent lands. It would seem somewhat remarkable to hold that a sale, which, by reason of irregularities, would not support a title to a purchaser, nor work a forfeiture to the state,

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chargeable with the payment of the taxes, and that therefore the purchase of the lands at the tax sale by her brother-in-law, and the subsequent assignment of the certificate of purchase by him to her, constituted in law only a mode of payment of the taxes by her, and therefore the tax deed purporting to convey said lands to her was inoperative and void,—the court held that it could not be doubted but that the deed constituted color of title in such life tenant as it purported on its face to convey to her the fee, and although the circumstances would doubtless be evidenced as against her of bad faith in acquiring such color of title, yet her want of good faith could not be imputed to her grantees, nor could it in any way affect their rights, so long as it was shown that when they accquired from her their title or color of title they had no knowledge or notice whatever of any of the facts from which bad faith on her part could be implied, and that therefore the title or semblance of title vested in her by the said tax deed, and passed to and became vested in her grantees by her conveyance, and that, so far as they were concerned, such claim and color of title were made and acquired in good faith, and being to the fee, their possession under it was adverse to the other claimants and so adverse to the heirs of the decedent. Lewis v. Pleasants, 143 Ill. 271.

Where one took property under a devise to him for life, and gave in the land for taxation along with other land as "all his land," and the land was levied upon for taxes and sold for its full value, it was held that there was a general assessment of taxes against all his property, and execution was levied upon the particular land in dispute which was included in such general return, and that the purchaser at the tax sale got no better title than the tenant for life had, the proceedings not being *in rem* to collect taxes from the particular land but a proceeding *in personam* against such tenant for life. Gross v. Taylor, 81 Ga. 86, 88.

Where, in ejectment proceedings, the plaintiffs were remaindermen and their father was tenant for life, and the property was sold for taxes, and defendants claimed through mesne conveyances under the purchases at the tax sale for taxes which ought to have been paid by the tenant for life, it was held that the action lay, the three years imposed by the Missouri statute of limitations under which title must be set up not having expired between the death of the tenant for life and the commencement of the suit, such statute only running as against the remaindermen from the death of the life tenant. Allen v. De Groodt, 98 Mo. 159.

Where the grantee of a tenant for life, who has acquired the estate by purchase under a tax title which is defective, has made improvements of a permanent character believing that he has the valid title and purchases the fee simple, such improvements materially increasing the value of the inheritance, he is entitled, as against the actual owner who seeks relief in equity, to an apportionment. Foley v. Kirk, 33 N. J. Eq. 170, 178.

Where a judgment was recovered in a suit commenced by the collector of taxes to enforce the lien against the property of a married woman for unpaid taxes without making her a party defendant, it was held that it would not affect her interest in the property, and, as the marital interest of her husband in the property was not vendible on execution for his debts, the purchaser at the tax sale under a judgment acquired no title which enabled him to prevail in an action of ejectment against the husband. Gitchell v. Messmer, 87 Mo. 131.

The purchaser of an estate in remainder at a sale on foreclosure of a mortgage made subject to the life estate on which the remainder is limited, cannot claim a forfeiture of the life estate from the sale of the lands at delinquent tax sale, and a failure to redeem within the time prescribed by Ohio Rev. Stat. § 2852, where the omission occurred prior to the foreclosure and there is nothing to show but that the forfeiture was waived by the mortgagor. Chaffee v. Foster, 52 Ohio St. 358.

In the above case, however, there were two dissenting opinions. *Ibid.*

VI. *The statute of limitations.*

A tenant for life whose duty it is to pay taxes cannot acquire a title under the statute of limitations by a discharge of such duty. Higgins v. Crosby, 40 Ill. 260.

A life tenant who becomes a purchaser at a tax sale cannot claim the statute of limitations of one year under the Mississippi laws of March 2, 1888, p. 40, for the reason that he was under disability to buy, and set up the state's title as against the remainderman. Jones v. Merrill, 69 Miss. 747, 752; McGee v. Holmes, 63 Miss. 50.

The statute of limitations will not run in favor of a purchaser at a tax sale who was himself the party legally and morally bound to pay the taxes. Duffitt v. Tuhan, 28 Kan. 292.

See also Allen v. De Groodt, 98 Mo. 159, *supra*, V.

VII. *Decisions under state statutes.*

Section 3845 of the Revised Statutes of Connecticut provides that when the real estate is in possession of a tenant for life, and another person is entitled to the "ultimate enjoyment" of it "such estate shall be set in the list of the tenant for life in possession" except when it is specially provided otherwise, and therefore the statutory lien for such a tax rests upon the estate of the tenant for life and not upon the estate of the remainderman, such being the express provision of § 3890 of the General Statutes, which imposed such a lien "for that part of his taxes which is laid upon the valuation of the said real estate as found in the said list when finally completed." White v. Portland, 67 Conn. 272.

The words "owner or possessor," as used in the

would, nevertheless, work a forfeiture of a life estate to the one next in estate. Such a holding is not required by the reason nor by the letter of the statute. The language of the statute, as far as applicable, is as follows: "If any person . . . who shall be seised of lands for life, . . . shall neglect to pay the taxes thereon, so long that such lands shall be sold for the payment of the taxes, and shall not, within one year after such sale, redeem the same, according to law, such person shall forfeit to the person or persons next entitled to such lands in remainder or reversion all the estate which he or she, so neglecting as aforesaid, may have in said lands." By the terms of this statute the forfeiture is made to depend upon a sale for the nonpayment of taxes, and a failure to redeem within one year from the sale. Its language necessarily imports a valid sale, since an invalid sale is, in contemplation of law, no sale (cases above cited); and where there is no sale there is no forfeiture, and, consequently, nothing from which a redemption can be required. According to the usage of language, where a word is employed without qualification, it is to be understood in its integral, and not in a partial or negative sense. To illustrate, a contract for the execution and delivery of a deed is not performed by the delivery of a defective deed. And so, in *Cincinnati* v. *Diekmeier*, 31 Ohio St. 242, an agreement to pay a contractor in "assessments" was held to be an agreement to pay in "valid assessments." So that, in this case, the statute can only be held to apply where there has been a valid sale of the land. Where the sale is invalid, no title can be made the purchaser, and no loss of estate can, therefore, result either to the next in estate or to the life tenant. It is the loss that may result to the next in estate from the nonpayment of taxes on the land, which constitutes the reason and spirit of the statute; and when such loss cannot result from the neglect of the life tenant to pay taxes, the important fact is wanting on which the limitation in law, provided by the statute, can take effect and work a forfeiture of the estate of the life tenant.

The case of *McMillan* v. *Robbins*, 5 Ohio St. 28, is relied on to support the conclusions of the court below. But it is far, as we think, from so doing. It was the case of a sale made upon a valid assessment—no question being made as to the amount of the tax or the regularity of the proceedings by which it was levied and the sale made. The case held that the happening of the event on which the forfeiture is made to depend terminates the estate of the life tenant, and that the next in estate may enter without the judgment of a court declaring the forfeiture. This we accept as the law, although it was held otherwise in *Johnson* v. *Pettit*, 1 Cin. Sup. Ct. Rep. 25, Storer, J., delivering the opinion. The provision of the statute is in the nature of a limitation in law, which cannot be relieved against by a court of equity. Pom. Eq. Jur. § 458. The occurrence or the fact terminates the estate. But the fact must occur before the limitation takes effect; a void sale is not within the limitation and does not, therefore, work a forfeiture.

Kentucky Revised Statutes, are so used as precautionary to embrace both classes, and for the better securing of the payment of the taxes assessed. Johnson v. Smith, 5 Bush, 102, 104.

The validity of the sale for taxes cannot be denied by the tenant for life, for the reason that under the Maine statutes the reversioner cannot dispute such sale until such time as he has paid or tendered the full amount of the tax together with the charges and interest. Stetson v. Day, 51 Me. 434.

The New York act of 1855, chap. 327, provides "for the due apportionment of taxes and assessments, and for the sale of real and personal estate to pay the same," and a sale made under such act by a judgment of the supreme court taken in an action wherein all having vested estates, either legal or equitable, were made parties, or proceeded against by a publication of notice as unknown owners, bars all contingent or unvested estates as well as possible interests which might vest in persons not yet in being, as well as vested estates, and under such act the purchaser by reason of the sale takes the fee simple absolutely. Jackson v. Babcock, 16 N. Y. 246.

Under the New York act of April 12, 1855 (Laws 1855, chap. 327), an action may be maintained by the owner entitled to real estate in fee against a widow, a dowress of the property, to recover an apportionment of taxes and assessments imposed upon the property, which assessments are a lien thereon. Linden v. Graham, 34 Barb. 316, 319.

All proceedings under the Ohio statute for the sale of lands for nonpayment of taxes are *in rem* and not *in personam*, and operate, if at all, upon the land itself, and not merely upon the title of the person in whose name it may have been listed for taxation. Jones v. Devore, 8 Ohio St. 430, 431.

The Ohio law which forfeits the estate of a life tenant for the nonpayment of taxes has been held constitutional. McMillan v. Robbins, 5 Ohio St. 28, 30.

In that case it was held that a tenant for life without impeachment of waste, who suffered the land to be sold for taxes, forfeited his estate, and that the reversioner was entitled to recover the same in an action of ejectment as against such tenant, the Ohio statute, § 14 of the act of 1824, making it the duty of every person standing seised or having the charge of lands, either as guardian, or executor, or by curtesy, or in dower, for life, or in right of his wife, or as agent or attorney having funds of his principal in his hands, to pay such taxes, and to cause the same to be listed for the purpose of taxing the reversioner having the right to redeem where the land is sold for taxes, which right cannot be devested by the life tenant depositing the amount of the taxes and interest. See also Tullis v. Pierano, 9 Ohio C. C. 647, *supra*, II.

Where land was devised to one for life with remainder over in fee, and during the life estate one of the remaindermen mortgaged his interest, and subsequently the land was levied upon for taxes and after advertisement the collector sold the right, title, and interest of the life tenant and the remainderman in and to an undivided seven-eighths part, and subsequently for another tax levied again, and after advertisement, sold the right, title, and interest of the life tenant and the remaindermen to three undivided eighth-parts, no notice of the sale being given to the mortgagee, who became the purchaser of both sales,—it was held, under the provisions of R. I. Pub. Stat. chap. 42, §§ 4, 6, and chap. 44, §§ 8, 10, 12, that the sale was void for the reason that as to annual taxes the estate of the life tenant was first liable. Weaver v. Arnold, 15 R. I. 53. See also Little v. Edwards, 84 Wis. 649, 651, *supra*, II. E. W.

Again, it should be observed that under this statute it is only the land sold that is declared forfeited; so that where, as in this case, only a part of the land is sold to pay the taxes on the entire tract, the forfeiture extends simply to the lands sold.

It is argued that under the construction given the statute the land, by the neglect of the tenant, may be burdened with an accumulation of unpaid taxes, which the next in estate will have to pay when he comes into possession. This does not necessarily follow. Such accumulations can only result from the failure of the state, or purchaser, on a void sale for taxes, to pursue the proper legal remedy. Various methods are provided to the state for the collection of taxes; and the purchaser at a void sale is substituted to the lien and rights of the state; and, on a void purchase, may collect what is justly due from a life tenant as from a tenant in fee simple. Rev. Stat. § 2880. So that the supposed hardship is more imaginary than real. At any rate the injustice of forfeiting the estate of a life tenant for failure to pay an illegally assessed tax, or to redeem from a void sale, may well be balanced against such possible hardships to the next in estate. And it is these considerations that have uniformly influenced the courts to apply the law with great strictness where forfeitures are claimed. They are odious in law, because they necessarily work a sacrifice of the rights of the party whose estate is forfeited. Where equity may relieve the sacrifice is less; but where, as in this case, it cannot, and nothing but the pound of flesh will satisfy the demand, it is the duty of courts to see that all the requirements of the law have been complied with.

Judgments of the court below reversed, and cause remanded to the Common Pleas for further proceedings.

Williams and **Bradbury, JJ.**, dissent.

IOWA SUPREME COURT.

RIDDLE, *Appt*,
v.
S. E. DOW *et al.* (W. C. Dickey & Company, Interveners).

THOMPSON NATIONAL BANK, *Appt.*,
v.
SAME.

(.....Iowa.....)

A lessor's mortgage of his interest in crops raised by a tenant on leased land, and still in the possession of the tenant and undivided, gives the mortgagee a right paramount to that of the creditors of the mortgagor under garnishment proceedings subsequent to the mortgage.

(*Rothrock, Ch. J., and Granger, J., dissent.*)

(April 13, 1896.)

APPEALS by plaintiffs from judgments of the District Court for Crawford County in favor of the interveners in a garnishment proceeding to reach the landlord's share of crops grown on leased premises which were to be paid as rent in satisfaction of judgments against the landlord, the intervener claiming under a mortgage from the landlord. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Nash & Phelps, W. R. Green,** and **Theodore F. Myers** for appellants.

Mr. **J. P. Conner** for interveners, appellees.

Robinson, J., delivered the opinion of the court:

The two cases are submitted together. The controlling facts are the same in both, and the district court was authorized to find the facts to be substantially as follows: In the year 1891 the plaintiffs recovered judgments against the defendant S. E. Dow, which are still unpaid. The defendant Dow rented to J. H. Griffin and J. R. Griffin by verbal agreements certain land for the year 1892, and was to receive from them as rent one third of the crops which should be raised on the leased premises, to be delivered in Dow City, about 3 miles distant from the land. The tenants occupied the premises, and proceeded to raise crops thereon. On the 2d day of September, 1892, Dow made to the interveners W. C. Dickey & Co. a promissory note for the sum of $400, payable on the 1st day of the next November, and to secure its payment executed a chattel mortgage upon the property, described as follows: "My undivided one-third interest in all the crops of every kind and description grown during the season of 1892" on land which was fully described and which was that leased to the Griffins as stated. At that time no division of the crops grown had been made. The small grain, consisting of wheat and oats, was in stack, and the corn was in the field, and all were in the possession of the tenants. After the mortgage was given, but on the same day, the tenants were garnished under executions issued on the judgments, and their answers were taken. The answers admitted that the garnishees were under obligations to deliver a share of the crops raised by them, but showed that no division had been made. Subsequently nearly 120 bushels of wheat, 320 of oats, and more than 2,000 bushels of corn were delivered by the tenants to the sheriff under the garnishments. A stipulation was then made under which the grain so delivered was sold, and the proceeds of the sale were paid into the court, to be appropriated by the judgments which should be rendered in the cases. The district court adjudged that the lien of the mortgage

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NOTE.—As to the sale or mortgage of future crops, see *note* to Dickey v. Waldo (Mich.) 23 L. R. A. 449.

For *note* respecting crops as personal property for the purpose of levy and sale, see Polley v. Johnson (Kan.) 23 L. R. A. 258.

was paramount to the rights acquired by the garnishment proceedings, and awarded the proceeds of the grain to the interveners.

1. It may fairly be inferred from the record before us that the lease made by Dow gave to the tenants the sole possession of the leased premises during the terms of the lease, the exclusive right to possess and hold the crops which should be grown until they should be divided, and the right to make the division. The division of the crops actually made by the tenants and the delivery of a share thereof to the sheriff were voluntary on the part of the tenants in fulfilment of the requirements of their lease. No question as to notice of the rights of any party is involved in this case. The question we are required to determine is whether the mortgage given by the landlord to the interveners was effectual to create an interest in the crops grown upon the leased premises superior to the rights acquired by the judgment creditors of the landlord by virtue of the garnishments. It is earnestly contended that the landlord had no interest in the crops until they were divided and his share was delivered; that he could not mortgage a share of them until it was set apart to him; and that, as the tenants were garnished before that was done, the judgment creditors acquired rights which were paramount to those created by the mortgage. It is undoubtedly true that the authorities generally hold that, where a tenant on shares has exclusive possession of the leased premises, the legal title to the entire crop grown thereon and the right to possess it are vested in him until the share which is to be delivered as rent is separated from the remainder of the crop, and some authorities hold that such ownership is exclusive. It will be found, however, that in most cases of that character the landlord or person claiming through him was endeavoring to assert a right of possession as against the tenant before a division of the crops had been made, or that there had been a conveyance of the land before a maturity of the crops, and a claim made that the landlord's share did not pass by the conveyance. But the rules which control in such cases are not applicable to this case. To ascertain the fair scope and intent of a decision and the force which should be given it, attention must be paid to the very questions which required determination. The case of *Rees* v. *Baker*, 4 G. Greene, 461, may properly be regarded as the leading one in this state for the doctrine that the exclusive ownership of growing crops, of which a share is to be delivered as rent, is in the tenant, but no question of that kind was involved in the case. The landlord had leased to the tenant land on shares. The tenant plowed and cultivated it, and sowed fall wheat upon it. The wheat was frozen out during the winter, and, in the spring following, the landlord, without the permission of the tenant, took possession of the land, and sowed it with spring wheat. The court held that the landlord was a trespasser, and that the tenant could recover the value of his labor in preparing the ground for a crop. What was said in regard to the ownership of a crop, had one been raised by the tenant was not relevant to any issue in the case. The facts involved in *Townsend* v. *Isenberger*, 45 Iowa, 670,—the next case decided by this court,—which is alleged to support the doctrine in question, were substantially as follows: The owner of land leased it to a tenant, who was to deliver for its use one third of the grain he should raise upon it. Before the crops were planted a creditor of the landlord levied a writ of attachment upon the land. A judgment in the action was afterwards obtained, and before the crops matured the land was sold without redemption and a sheriff's deed therefor executed. After the attachment was effected, but before the crops were planted, and before the judgment was rendered, the landlord assigned the lease, and the controversy in the case was in regard to the ownership of the share of the crop which was set apart by the tenant as rent. What was said in regard to the ownership of the tenant was designed to show that the rent had not accrued and was not payable until after the purchaser at the sheriff's sale had acquired title to the land; hence that the case was controlled by the rules that rent reserved by lease, and not accrued, passes by a conveyance of the land, and that a purchaser under execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed. It is clear that those rules have no application in this case. The cases of *Rees* v. *Baker*, and *Townsend* v. *Isenberger* were referred to in *Atkins* v. *Womeldorf*, 53 Iowa, 150, where it was said that, although it be true that the right of property in a crop grown on shares was, as between the landlord and tenant, in the latter until it was divided, yet that it was the "property of the tenant in the sense that the landlord may not enter upon the premises and take possession of the crops without consent of the tenant." The case of *Howard County* v. *Kyte*, 69 Iowa, 307, merely decided that a writ of attachment against the property of a landlord cannot be levied on growing crops of which he is to have a share as rent, for the reason that the officer has no right to take possession of the crop, and the proper method of reaching the right of the landlord to the rent is by garnishment. It was said that "the rent reserved, being a share of the crop, is the same as when the rent is reserved in money, so far as the rights of the landlord or his creditors to take possession are involved, and the tenant is in no manner in default until he refuses to deliver the share of the grain in compliance with his contract." But it was not said that the interest of the landlord in the crops raised was no more than it would have been had the rent been payable in money. In no case which has been called to our attention has a share of the crop to be delivered as rent been treated in all respects as though it were money rent. That it should not be is clear on principle. When rent is to be paid in money, the obligation of the tenant is discharged by the payment of the specified amount of money from whatever source obtained; and if a share of the crop to be grown, or its equivalent, is to be paid as rent, the requirements of the lease will be satisfied by the delivery of the share itself or by delivering an equivalent, as crops of a kind and quality equal to the share designated. But when the rent is to be paid by the delivery of a share of the crop raised on the leased premises, and no option is given to deliver an equivalent, the obligation of the tenant can be

satisfied only by a delivery of the specified share of the crops grown on the leased premises. Nor can he be compelled to pay anything but the stipulated share, unless he fails to deliver it according to the terms of his contract. *Johnson* v. *Shank*, 67 Iowa, 116.

In a proper case a specific performance by the tenant of his contract to deliver a share of the crops as rent would be compelled by a court of equity. Whether it would be compelled in all cases we do not decide. The rule in regard to ordinary contracts for the sale of personal property is that specific performance will not be decreed where compensation in damages will afford complete and satisfactory relief. It was intimated, however, in *Parker* v. *Garrison*, 61 Ill. 250, that the delivery of a share of grain reserved as rent might be enforced as the execution of a trust. In that case the tenant had agreed to deliver as rent one half of the crops which he should raise on the leased premises, but it was to be paid in corn. He refused to deliver the stipulated share, and did not separate it from the remainder of the crop, but intended to sell all of it. He was enjoined from selling or otherwise disposing of the grain at the suit of the landlord. The court said that the landlord had an interest in the corn; that "it justly and equitably belongs to him." That "the defendant Garrison had received from him the entire consideration for it . . . and it was his plain duty to deliver the corn to the complainant." That case is an authority for the theory that the landlord has an interest in the crop of which he is to have a share as rent, before a division is made, which is more than a mere right to a landlord's lien, and which the court will protect. It should be remembered in this connection that the rule that the legal title to crops, a share of which is to be delivered as rent, and the right to their exclusive possession, are in the tenant until a separation and delivery of the rent share is fully recognized by the supreme court of Illinois. *Atwood* v. *Ruckman*, 21 Ill. 200; *Dixon* v. *Niccolls*, 39 Ill. 384, 89 Am. Dec. 312; *Sargent* v. *Courrier*, 66 Ill. 245. It is true it was said in *Drake* v. *Chicago, R. I. & P. R. Co.* 70 Iowa, 63, that a landlord has not such an interest in the growing crops of his tenant as will enable him to maintain an action against a person who injures the crops. But the nature of the landlord's claim to the crops in that case is not shown. The point was decided without discussion by the court, apparently on the authority of *Townsend* v. *Isenbery*, *supra*. The case cannot, therefore, be regarded as in conflict with the views we now express. That a lease may be assigned as security, and the right to recover the rent reserved be thereby given to the assignee, was decided in *Watson* v. *Hunkins*, 13 Iowa, 548. This rule was followed in *Lufkin* v. *Preston*, 52 Iowa, 235, and 57 Iowa, 28. In the opinion filed on the first appeal in the case last cited the cases of *Rees* v. *Baker* and *Townsend* v. *Isenberger*, *supra*, were referred to, but the court said: "It has never been held that a landlord may not assign his interest in the lease, and thus invest his assignee with the right to secure the rent when it is in a condition to be set apart." The leases considered in that case provided that the landlord should have one half of the crop in the field at harvest time. The leases were assigned as collateral security, and afterwards, in March, and again in May, an execution was levied upon an undivided half of the corn growing upon the leased premises as the property of the landlord. A sale thereof was made, and when the corn matured one half of it was gathered by the purchaser, by permission of the tenants. It was held that the assignments, if not fraudulent, invested the assignee with the right to one half of the corn at harvest time. In *Haywood* v. *O'Brien*, 52 Iowa, 537, it was held that the assignment of a lease gives to the assignee the right to a landlord's attachment. The case of *Stickney* v. *Stickney*, 77 Iowa, 699, was for the foreclosure of chattel mortgages upon live stock, grain, and hay on certain farms. One of them was occupied by a tenant who had agreed to pay one half of the products, including all crops and fruits grown upon the farm, and hogs, cattle, and calves raised on it. It did not appear that there had been any division of the property, but the court said of that in which the tenant claimed an interest: "Of course, one half was the landlord's and one half the tenant's." That a landlord has an interest in crops of which he is to have a share as rent, before separation and delivery of the share, which he may mortgage or sell, has been affirmed in other states. This was expressly held in *Howell* v. *Pugh*, 27 Kan. 702. The particulars of that tendency do not fully appear in that report, but the statements of the case made on an earlier appeal, which is reported in 25 Kan. 97, with those made on the second appeal, show that the tenant was to pay as rent one half of the wheat and one third of the corn and flax raised on the leased premises during the term, the wheat and flax to be delivered in the half bushel and the corn in the crib. On the 8th day of July, 1879, the landlord sold his share of the crops, and three days later suits were commenced against him, and the tenant was garnished. At that time the flax and corn were growing in the field, and the wheat was in stack, but no division had been made, and the question to be determined was whether the sale by the landlord was valid and effectual as against the garnishment. The only material difference between that case and this is that in the Kansas case the sale was absolute, while in this it was conditional. In *Potts* v. *Newell*, 22 Minn. 561, it was said that the right of the landlord to a share of the crop which was to be paid him as rent was as clearly assignable as the right to receive a specified rent in money; and a mortgage of such share, made before its separation from the remainder of the crop, was sustained.

The interest of the landlord in the share of crops to be delivered by the tenant, where the latter has the legal title and right of possession until separation and delivery, is similar to that of the tenant in the share he is to receive when possession of the crop is retained by the landlord until division. In *Yates* v. *Kinney*, 19 Neb. 275, it appeared that the tenant, Kinney, was to deliver to his landlord as rent one third of the crops to be raised on the leased premises, but the crops were to be considered the property of the landlord until they were divided. The tenant executed mort-

gages upon two thirds of the crops before they were divided, and while they were growing. The court said: "It is evident that Kinney had some interest in the crops. The fact that the extent of that interest depended upon his compliance with the terms of his lease would not deprive him of the right to sell or mortgage it." The court also held that, where the tenant had the right to assign his lease or sell his share of the crop raised on the leased premises, it logically followed that the same rights or interests might be mortgaged. In *Hammock* v. *Creekmore*, 48 Ark. 264, it was said that a party who works land for a share of the crops raised thereon, under an agreement by which the landlord owns the entire crops until division, "may sell or mortgage his contingent interest, just as he may assign his wages to be hereafter earned." The doctrine of these cases was recognized in *Meacham* v. *Herndon*, 86 Tenn. 366. It was said in *Horseley* v. *Moss*, 5 Tex. Civ. App. 341, that a land owner who furnished the land, teams, food for teams, and tools, for which he was to receive one half of the crops raised on the land, had more than a landlord's lien on the crops; that he had a specific interest in the crops themselves. In *Ferrall* v. *Kent*, 4 Gill, 209, it was said of a lease which provided that the tenant should give the landlord one half of everything made on the leased premises, and carry all the crops to market, and pay the landlord one half of the proceeds after they were sold, that it vested in the parties to it a joint interest in the crops. It is well settled that in this state valid mortgages of personal property, not in existence until after the mortgage is given, are valid. It was said in *Lawrence* v. *McKenzie*, 88 Iowa, 440, that the "general rule is that, in the absence of statutory provisions to the contrary, any personal property which is capable of being sold, and which has an actual or prospective existence, may be mortgaged." That rule is in force in this state. *Sandwich Mfg. Co.* v. *Robinson*, 83 Iowa, 568, 14 L. R. A. 126. In the case last cited it was said that the power to sell an account for money due cannot be questioned; that an interest in such an account less than the unqualified ownership of it may be transferred, and that a valid mortgage may be given on a claim for money not earned. When the mortgage in question was given, the small grain grown upon the leased premises was matured and in stack, and the corn must have been nearly, if not quite, full grown. The description in the mortgage was sufficient, and when the division was made the mortgage attached to the landlord's share thus ascertained. *Johnson* v. *Rider*, 84 Iowa, 53; *Lufkin* v. *Preston*, 52 Iowa, 235. See also *Melin* v. *Reynolds*, 32 Minn. 52; *Potts* v. *Newell*, 22 Minn. 562; *Zehner* v. *Aultman*, 74 Ind. 24; *Sims* v. *Mead*, 29 Kan. 125. In *Potts* v. *Newell*, *supra*, it was held that a mortgage upon "all the right, title, and interest" of the landlord in a crop to be grown, of which he was to have a share as rent, attached the instant the share was set apart, and was superior to the levy of an execution made after the mortgage was executed, but before the share was separated. It is the law in this state that no lien is obtained by the process of garnishment, but only a right to proceed against the garnishee personally. *Clark* v. *Raymond*, 86 Iowa, 667.

According to numerous decisions of this court, the mortgage in question must have attached to the landlord's share at the moment it was ascertained and set apart, if it did not attach before; and, since the garnishment did not create a lien, the mortgage became a first lien upon the property in controversy. The case of *Orcutt* v. *Moore*, 134 Mass. 48, 45 Am. Rep. 278, is relied upon as in conflict with the rule we have announced, but we do not think that it is. The lease involved in that case provided that the tenant, Bailey, should "carry on the farm at the halves," and he was to leave at the end of the term "as much hay as he found there when he took the farm." In commenting on the lease the court said: "It is not stated whether this hay was to be hay raised on the farm, or other hay of equal quality; whether the crops were to be divided in kind, or whether Bailey could sell them, accounting for one half of the proceeds; and the evidence bearing on these questions is not stated." The court said that on the case thus made it could not be said as a matter of law that the parties to the lease were tenants in common. When read in connection with the facts to which the court refers, its conclusion appears to be in harmony with the views we have expressed, for in this case it is not shown that the obligation of the tenant to deliver a share of the crops as rent could be discharged by paying an equivalent in crops grown elsewhere than on the leased premises, or in money. On the contrary, it appears that the lease was designed to give each party a share of the crops actually grown on the leased premises. That the landlord may sell the rent for the land at any time is not to be questioned. If he can sell all he can sell a part, especially when it is readily ascertainable; and if he can make an absolute sale it follows that he can make a conditional one. The mortgage in controversy was a conditional sale of the landlord's share of the crops which had been grown, and was to be delivered according to the terms of the lease. What right or interest the mortgage would have conveyed had a share of the crops grown not been delivered need not be determined. The conclusions which reason and authority demand are that the landlord had a mortgagable interest in the crops in controversy when the mortgage was given; that the interest was made definite and certain when his share was separated and determined; that the mortgage fully attached to that share when it was thus ascertained if it had not been operative before; that as the mortgage was given before the garnishment was effected, the latter was subject to the rights conferred by the former.

It follows that *the judgments of the District Court were right, and they are therefore affirmed.*

Deemer, J., concurring specially:

I agree with the minority opinion on the question as to the interest of the landlord in a share of the crops grown on the leased premises. I do not think he has such a vested or potential interest in the share to be set apart to him as rent that he may make a mortgage which will

presently carry the undivided one third of the property growing upon the land. But I do think that he has a lien upon the crops which may finally ripen into a title of an aliquot part thereof, and that, when the third is delivered to or set apart for the landlord in accordance with the terms of the lease, then his title becomes perfect. Now, it is held in this state that one may make a mortgage of property to be acquired in the future which will be valid, and which I think will take precedence of a garnishment of him who holds the property for the mortgagor. In the case of *Scharfenburg* v. *Bishop*, 35 Iowa, 60, we said: "By the strict common-law rule, it is doubtless true that a party could not mortgage property, not then *in esse*, so as to vest the title in the mortgagee when the property should come *in esse*. But at civil law he could. . . . Courts of equity, and under our practice courts of law also, will recognize the rights of such mortgagee, and enforce them as against all persons having notice of them." If it does not at the common law amount to a technical legal mortgage, it is at least an equitable mortgage. Of course, it is necessary that such future-acquired property shall be capable of identification. See also, on this same point, *Brown* v. *Allen*, 35 Iowa, 306; *Fejavary* v. *Broesch*, 52 Iowa, 88, 35 Am. Rep. 261; *Dunham* v. *Isett*, 15 Iowa, 284; *Stephens* v. *Pence*, 56 Iowa, 257; *Phillips* v. *Both*, 58 Iowa, 499; *Hughes* v. *Wheeler*, 66 Iowa, 641. In the case last cited we held that a mortgage drawn with the intention of covering future-acquired property which was in existence, but not the property of the mortgagor, will be valid as to such property when acquired. And we also held that the mortgagee under such a mortgage was entitled to the possession of the property as against a purchaser from the mortgagor. There is no question but that the description of the property in controversy is sufficient to cover the property. Indeed, the property is specifically described as that growing upon certain land during the year 1892. It could scarcely be more definitely described, and it would be difficult to make a description which would more clearly indicate that the mortgagor intended to convey his interest in that crop, no matter when acquired. It follows, then, that as soon as the property was set apart by the tenant the mortgage attached to it, and that the mortgagee then had a perfect lien upon and was entitled to the property or to its proceeds when sold, under the stipulation in this case.

The garnishing creditor acquired no greater rights against the mortgagee than the mortgagor would have had had he brought the suit, nor are his rights against the garnishee, the tenant, any different than those held by the garnishee against the mortgagee. In a contest between the garnishee, who was the tenant, and the mortgagee there ought to be no doubt about the outcome. When the property was set apart by the tenant, who was garnished by a judgment creditor of the landlord, who was the mortgagor, the mortgage immediately fastened itself upon it, and the tenant held it as the property of the landlord, subject to the mortgage made to the interveners Dickey & Co. The proceedings by garnishment gave the plaintiffs no lien upon the property. They simply succeeded to the rights of the landlord, Dow, against the tenant, in and to the property raised upon the leased premises, and they have no other or greater rights against the interveners Dickey & Co. than Dow would have had. I desire to say again, in order that my position may not be misunderstood, that no question as to the sufficiency of description or notice to the creditors in the garnishment is made. Moreover, no such question could be in the case, because the mortgagor was not in possession when he gave the mortgage. In the case of *Jessup* v. *Bridge*, 11 Iowa, 572, 79 Am. Dec. 518, we held a mortgage on the future earnings of a railway company was prior and superior to the rights of judgment creditors of the railroad company under garnishment proceedings. In view of these well-settled rules, it seems clear to us that the mortgage of the interveners is superior to the claim of plaintiffs in their garnishment proceedings, and that it is not necessary to determine what interest a landlord has in growing crops of which he is to receive a share as rent for the use of his lands. There is no occasion to determine whether the interveners' rights under their mortgage are equitable or legal, for they pleaded the facts necessary to entitle them to recover, and proved without objection all that is required to give them the relief they prayed. An error as to the choice of form will not, under our reformed procedure, defeat them.

Another rule tends to support the interveners in their claim. The mortgage under which they claim contained the usual covenants of warranty, and correctly described the property intended to be conveyed. Now, it seems to be well settled that if a mortgagor who has no title, or whose title fails, afterwards acquires it, it inures to the mortgagee. Jones, Chat. Mortg. § 101. Now, when the property was set apart by the tenant, in accordance with the terms of the lease, the title vested in the landlord, and immediately inured to W. C. Dickey & Co., the mortgagees. Under the doctrine announced in the minority opinion, there was nothing the judgment creditor could get until the property was set aside by the tenant for the landlord had no interest in it. Neither the mortgagee nor the judgment creditor by virtue of his garnishment had any claim against, right to, or interest in the property until set apart. When set apart, their respective interests in it, if they had any, immediately vested; but as the mortgage was first in point of time, it should be given priority. This is the most favorable attitude for the judgment creditors, and it seems to me that it gives them no standing in this controversy. But as it is well settled that a garnishment creates no lien, and that the mortgage does, even when the property is subsequently acquired, it follows as a necessary conclusion that the mortgagee should be protected. On these grounds I vote to affirm, and as the majority reach this conclusion, although by a somewhat different course of reasoning, it follows that the judgment is affirmed.

Granger, J., dissenting.

The majority opinion closes with a holding

that reason and authority demand a conclusion that the landlord had a mortgageable interest in the crops in controversy when the mortgage was given. Regarding the conclusion as a clear misapprehension of authority, and of at least doubtful support in reason, I dissent from it. The proposition, briefly stated, is: Where a landlord leases land, and is to receive for his rental one third of the grain raised thereon, to be delivered at another place than on the land, and there is no relationship between the landlord and tenant, as that of tenants in common, has the landlord such an interest in the specific grain he will be entitled to receive that he can mortgage the same, and the mortgage be effective, before the grain is set apart for him? I think the authorities are, in this state, on principle, conclusive of the question. I do not see how language can be more so. In *Rees* v. *Baker*, 4 G. Greene, 461, it is true the question is but incidentally involved, but it is there said, speaking of the rental: "This share was in the nature of rent, and until it was delivered the exclusive ownership of the growing crop was in the tenant." I cannot imagine an interest the landlord could have except ownership and a lien. That he has the latter no one doubts. The case puts the ownership exclusively in the tenant until set apart. *Townsend* v. *Isenberger*, 45 Iowa, 680, is also cited in the majority opinion. I regard the case as a very conclusive test of the question, and its facts should be well in mind. It presents fairly the question whether or not a landlord has any interest in a growing crop that is assignable. In that case the landlord assigned his lease to the plaintiff, which would convey to the plaintiff every assignable interest he had. After the landlord had made such assignment, his land was sold on execution, and the case settled the question whether anything passed to plaintiff by the assignment of the lease. Speaking of that question, it is said: "The share of the crops reserved by the lease to the land owner is to be regarded as rent. . . . The owner of the land acquired no property in the part of the crop reserved for rent until it was set apart to him by the tenant, the ownership of the tenant continued until that time." If the conclusive language of *Rees* v. *Baker* was to be doubted as authority because not applicable directly to the issues, the question was certainly involved in *Townsend* v. *Isenberger*, and the same conclusive language is there used, and *Rees* v. *Baker* is cited in support of it, as well as other authorities. The majority opinion evades the force and language of that opinion by assuming that what is said was designed to show that the rent had not accrued and was not payable until the purchaser at the sheriff's sale had acquired title to the land. I must and do insist that the point ruled is that, before the rental was set apart, the landlord had no property therein that he could assign. The contention of ownership arose after the grain was set apart in a granary for the legal owner, so that the question was fairly presented whether or not the assignment was of validity to transfer title when made, or became afterwards effective, when the title would pass by the setting apart. It is there held that the assignee took no property by the assignment, not because the rent had not accrued when the purchaser took his title to the land, but for no other reason than that the "owner of the land acquired no property in the part of the crop reserved until it was set apart to him." It is in the same connection said, "The ownership of the tenant continued until that time." If the right of the landlord to assign the crop is not denied in that case for the sole reason that he had no ownership as a basis for it, and that the tenant was the owner, then it is not the province of language to express such a holding. The doctrine of these cases is followed in *Atkins* v. *Womeldorf*, 53 Iowa, 150, also cited in the majority opinion; and in fixing a rule for the protection of a landlord so that his interest may not be lost to him to benefit the creditors of the tenant it distinguishes, but in no way denies, the rule as stated in *Townsend* v. *Isenberger*. It gives to the landlord a protection against the seizure by such creditors because of his landlord's lien. The case recognizes the rule of the other cases. Mr. Justice Rothrock wrote the opinion in the case of *Atkins* v. *Womeldorf*, and also in *Howard County* v. *Kyte*, 69 Iowa, 307. It is there said: "When land is rented on shares, the tenant is the exclusive owner of the crop while growing, and the landlord has no control over it, nor title to the part of the crops reserved as rent, until it is set apart to him." It cites the former cases, and then says: "It is true that the landlord has a lien for the rent reserved, but he has neither title nor right of possession of the crop while growing." It is beyond a peradventure that the cases fix the right of a landlord in a growing crop as a lien merely, and not an ownership. It is true that in some of the cases the language relied on is used by way of illustration or argument, but it is significant in this: that at all times, whether treating of the right of the landlord to assign the crop reserved as rent or of its use in other ways, the same thought or rule is observed,—that his interest is a lien, and not an ownership that he can convey. In *Drake* v. *Chicago, R. I. & P. R. Co.* 70 Iowa, 63, crops had been injured by defendant, and the question of the plaintiff's right to recover damages therefor was presented, he being the landlord; and it is said: "A landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injures the crop." This holding is based on *Townsend* v. *Isenberger*, and the reason for the holding must be that the landlord had no property interest to authorize the action. It is the law of Iowa, in view of the majority opinion, that a landlord has such a property interest in the growing crop that he may assign or mortgage it; but if some person shall destroy that interest he may not recover, for the reason that he has no interest that will permit it. I think ours is the only state in the Union to sustain such a rule. Our own holding ought to settle this question, I think, independent of reason or other authorities. If they announce a bad rule, we should meet the situation frankly, and overrule them, and not attempt to distinguish on principle where there is no difference.

It is said that a lease may be assigned, and the right to recover the rent reserved to be

given to the assignee. The rule is not doubted. It is no more than to say that the landlord may assign his right. That he can assign his right to the rent, whether payable in money or other property, is not, to my knowledge, questioned. The assignee can take the place of the assignor. When the rent is payable, he can receive it or enforce payment precisely as the landlord could have done. But that is not the question we are considering. It may further be conceded, for the purposes of the case, that he can mortgage the debt,—that is, the chose in action. But that does not mean that he can pledge the specific property with which the debt is to be paid until it is his. I may also concede that a landlord can pledge the rental in the growing crops, and that, as between himself and his pledgee, if he afterwards acquires the title, the pledge will be valid. But not more so than if one should sell or mortgage property in which he confessedly had no interest. If he should afterwards acquire the title, it would inure to the benefit of the vendee or mortgagee. This is the rule as to real estate. Miller's Code, § 1931; *Rice* v. *Kelso*, 57 Iowa, 115 and 119. As to personal property, see Jones, Chat. Mortg. 4th ed. § 101. I submit that this court has held, in the cases cited, that a landlord may not assign his interest in a growing crop; that he has no interest therein that could be made the subject of a levy; and that he has no such interest therein that, if it is destroyed, he can maintain an action for damages; and that all such holdings are, in terms, based on the single fact that he has no ownership in the crop until it is set apart. If this is true, I am led to inquire, What is there to which a mortgage can attach? The majority refer to *Parker* v. *Garrison*, 61 Ill. 250. It is, in my judgment, without the slightest bearing on the question. In that case the tenant was insolvent, and, after the rental was due, he was removing it, and refusing to set apart the rental according to the contract. The action was to enforce specific performance of the contract by injunction. It simply held the holding of the property, after the time for delivery, was a trust. That was because the tenant had, after the debt was due, refused to deliver the crop in payment as he had agreed to do. It is said in the opinion that the rental share justly and equitably belonged to the landlord, and that is true; and the suit was to compel a specific performance, so that he might have the legal title. The majority omit to quote from the same case the significant remark as a basis for equitable cognizance, as indicating the thought of the court as to the legal title, that "the remedy by replevin, at least, would have been doubtful and uncertain from the difficulty of showing a legal title in the specific property, there having been no delivery;" and the corn was at the time undivided. In *Woodruff* v. *Adams*, 5 Blackf. 317, 35 Am. Dec. 122, in considering the question of trespass to the real estate, it is held that the landlord's right was to receive a portion of the crop after severance, and other land,—which is precisely this case, —as he was not jointly interested with the producer in the crop while it was growing. It is there said: "His share was in the nature of a rent, and until that was delivered the exclusive ownership of the crop was in the raiser of it." In *Howard County* v. *Kyte*, *supra*, this court said: "The rent reserved, being a share of the crop, is the same as when the rent is reserved in money, so far as the rights of the landlord or his creditors to take possession are involved." The words, because of the nature of the case, are used with a limitation as to persons, but they strengthen the oft-repeated holding that the landlord has no ownership. It means that the landlord's right in the growing crop is the same as his right to money to be paid as rent, so far as concerns his right to sell or pledge it. This exact question has received consideration by the supreme court of Massachusetts in *Orcutt* v. *Moore*, 134 Mass. 48, 45 Am. Rep. 278. I think that here also the majority have perverted the reasoning and conclusion of the case. After a careful discussion of this and kindred questions, speaking of the interest of the landlord in the crop, it is said: "Whether he has any potential interest depends on the contract, which may be ascertained by the jury. If the contract is, that the specific products are to belong to the parties jointly, and are to be divided, he has such potential interest; if the contract is, that the lessee is to pay, as rent, a share of the crops, or its equivalent, he would have no interest in any specific property so that he could sell it, though he has a claim for rent payable at the stipulated time." It seems to me that the language is not susceptible of misconstruction. Its conclusiveness is strengthened by the facts and reasoning. In that state, if the contract is such that the landlord and tenant are tenants in common, the rule is different. No such relationship is claimed in the case at bar. It is held in *Sunol* v. *Molloy*, 63 Cal. 369, that the landlord and tenant were tenants in common, and that a mortgagee of the tenant could not hold the entire crop. Such a rule is not to be disputed. The fact of the tenancy in common brings the case in line with the Massachusetts case.

The only conflict of authority that I have discovered is because of holdings in Kansas and Minnesota. In *Howell* v. *Pugh*, 27 Kan. 702, some language, used rather argumentatively than otherwise, in considering the principal question in the case, recognizes the right of a landlord to sell his rental share of the crop. The case is somewhat in doubt as to the precise nature of the contract, but what is said is without a citation of authorities, and gives to the landlord a property in the growing crop, which is certainly against the express holdings in this state, and the great weight of authority. In the Minnesota case (*Potts* v. *Newell*, 22 Minn. 561), what is said as to the right to mortgage the rental share of the crop is without reference to authorities on the subject. It seems to be the thought of the opinion that the legal title would not pass until the share was separated, which is the recognized rule; and that the landlord would have the right to receive the share in the future when separated, which is also the rule. It is also said that the right of the landlord "was as clearly assignable as the right to receive a specified rent in money, and in case of assignment the title to the third of the wheat would, upon its being set apart, vest at once in the

assignee, precisely as it would vest in the assignor if no assignment were made." These rules are nowhere disputed, and they constitute the reasoning for the conclusion. The opinion leaves to inference what the interest was to be mortgaged before the title or ownership passed. The case as clearly holds that the money to be paid as rent could as well be mortgaged as the grain, for the conclusion seems to rest on the right to assign the chose in action. The opinion is, in its reasoning, in accord with general authority to the effect that the landlord has no ownership of growing crops before there is a separation. The case of *Hammock* v. *Creekmore*, 48 Ark. 264, is cited by the majority. The case expressly holds that the relation of landlord and tenant did not exist, and the rule of the case is undoubtedly correct. However, the majority have omitted to notice this conclusive language of the case against their theory of the law: "If the terms of the contract had been such as to indicate the intention to create the relationship of landlord and tenant, . . . the title to the crop would have been in Stewart, the tenant, subject to the landlord's lien for rent, and the landlord could have maintained no action against Creekmore for converting any part of it. The case holds that Stewart was a laborer for wages, and not a tenant, and it fully supports the holdings in this state as to there being no ownership of the crop in the landlord. It fixes his right in the crop before separation as that of a lien for rent, as I maintain this court has done. The case fully supports my view in this: that the landlord was to furnish the team, utensils, etc., to raise the crop, and Stewart was to do the work, and receive a share of the crop for his labor. Stewart sold a part of the crop, and the holding is that the title to the crop was in the land owner, and Stewart could not sell a part of it. The case places Stewart, under his contract to take a share of the crops for his wages, precisely as that case does, and other cases do, the land owner when he agrees to take a share of the crop for his rent. In one case the rent is to be paid by the tenant, and in the other the wages by the land owner. In either case it is a debt. The person who is to pay owns the money or property with which the debt is to be paid until payment. The mere fact that a debt is payable in a specific article, either of money or of other property, does not invest the creditor with ownership in the specific property until his contract gives him the right to demand payment, if even then. I am not disposed to pursue the discussion further. I am confident of the conclusion that our holdings are conclusive against the rule announced by the majority, and these holdings are aided by the great weight of authority. It is said, in substance, in the majority opinion, that the attachment by garnishment did not effect a lien on the grain before it was set apart, and that when so set apart, if not before, the lien of the mortgage attached, and gave it priority. I am understanding this to mean, as a legal proposition, that if A is attached as garnishee in a suit by B against C, and he has property belonging to C in his possession, C may afterwards mortgage it, and the mortgage would be a prior lien. I am much disposed to doubt the rule, but desire to reserve my opinion on that question and that stated in the concurring opinion. In view of the conclusion of the majority the case must stand affirmed, and I need not now take time to examine the latter question.

Rothrock, Ch. J., concurs in this dissent.

CONNECTICUT SUPREME COURT OF ERRORS.

Erastus GAY *et al.*, Exrs., etc., of William Gay, Deceased, *Appts.*,
v.
Susan WARD, Admx., etc., of Augustus Ward, Deceased, *et al.*

(67 Conn. 147.)

(December 16, 1895.)

1. **A bond guaranteeing the full, prompt, and ultimate payment** of all paper discounted by a bank for a corporation does not include renewals of such discounts made after notice of the death of a guarantor.
2. **A renewal after notice of the death of a guarantor,** on paper discounted by a bank during his life, is, so far as his estate is concerned, a payment, and terminates his liability.
3. **Any notice of the death of a guarantor** which brings that fact within the knowledge of the guarantee is sufficient to revoke a continuing guaranty.
4. **Power to revoke a continuing guaranty** upon notice is implied unless the terms of the guaranty forbid.

NOTE.—As to the effect upon a guaranty of the death of a party thereto, see *note* to Drummond v. Crane (Mass.) 23 L. R. A. 707.

RESERVATION by the Superior Court for Hartford County for the opinion of the Supreme Court of Errors of an action brought to compel contribution of the amount for which defendant's intestate was alleged to be responsible upon a bond guaranteeing the payment of certain commercial paper. *Judgment for defendants advised.*

The facts are stated in the opinion.

Messrs. **Charles E. Perkins** and **Arthur Perkins** for plaintiffs.

Messrs. **Robinson & Robinson,** for defendant Susan Ward:

The defendant, the estate of Augustus Ward is not liable at all to claim for contribution.

The right to contribution is "based on equality of burdens and benefits."

De Colyar. Guaranties & Suretyship, 339; *Deering* v. *Earl Winchelsea*, 2 Bos. & P. 270; Bishop, Cont. § 216.

How can Mr. Ward's estate be interested in a credit given to a corporation to enable it to carry on its business in which the estate has no interest at all?

The notes were extended for the benefit of

the business as it was conducted after Mr. Ward's death.

According to the general custom and understanding of the mercantile world, the new note cancels the old note for which it is given, and which is taken up as it is termed.

2 Parsons, Notes & Bills, 203; *Bank of the Commonwealth* v. *Letcher*, 3 J. J. Marsh. 195.

The death of Mr. Ward terminated his responsibility under the contract.

The contract of the guarantors was a contract of continuing guaranty.

Coulthart v. *Clementson*, L. R. 5 Q. B. Div. 42.

An essential element of this contract is the right of the guarantors to at any time withdraw from its toils as to indebtedness incurred subsequently to such withdrawal.

Offord v. *Davies*, 12 C. B. N. S. 748; *Jordan* v. *Dobbins*, 122 Mass. 168, 23 Am. Rep. 305.

The death of the guarantor acts *per se* as a discharge, and terminates his liability upon the contract for subsequent indebtedness.

Coulthart v. *Clementson*, *supra*; *Harriss* v. *Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. 866; *Jordan* v. *Dobbins*, *supra*; *Hyland* v. *Habich*, 150 Mass. 112, 6 L. R. A. 383; *Re Sherry*, L. R. 25 Ch. Div. 705; Smith, Mercantile Law, 467; Wms. Exrs. 1869; 9 Am. & Eng. Enc. Law, pp. 83, 84.

The bank had actual notice of Ward's death many years before making the loans, the losses upon which entitled them to the protection of the contract of guaranty.

Notice or knowledge of death discharges.

Coulthart v. *Clementson*, *supra*.

The contract of continuing guaranty was not kept alive by the repeated renewal of notes which represented an indebtedness incurred during Ward's lifetime.

Ibid.

Notice to the bank of his death was notice of a discontinuance of his guaranty; and with the discontinuance of the guaranty the giving of new credit by renewals discharged him from all obligation on account of such indebtedness.

De Colyar, Guaranties & Suretyship, 433; 9 Am. & Eng. Enc. Law, pp. 83, 84, and citations; *Adams* v. *Way*, 32 Conn. 172.

His estate cannot be compelled to recontribute to costs and expenses in a suit of which he had no notice.

Chapin v. *Smith*, 52 Conn. 263.

If it be arranged by contract that each surety shall be answerable only for a given portion of one sum of money, there is no right of contribution among the cosureties beyond that amount.

Pendlebury v. *Walker*, 4 Younge & C. 424; *North* v. *Brace*, 30 Conn. 60.

All the parties who signed this original contract did so with the full knowledge that each might be compelled on this joint and several obligation to pay any obligations of the corporation up to the limit assigned, and that if so he could look to his associates only for the proportional shares that were expressly agreed to be borne.

Deering v. *Earl Winchelsea*, 2 Bos. & P. 270, 1 Lead. Cas. in Eq. Hare & Wallace's notes, 96, and cases cited; *Craythorne* v. *Swinburne*, 14 Ves. Jr. 164; 1 Parsons, Cont. 32; Burge, Suretyship, 385; Story, Eq. Jur. § 498; *Andrews* v. *Callender*, 13 Pick. 484; De Colyar, Guaranties & Suretyship, 343, 344; Pom. Eq. Jur. § 1418; *Armitage* v. *Pulver*, 37 N. Y. 494; Brandt, Suretyship, § 252; *Security Ins. Co.* v. *St. Paul F. & M. Ins. Co.* 50 Conn. 233.

Mr. **T. Henry Dewey** for the other defendants.

Wheeler, J., delivered the opinion of the court:

This case comes before us for our advice on a reservation upon an agreed statement of facts, and with a stipulation, entered into by all the parties to the record, that all questions arising upon the pleadings or upon the agreed facts may be finally determined by this court.

On January 8, 1872, the stockholders of the Delaney & Munson Manufacturing Company, located at Farmington, Conn., executed and delivered to the National Exchange Bank of Hartford a contract of continuing guaranty in the form of a bond, the terms of which appear at length in the opinion of this court in the case of *National Exch. Bank* v. *Gay*, 57 Conn. 224, 231, 4 L. R. A. 343, brought against one of the guarantors upon the bond. This bond guaranteed to the bank "the full, prompt, and ultimate payment" of all commercial paper which the bank may "have discounted or may hereafter discount, . . . to an amount not to exceed $15,000 in all at any one time." It provided that, upon notice to the bank by one or all of the guarantors upon such instrument, such guarantor or guarantors should not be holden upon said bond for any liability created by such company subsequent to the giving of such notice. From the date of the bond, to February 9, 1888, the bank discounted commercial paper of said company, upon which date the company failed. On January 21, 1889, the bank recovered judgment against the executors of Gay, one of the guarantors upon the bond, for the sum of over $11,000, which sum, together with the expenses of the suit, the executors paid. Subsequently, Wadsworth, another guarantor upon the bond, voluntarily paid to the executors of Gay one half of said amounts. The present action is brought by the executors of Gay and of Wadsworth, against the administratrix of Augustus Ward, a guarantor upon the bond; William Potts, administrator upon the estate of Samuel S. Cowles, a guarantor upon the bond; Horace Cowles, a son of said Samuel S. Cowles; and Mary C. Hardy, a purchaser from a distributee of the estate of Horace Cowles. Said Ward died April 6, 1883. His estate was duly settled, and distribution made December 8, 1883. Said Samuel S. Cowles died in 1873. His estate was duly settled and distribution made June 7, 1873; a part being distributed to his son, Horace Cowles, who died in 1876. His estate was duly settled and distribution made September 25, 1876. A part of the estate inherited by Horace Cowles from his father, Samuel S. Cowles, was purchased by Mary C. Hardy from a distributee of the estate of Horace Cowles, and owned by her when she was made a party to this action. All of the discounts existing February 9, 1888, which the estate of Gay and Wadsworth paid, were

made by the bank long subsequent to the death of Samuel S. Cowles, and none were renewals of discounts made in his lifetime. $5,000 of said $11,000 were discounts made by the bank after having notice of Ward's death, and $6,000 of said $11,000 were renewals of paper made after notice of Ward's death, but of paper originally discounted prior to Ward's death. The bank, Gay, and Wadsworth had immediate notice of the death of said Samuel S. Cowles and of Ward. The said manufacturing company was solvent at the time of the death of said Samuel S. Cowles and of Ward.

The stockholders of the Delaney & Munson Manufacturing Company, by pledging their individual credit to the National Exchange Bank, secured funds, through discounts made by the bank, with which to conduct its business. "To avoid the inconvenience of indorsements by several individuals upon each of a large number of original notes and the renewals thereof, the obligors made one comprehensive continuing contract of indorsement in the form of a guaranty under their respective hands and seals." *National Exch. Bank* v. *Gay*, *supra*. The bond constituted a contract of continuing guaranty, upon the part of its obligors or guarantors, of payment of all paper discounted by the bank up to the limit of the amount named in the bond. No consideration passed at the execution of the bond. Each discount, when made upon the credit of the guaranty, constituted a consideration, separable and divisible. No obligation arose and no liability was created until a discount was made upon the credit of the guaranty. The bond was framed to meet the contingency of the long continuation of discounts by the bank, and the extension and renewal of discounts made upon the security of its guaranty. Upon the nature of this guaranty this court expressed itself, in the case we quoted from above, as follows: "To guarantee 'full and prompt' payment would meet the case of a note, on usual bank time, actually to be paid in full at maturity. To guarantee, in addition to 'full and prompt' payment, the 'ultimate' payment, can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals, and extensions."

The bank was under no compulsion to discount the company's paper. It might, at its option, refuse to continue discounting it. When it made the discounts, the guaranty of the bond attached. Each guarantor upon the bond might, upon notice in writing to the bank, terminate all liability thereafter arising under the bond. Unless the terms of the guaranty forbid, the law writes in the contract of continuing guaranty a like power to revoke the guaranty upon notice. *Coulthart* v. *Clementson*, L. R. 5 Q. B. Div. 42; *Jordan* v. *Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Agawam Bank* v. *Strever*, 18 N. Y. 502. The effect of the death of a guarantor upon a continuing guaranty has been determined differently in different jurisdictions. In Massachusetts, death is held to work a revocation of the guaranty. The court, in construing a continuing guaranty of the sale of goods, in the case of *Jordan* v. *Dobbins*, *supra*, said: "Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke. See also *Hyland* v. *Habich*, 150 Mass. 112, 6 L. R. A. 382. In England, death does not work a revocation of the continuing guaranty. The case of *Coulthart* v. *Clementson* *supra*, was an action brought by a bank upon a continuing guaranty against the executor of a deceased guarantor. The court said: "A guaranty like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor." These two cases illustrate the two views held by courts of different jurisdictions. We prefer to adopt the latter view. To adopt the Massachusetts doctrine would impose upon the guarantee the burden of knowing at all times whether or not the guarantors are in life. There could be no safety in relying upon the credit of the guarantor, unless at the moment of reliance the guarantee knew the guarantor to be in life. The practical difficulties in the way of a guaranty so construed would prevent credit being given upon it, and curtail a useful method of commercial business. Further, a guaranty of this nature is intended to continue until revoked by act of the parties or its equivalent. But, when the guarantee has knowledge of the death of the guarantor, such knowledge works a revocation of the guaranty. The guarantee no longer relies upon the credit of the deceased guarantor. Each advance made by the guarantee constitutes a fresh consideration, and, when made, an irrevocable promise or guaranty on the part of the living guarantors. Each advance thereafter made is upon the credit of the living, not of the dead, guarantor. Were this not so,—unless it be held that the representatives of the deceased may upon notice terminate the guaranty,—the guaranty, terminable at the option of the guarantor during life, becomes, upon his death, never ending. The limitation which the law gives the living is denied the dead. Estates must remain unsettled, devises of property be withheld, so long as the guaranty may last, and the representatives of the deceased guarantor be powerless to save his estate from a loss which neither he nor they authorized or received benefit for. Such a result justifies and impels a court in reading into the guaranty a limitation of termination of the guaranty, upon notice of the death of the guarantor, as well as upon notice from the living guarantor. Any notice of death which brings that fact within the knowledge of the guarantee is a proper and sufficient notice. In the case of *Coulthart* v. *Clementson*, *supra*, the court said: "It is now established by authority that such continuing guaranties can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guaranty

irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract, in order to protect the dead man's estate, a limitation which is read into it to protect him while he is alive. . . . But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator, and of the existence of a will, is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guaranty by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guaranty, then the bank has constructive notice that the guaranty is withdrawn." *National Eagle Bank* v. *Hunt*, 16 R. I. 148; *Harriss* v. *Fawcett*, L. R. 15 Eq. 311. The authorities uniformly hold either that death, *ipso facto*, or notice of death, revokes a continuing guaranty. The fact that the instrument is under seal cannot change its nature or construction. *Jordan* v. *Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Offord* v. *Davies*, 12 C. B. N. S. 748. A similar doctrine holds that notice of the dissolution of a copartnership revokes a continuing guaranty made by the copartnership. *City Nat. Bank* v. *Phelps*, 86 N. Y. 484.

The application of these principles to the case in hand is this: All of the discounts for which recovery was had against Gay's estate, and payment made by Gay's executors and Wadsworth, were made after notice of the death of Samuel S. Cowles. His representatives are therefore freed from all liability for such discounts. Liability, if any, for discounts so made upon the credit of the guaranty, could only accrue against the estate of Samuel S. Cowles, and could in no view of the case be maintained against the estate of Horace Cowles or Mary Hardy. Five thousand dollars of the said discounts were made after notice of the death of Augustus Ward. His representatives are therefore freed from all liability for such discounts. The remaining discounts ($6 000) were originally made before the death of Augustus Ward. His death, with notice, did not relieve his estate from liability for such discounts. For all discounts made prior to his death, whether original discounts or renewals or extensions thereof, his estate is liable upon his death. The duty of the bank upon this bond, if it desired to hold the estate of Ward liable, was to enforce its claim upon the paper existent at Ward's death, against his estate. Instead of this, the bank renewed and extended its discounts taking new paper for the old, without the knowledge or acquiescence of the representatives of Ward. Thereafter the bank must look to the remaining guarantors upon the bond. It waived its right to enforce payment from the estate of Ward when it accepted paper in renewal of the old. Each renewal of the old paper constituted payment of the old paper, so far as Ward's estate was concerned. Each renewal so made had, for its security, the guaranty of the living guarantors upon the bond, who had not notified the bank of the termination of their liability upon the guaranty.

The conclusion arrived at is just to the bank, for it can cease, upon notice of the death of a guarantor, to renew paper then discounted, and can enforce its payment against the estate of the deceased guarantor. It is just to the remaining guarantors, who can, upon notice of the death of a guarantor, terminate their liability, and, if compelled to pay that liability, by appropriate remedy compel the estate of the deceased guarantor to contribute his proportion to the liability incurred. For all liability arising before notice of the death of the guarantor, the remaining guarantors can provide by the terms of the guaranty. In the case at hand, all the guarantors upon this bond had notice of the death of both Samuel S. Cowles and Augustus Ward, and made no attempt to terminate their liability upon the bond, and no effort to compel the estate of either to help meet the liability existing, but thereafter, without the knowledge, consent, or acquiescence of the representatives of Cowles or Ward, renewed the old paper through a long series of years, and increased their own liability by fresh discounts. A renewal of paper made before the death of a guarantor, upon the credit of a bond guaranteeing payment of such paper, made after notice of said death to the guarantee, terminates the liability of such guarantor after said notice. The precise question at issue was determined in accordance with the conclusions we reach, in the case of *National Eagle Bank* v. *Hunt*, 16 R. I. 148, 153. In its opinion, the court said: "The guarantees in the case at bar come within the second class above considered. They were therefore, upon the authorities cited, terminated by the death of the guarantor, and notice of it to the plaintiff, as to all subsequent transactions. As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the maker prior to the death of the guarantor, the plaintiff would have been entitled to recover but for the fact, set up in the pleas, that, after notice of the death of the guarantor, it extended the time of payment for a further period, by taking a new note from the principal debtor, and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right, assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself, and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defendant, as his representative, from liability, is too well established to need the citation of authority."

The question whether a guaranty will be revoked by notice of death, when, by the terms of the guaranty, the guarantor could not in life have revoked the guaranty, is not before us, and we express no opinion upon this point.

The claim that, because the bond of guaranty in this case bound the guarantors to the

"full, prompt, and ultimate payment" of all paper discounted after the execution of such bond, therefore the guaranty covers discounts made before the death, and the renewals of such discounts made after the death of the guarantor, cannot be sustained. The guaranty here applies to paper discounted, and to the renewal or extension of such discounts, before the decease of a guarantor; otherwise, a continuing liability existed against the estate of the deceased guarantor so long as the renewals were made. Such a result was not intended by the parties to the bond. They did not intend to continue a liability after the death of a guarantor, for an indefinite period, which he and they could terminate at any time during his life. A contract of guaranty is to be construed so as to promote the use and convenience of commercial intercourse. *Davis* v. *Wells, F. & Co.* 104 U. S. 159, 169, 26 L. ed. 686, 690. And its language is not to be extended by any strained construction, for the purpose of enlarging the guarantor's liability (*Hall* v. *Rand*, 8 Conn. 560, 573); but its construction is to be according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety (*Lee* v. *Dick*, 35 U. S. 10 Pet. 482, 493, 9 L. ed. 503, 507; *Evansville Nat. Bank* v. *Kaufmann*, 93 N. Y. 273, 281, 45 Am. Rep. 204). These established rules of construction accord with the construction we give to the guaranty before us.

We deem it unnecessary to discuss other questions argued before us, since the questions considered are decisive of the case. We have not overlooked the fact that there has been a misjoinder of parties defendant. The estate of Horace Cowles and Mary Hardy were strangers to the guaranty. The representatives of Samuel S. Cowles are alone liable upon his obligations. There is, as well, a misjoinder of parties plaintiff. Mr. Wadsworth voluntarily paid one half of the amount recovered against the estate of Gay. He cannot now maintain, with Gay's representatives, an action to compel payment to them of the share of other guarantors paid by him for them.

The Superior Court is advised to render judgment in favor of the defendants.

The other Judges concur.

SARGENT & COMPANY
v.
Theodore A. TUTTLE, Tax Collector.

(67 Conn. 162.)

1. An assessment for benefits for a local public improvement is in its nature a tax.

2. A sewer assessment carries no interest as such nor by way of penalty for nonpayment unless the law so provides.

3. A municipal by-law cannot require interest on sewer assessments unless the power is conferred upon the city to make such by-law.

(December 16, 1895.)

CASE reserved by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors in a proceeding to have certain alleged tax liens on plaintiff's property adjudged to be invalid. *Judgment for plaintiff advised.*

The facts are stated in the opinion.

Mr. **John Kimberly Beach,** for plaintiff:

Interest does not run in general upon taxes and assessments.

Camden v. *Allen*, 26 N. J. L. 398; *Shaw* v. *Peckett*, 26 Vt. 482; *Belvidere* v. *Warren R. Co.* 34 N. J. L. 193; *State, Brennert*, v. *Farrier*, 47 N. J. L. 75; *Eaton Bank* v. *Com.* 10 Pa. 452; *Com.* v. *Standard Oil Co.* 101 Pa. 149; *People* v. *Gold & Stock Teleg. Co.* 98 N. Y. 67; *Danforth* v. *Williams*, 9 Mass. 324; *Lane County* v. *Oregon*, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Perry* v. *Washburn*, 20 Cal. 350; *Meriwether* v. *Garrett*, 102 U. S. 513, 26 L. ed. 204.

There is no element of contract or agreement from which a promise to pay interest on taxes can be implied.

Whatever interest was demanded by the state must be regarded as in the nature of a penalty, and the statutes providing for interest upon unpaid taxes must not be extended by implication or construction beyond their strict meaning.

The charter and by laws of the city of New Haven do not provide for the exaction of interest on assessments appealed during the pendency of the appeal.

An assessment is a tax.

Nichols v. *Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Zottman* v. *San Francisco*, 20 Cal. 96, 81 Am Dec. 96; *Brady* v. *New York*, 16 How. Pr. 432.

Messrs. **Case, Ely, & Case,** for defendant:

The laying of this assessment is not a tax in the usual acceptance of the term, but is an assessment for a local and special benefit to private property, while a tax is an assessment for a public or general use in which the payee has no direct or immediate interest.

Buffalo City Cemetery v. *Buffalo*, 46 N. Y. 506; *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63.

The city is not at fault. It performed all of its duties and has paid money which plaintiff should have paid, and the city, unless it can collect the interest, will have to pay a bonus for discharging a duty from which it has derived no benefit.

Haverhill Bridge Proprs. v. *Essex County Comrs.* 103 Mass. 128, 4 Am. Rep. 518; *People* v. *Myers*, 138 N. Y. 590.

Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor.

Redfield v. *Ystalyfera Iron Co.* 110 U. S. 176, 28 L. ed. 110.

The assessment was legally made after a full hearing by the proper tribunal and should have the same effect and be governed by the

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NOTE.—For interest on sum allowed as damages, see *note* to Wilson v. Troy (N. Y.) 18 L. R. A. 449.

rules governing judgments so far as interest is concerned.

Strusburgh v. *New York*, 13 Jones & S. 508.

Torrance, J., delivered the opinion of the court:

This is an action under § 3040 of the General Statutes, to have certain liens upon real estate adjudged invalid. The case comes to this court by reservation upon a statement of facts, of which the following is the substance: Prior to December 13, 1873, four assessments of benefits, amounting in all to nearly $2,000, were laid, under the charter of the city of New Haven, against certain real estate of the plaintiff in said city, on account of the construction of a public sewer. These assessments were legally laid, and would, if unappealed from, have become payable on December 13, 1873; but prior to that day the plaintiff, under the charter, took an appeal from said assessments to the superior court. On February 11, 1874, and while said appeal was pending, four certificates of lien, on account of said assessments against said real estate, were filed in the town clerk's office in New Haven for the purpose of continuing the liens upon said real estate, under § 37 of the then city charter. Said appeal was finally determined in the superior court on the 29th of November, 1892, and the assessments in question were by that tribunal confirmed, with costs against the present plaintiff. Afterwards, in March, 1893, the plaintiff paid to the proper officer of said city the amount of the four assessments, with interest only from November 29, 1892, which amount was tendered and received without prejudice to the rights of either party. On receipt of this money the defendant discharged two of the liens, but refused, and still refuses, to discharge the other two. This refusal was and is based on the claim that the assessments in question carried interest, either from December 13, 1873, or at least from the time the certificates of lien were filed in 1874. If this claim is correct, the defendant is justified in his refusal to discharge the liens. On the other hand, the plaintiff claims that interest was due only from the date of the final determination of the appeal in the superior court in 1892; and, if this claim is correct, it is found that the plaintiff "tendered to the tax collector all that was due on said assessments on March 23, 1893." If then, the plaintiff's claim is correct, judgment must be advised for it; otherwise for the defendant.

Passing the first point made in the plaintiff's brief, his claim is based upon three propositions: First, that these assessments were really taxes; second, that, as taxes, interest as such, or by way of penalty upon them, cannot be collected, unless the power to do so is conferred by law; and, third, that no such power was so conferred upon anyone with reference to the assessments in question. If these propositions are true,—and we think they are,—the plaintiff's claim must be sustained.

That assessments, like those in question here, upon specific property specially benefited by a local public improvement, for the purpose of paying the expense of that improvement, are taxes, is too well settled to require extended argument. Such assessments are enforced proportional contributions of a somewhat special kind, made *in invitum*, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature, within constitutional limits, sees fit to impose. The power thus conferred is essentially a power to tax; its exercise in the manner prescribed is a mode of taxation; and the sums raised by such exercise are taxes, and are always treated as such. Such assessments are not liable to set off, nor attachment, as debts; and they can be collected summarily by the tax collector, in like manner as ordinary taxes, if the legislature sees fit to authorize such method, without the aid of courts, and without the delay incident thereto. Assessments of benefits caused by the layout or alteration of highways may, by statute, "be collected in the same manner as town taxes are collected." Gen. Stat. § 2705. And the assessments of benefits under the charter of New Haven, like those in question, were treated by the legislature as taxes, and were made collectible by the tax collector in the same manner as any other tax. Charter of 1869, § 50. It is true, provision is also made in the charter for collecting such assessments by proceedings in the nature of a foreclosure of a tax lien; but this does not alter the nature of the sum to be collected. The proceeding by way of foreclosure was, in effect, only another method which the tax collector was authorized to employ to collect the tax. But the decision of this court in *Nichols* v. *Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636, approved in *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63, is so conclusive upon this first point in favor of the plaintiff as to render unnecessary further argument or citation of authority.

The second proposition, to the effect that a tax carries no interest, as such, nor by way of penalty for nonpayment, unless the law so provides, is, we also think, a correct statement of the law. Most of the cases in which interest may be recovered, under our law, in the absence of any statute regulating the matter, are enumerated in *Selleck* v. *French*, 1 Conn. 32, 6 Am. Dec. 185; and clearly assessments of this kind do not come within any of the classes of cases there enumerated. It will, we think, also be found true that whenever taxes have carried interest, either as such, or by way of penalty, it has been by virtue of some statutory provision to that effect. And this is as it should be. At best, a tax is a burden—a necessary one, it is true, but none the less a burden—imposed on the taxpayer without reference to his consent; and it seems reasonable to hold that any increase of that burden, by way of penalty or otherwise, should be expressly made by the power which imposes it, and that, until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed. This conclusion, which on principle seems reasonable, is supported more or less strongly by the following authorities: *Camden* v. *Allen*, 26 N. J. L. 398; *Belvidere* v. *Warren R. Co.*

34 N. J. L. 193; *Brennert* v. *Farrier*, 47 N. J. L. 75; *Danforth* v. *Williams*, 9 Mass. 324; *Shaw* v. *Peckett*, 26 Vt. 482; *Perry* v. *Washburn*, 20 Cal. 318; *People* v. *Gold & Stock Teleg. Co.* 98 N. Y. 67; *Western U. Teleg. Co.* v. *State*, 55 Tex. 314; Cooley, Taxn. 300, note 4.

We think the above rule, thus applied in the case of taxes as ordinarily laid, is applicable to the kind of taxes here in question; and that unless some public statute, or the city charter, expressly or by clear implication, authorized the collection of interest, as claimed by the defendant, upon the assessments in question, it was not collectible. The remaining question, then, is whether such authority was conferred upon anyone, either by some public statute, or by the city charter. At the time these assessments were made, in 1873, and ever since, interest was and has been collectible on overdue ordinary taxes in New Haven under the provisions contained in title 64, chap. 2, of the General Statutes of 1866, which are still in force in that city. See Gen. Stat. 1875, p. 552; Charter of 1869, § 50; Charter of 1881, § 14; and Charter of 1890, § 14. But it is not claimed, nor can it reasonably be claimed, that the aforesaid provisions are applicable to the assessments here in question, for those provisions clearly relate solely and only to ordinary taxes laid in the ordinary way by the city or town of New Haven, or school districts therein; and, although we hold an assessment of benefits to be a tax, it is clearly not a tax, of the kind specified in those provisions. Section 2704 of the General Statutes of 1888 provides that when assessments of benefits shall be laid by any municipality upon property specially benefited by any public work or improvement, and a certificate of lien therefor has been filed, "neither the principal of such assessment nor any interest thereon shall be collectible by such municipality" until the work is completed, and the fact of such completion duly recorded. It may be said that this statute recognizes, by implication at least, the right to collect interest upon such assessments where a lien has been filed; and, with proper limitations, this may be conceded, for we think it does recognize such right, but only in cases where the right already exists. It does not create, nor was it intended to create, such right. That statute was passed in 1883, ten years after these assessments were made, and its plain and obvious purpose was, not to confer power to collect interest on such assessments where it did not already exist, but to prevent municipalities from collecting any part of the assessed benefits until such benefits had been conferred by the completion of the public work. We have failed to find any other public statute relating to this matter, and perhaps we ought to say that counsel for defendant did not claim that there was any such public statute, but rested his contention solely upon the provisions of the city charter. After a somewhat careful examination of the charter of 1869 (the one in force in 1873), and of the charters of 1881 and 1890, we can find no power conferred, either expressly or by fair implication, to collect the interest here claimed by the defendant. In short, we know of no statute, public or private, which conferred this power with reference to these assessments. It is true that a by-law of the city existing in 1873, and in substantially the same form ever since, provides for the payment of interest upon liens of this kind from the date of the certificate of lien; but no provision in the charter has been found, or pointed out to us, which gave the common council power to make a by-law exacting interest in such a case, and in the absence of such provision the by-law can, in this respect, have no force; and, indeed, upon the argument, counsel for the defendant made no claim under the by-law. For the reasons given, we think the defendant was not entitled to interest upon these assessments for the period between the dates of the certificates of lien and November 29, 1892, and that the claim of the plaintiff upon this point must be sustained.

The plaintiff also claimed that, even assuming that interest was collectible by law upon assessments unappealed from after they become payable under the provisions of the charter and by-laws of the city, the appealed assessments here in question did not, under those provisions, become due and payable till November 29, 1892. In the view already taken of this case, we deem it unnecessary to consider or decide the questions involved in this claim.

The Superior Court is advised to render judgment for the plaintiff.

The other Judges concur.

TEXAS SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, *Plff. in Err.*,

Mollie EDWARDS, by Next Friend.

(.....Tex.....)

Injury to a child while playing on a pile of railroad bridge ties in the railroad yard, which is fenced except on the side along the railroad track, and out of which the servants of the company always ordered any children found there, does not render the railroad company liable, as it was not under obligation to so pile the ties as to prevent injury by a child climbing upon them.

(June 25, 1896.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Grayson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **R. C. Foster** and **A. E. Wilkinson**, for plaintiff in error:

Defendant was under no obligation to keep watch over its premises in order to exclude children therefrom. If the watchman of defendant discovered plaintiff with others playing in the yard shortly before the accident, and requested them to leave, and plaintiff thereupon withdrew from the premises but thereafter returned without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and, while doing so, was injured, without such watchman having knowledge of her being then present, and while playing there pulled down upon herself, or caused to fall, a tie or portion of a pile of ties upon which she was climbing,—defendant would not be liable to plaintiff by reason of any injury so received.

Gulf, C. & S. F. R. Co. v. *Cunningham*, 7 Tex. Civ. App. 65; *Mexican Nat. R. Co.* v. *Crum*, 6 Tex. Civ. App. 702; *Galveston Oil Co.* v. *Morton*, 70 Tex. 404; *Williams* v. *Texas & P. R. Co.* 60 Tex. 205; *Galveston, H. & H. R. Co.* v. *Moore*, 59 Tex. 68, 46 Am. Rep. 265; Bishop, Non-Cont. Law, § 845; Whart. Neg. §§ 344–361, 824, 824*a*; 2 Wood, Railway Laws, 1296; Cooley, Torts, 2d ed 358, and note 3, 718–722, and note, 792, and note 3; 16 Am. & Eng. Enc. Law, p. 412; *Hargreaves* v. *Deacon*, 25 Mich. 1; *Gillespie* v. *McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Vanderbeck* v. *Hendry*, 34 N. J. L. 467; *Zoebisch* v. *Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *McAlpin* v. *Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Rodgers* v. *Lees*, 140 Pa. 475, 12 L. R. A. 216; *Lary* v. *Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Wood* v. *Independent School Dist.* 44 Iowa, 27; *Central Branch Union P. R Co.* v. *Henigh*, 33 Kan. 347, 33 Am. Rep. 167; *Catlett* v. *St. Louis, I. M. & S. R. Co* 57 Ark. 461; *Rushenberg* v. *St Louis, I. M. & S. R. Co.* 109 Mo. 112; *Gramlich* v. *Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Williams* v. *Kansas City, S. & M. R. Co.* 96 Mo. 275; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221, 50 Am. Rep 783; *Pierce* v. *Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Mangan* v. *Atterton*, L. R. 1 Exch. 239; *Hughes* v. *Macfie*, 2 Hurlst. & C. 744, 33 L. J. Exch. 177; *Kohn* v. *Lovett*, 44 Ga. 251; *Gautret* v. *Egerton*, L. R. 2 C. P. 371; *Stone* v. *Jackson*, 16 C. B. 199; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Schmidt* v. *Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16; *Cauley* v. *Pittsburg, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Cook* v. *Houston Direct Nav. Co.* 76 Tex. 353; *Oregon R. & Nav. Co.* v. *Egley*, 2 Wash. 409; *Chicago & N. W. R. Co.* v. *Smith*, 46 Mich. 504, 41 Am. Rep. 177.

If the watchman directed plaintiff to leave said premises, and if said child immediately returned thereon while the said watchman had gone to another part of the yard and without the knowledge of said watchman, and became injured by pulling down upon himself a tier of a pile of ties, the defendant would not under such circumstances owe any duty for the protection of said child against such an injury.

Cook v. *Houston Direct Nav. Co. supra; Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164; *Chicago City R. Co.* v. *Wilcox* (Ill.) 43 Am. & Eng. R. Cas. 299; *Western & A. R. Co.* v. *Young*, 81 Ga. 397; *Oregon R. & Nav. Co.* v. *Egley*, 2 Wash. 409; *Rodgers* v. *Lees, supra; Ridenhour* v. *Kansas City Cable R. Co.* 102 Mo. 270.

An instruction in regard to the duty of an owner of premises towards trespassing children, which requires of such owner in general terms to exercise ordinary care to prevent injuring such children without limiting or defining in any manner the duties which he owes to such trespasser or informing the jury as to the matters in which such owner was bound to take precautions, or the nature, extent, or limit of his duty in the matter, in effect permits the jury to treat the owner of premises as a guardian of the safety of children trespassing thereon, and to require of such owner affirmative care in regard to the safety of such children, and permits the jury to indulge, without restriction, their own conception of what duty the owner should exercise towards such trespassers, and is erroneous.

Galveston, H. & S. A. R. Co. v. *Sweeney*, 6 Tex. Civ. App. 173; *San Antonio & A. P. R. Co.* v. *Jazo* (Tex.) 25 S. W. 712.

NOTE.—As to liability of railroad company for negligence as to turntables, see note to Ft. Worth & D. C. R. Co. v. Robertson (Tex.) 14 L. R. A. 781; also Walsh v. Fitchburg R. Co. (N. Y.) 27 L. R. A. 724.

For similar cases of dangerous attractions for children, see Gay v. Essex Electric Street R. Co. (Mass.) 21 L. R. A. 448; Barney v. Hannibal & St. J. R. Co. (Mo.) 26 L. R. A. 847; Osage City v. Larkins (Kan.) 2 L. R. A. 56; Penso v. McCormick (Ind.) 9 L. R. A. 313; Rodgers v. Lees (Pa.) 12 L. R. A. 216; Roddy v. Missouri P. R. Co. (Mo.) 12 L. R. A. 746; Robinson v. Oregon Short Line & U. N. R. Co. (Utah) 13 L. R. A. 765, and Pekin v. McMahon (Ill.) 27 L. R. A. 206.

32 L. R. A.

Messrs. **E. J. Smith** and **Wolfe & Hare,** for defendant in error:

Appellant was under obligations to keep watch over its premises in order to exclude children therefrom.

San Antonio & A. P. R. Co. v. *Robinson*, 79 Tex. 608; *Denham* v. *Trinity County Lumber Co.* 73 Tex. 83; *Campbell* v. *Trimble*, 75 Tex. 270; *San Antonio & A. P. R. Co.* v. *Robinson*, 73 Tex. 277; *International & G. N. R. Co.* v. *Dyer*, 76 Tex. 156.

One who erects or maintains on his own premises things which are so situated as to allure and attract children of tender years to play with the same, and which things so erected or maintained are in their nature dangerous to children, is bound to use ordinary care to protect them from the danger, to which they are themselves led and from which they could not be expected to protect themselves; and the question of what will constitute ordinary care is one of fact to be determined by the jury.

Galveston, H. & H. R. Co. v. *Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Texas & P. R. Co.* v. *O'Donnell*, 58 Tex. 27; *Cook* v. *Houston Direct Nav. Co.* 76 Tex. 353; *Evansich* v. *Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Texas & P. R. Co.* v. *Hall*, 83 Tex. 675; *Avey* v. *Galveston, H. & S. A. R. Co.* 81 Tex. 243; *Western U. Teleg. Co.* v. *Hoffman*, 80 Tex. 420; *Gulf, C. & S. F. R. Co.* v. *McWhirter*, 77 Tex. 356; *Bransom* v. *Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Penso* v. *McCormick*, 125 Ind. 116, 9 L. R. A. 313; *Schmidt* v. *Kansas City Distilling Co.* 90 Mo. 284; *Hydraulic Works Co.* v. *Orr*, 83 Pa. 332; *O'Malley* v. *St. Paul, M. & M. R. Co.* 43 Minn. 289; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Indianapolis* v. *Emmelman*, 108 Ind. 530, 58 Am. Rep. 65; *Powers* v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Whirley* v. *Whiteman*, 1 Head, 610; *Birge* v. *Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Westbrook* v. *Mobile & O. R. Co.* 66 Miss. 560, 14 Am. St. Rep. 595, note; *Jones* v. *Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

Gaines, Ch. J., delivered the opinion of the court:

Mollie Edwards, a minor suing by her next friend, brought this action against the Missouri, Kansas, & Texas Railway Company of Texas to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The negligence was alleged to consist in keeping a yard in which children were accustomed to play, and in piling a number of railroad bridge ties in such manner that they fell upon the plaintiff while playing upon them, and injured her. The facts disclosed by the testimony are as follows: The defendant company owned a lumber yard, which was used for the purpose of storing bridge material and other like lumber. It was fenced, except upon one side, along the company's railroad tracks. The plaintiff, at the time of the accident, was about eight years old, and lived, with her mother, just across an alley from the yard. Not being fenced along the track, the yard was easily accessible. It was shown that the plaintiff and other children were accustomed to resort there for the purpose of playing, but it was also shown that they were uniformly ordered out by the servants of the company. The parents of some of them were also warned to keep them away. It appeared, however, that, notwithstanding the persistent efforts of the servants of the company, the children would return. Just before the accident happened, the plaintiff was sent home by the watchman, and went out; but as soon as he was called away by other duties she returned. In attempting to climb upon the pile of bridge ties one of them fell down, and crushed her toes. There was evidence tending to show that the ties were insecurely stacked. The mother of the plaintiff testified in effect that she knew of the plaintiff's having visited the yard on former occasions and had punished her several times for it. There was a verdict and judgment for the plaintiff in the trial court, which judgment was affirmed in the court of civil appeals. 32 S. W. 815. The case comes to this court upon a petition for a writ of error, which has been granted.

The errors assigned in the court of civil appeals, and which are insisted upon in this court, are upon the charge of the court and upon the refusal to give certain special instructions requested in behalf of the defendant. But in the view we take of the case no critical examination of the charges is necessary. Two of the requested instructions were, in our opinion, statements of the law of the case, as applied to the facts in evidence, and should have been given. They were as follows: (1) "Defendant was under no obligation to keep watch over its premises in order to exclude children therefrom. If the watchman of defendant discovered plaintiff, with others, playing in the yard, shortly before the accident, and requested them to leave, and plaintiff thereupon withdrew from the premises, but thereafter returned, without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and while so doing was injured, without such watchman having knowledge of her being then present, and while playing there pulled down upon herself or caused to fall a tie or portion of a pile of ties upon which she was climbing, defendant would not be liable to plaintiff by reason of any injury so received." (2) "Defendant was under no obligation to plaintiff to keep its lumber yard in safe or proper condition for plaintiff to play thereon. The yards were its property, and it was entitled, as to plaintiff, to use them for piling lumber, and to pile the same in such form as it found convenient, with due regard to the safety of such persons only as might properly use the yards. It was under no obligations to so pile or place its bridge ties as to prevent injury by a child climbing upon them, or to so pile, fasten, or brace the same that the child could not, in trying to climb thereon, pull one or more of them down upon herself; nor can it be held negligent for failing to so pile, brace, or secure them, if the injured person was at the time thereon without its knowledge or invitation." Ordinarily, the owner of property is not bound to keep it in such condition as to protect trespassers upon it from danger. Liability may be incurred by making an excavation upon one's own land sufficiently near a

street or highway that another may, in the exercise of reasonable care, fall into it, or by exposing dangerous machinery or appliances in or near some public place, whereby one without fault on his part may be injured. Especially in the latter case may liability be incurred when children are the victims. Until they have learned some discretion, they cannot be held guilty of contributory negligence. *Lynch* v. *Nurdin*, 1 Q. B. 29, is a case of this class. There the "defendant negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on; and plaintiff was thereby thrown down and hurt." It was held that the plaintiff could recover. There are numerous American decisions which proceed upon the same principle. With reference to children, there is still another class of cases which go a step further, and hold that the owner of land may not place upon it dangerous machinery which is alluring to children, without securing it so as to protect them against injury while tampering with it. To this class belong what have become commonly known in legal parlance as "The Turntable Cases;" such as *Evansich* v. *Gulf, C. & S. F. R. Co.* (in this court), 57 Tex. 123, 44 Am. Rep. 586, and *Sioux City & P. R. Co.* v. *Stout* (in the Supreme Court of the United States), 84 U. S. 17 Wall. 657, 21 L. ed. 745. This line of decision has not been uniformly followed, and has met with much adverse criticism, and it seems to us that with respect to the care which the owner of land is required to exercise in order to secure from injury children who may trespass upon it they go to the limit of the law. They proceed upon the ground that turntables are attractive to children. In both of the cases cited stress was laid upon this fact, and also upon the fact that the use of the turntables by children was known to the servants of the defendants. The ruling in these cases must be justified, we think, upon one of two grounds: either that the turntables possess such peculiar attractiveness as playthings for children that to leave them exposed should be deemed equivalent to an invitation to use them, or that, when unsecured, they are so obviously dangerous to children that, when it is discovered that they are using them, it is negligent on part of the owner not to take some steps to guard them against the danger. But when it is said that it is enough that the object or place is attractive or alluring to children, and when it is said, as has been intimated, that the fact that they resort to a particular locality is evidence of its attractiveness, the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants? Here the language of an eminent judge in disposing of a similar case is appropriate: "There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface so that trespassers may not be injured would be an oppressive rule. The law does not require us to enforce any such principle even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." Paxson, J., in *Gillespie* v. *McGowan*, 100 Pa. 144, 45 Am. Rep. 365. We do not see that a yard kept by a railroad company for the deposit of old ties and other rejected material, or new material for railroad repair and construction, possesses any greater attraction for children than any other place of deposit of any similar material kept by people pursuing other avocations. Is a pile of ties any more alluring than a pile of wood kept for fuel, or a pile of rails laid aside for making or repairing a farm fence? Children may injure themselves in playing upon either. In such a case we conclude that the law does not devolve the duty upon the owner of the yard to see that the ties are so placed that children may not injure themselves while playing upon them. It has been so held in effect in many cases. See *Vanderbeck* v. *Hendry*, 34 N. J. L. 467; *McAlpin* v. *Powell*, 55 How. Pr. 163; *Gulf, C. & S. F. R. Co.* v. *Cunningham*, 7 Tex. Civ. App. 65; *Mexican Nat. R. Co.* v. *Crum*, 6 Tex. Civ. App. 702. We refer especially to the able and elaborate opinion of Mr. Justice Sherwood in *Barney* v. *Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, which contains a thorough discussion of the cases bearing on the question.

Applying the principles announced to the facts of this case, we are of opinion that the plaintiff was not entitled to recover. There was no peculiar allurement about the yard of the defendant company. Though the ties may have been inartistically piled, we do not see that any danger should have been anticipated from the manner in which they were stored. A witness swore that children seemed fond of playing about the lumber. If anyone ever tampered with the ties before, it does not appear from the testimony. The defendant could not, consistently with the use of its yard, fence it along its track. Children were persistently ordered out of the yard, and there is no ground for claiming an implied or constructive invitation to come upon the yard. In any possible aspect of the case the charge which was given by the court was erroneous in authorizing the jury to find for the plaintiff, without reference to the question whether the servants of the company had exercised ordinary care to keep children out of its yard. If, in the opinion of the jury, such care had been exercised, then the verdict should have been for the defendant. But the court should have gone further, and given the requested instructions which have been quoted above, and this

is equivalent to saying that it should have directed a verdict for the defendant.

The judgments of the District Court and of the Court of Civil Appeals are reversed, and the cause remanded.

UTAH SUPREME COURT.

Joseph KRANTZ, *Respt.*,
v.
RIO GRANDE WESTERN RAILWAY COMPANY, *Appt.*

(.....Utah.....)

***An appeal from a judgment or order which the district court entered** in exact accordance with the mandate of this court upon a previous appeal will be dismissed upon motion of the appellee.

(January 30, 1896.)

APPEAL by defendant from a judgment of the District Court for the Third District in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the wrongful acts of defendant's servants. *Appeal dismissed.*

The facts are stated in the opinion.

Messrs **Bennett, Marshall, & Bradley** for appellant.

Messrs. **C. S. Varian** and **E. W. Taylor,** for respondent:

Under no circumstances, in no event, can an appeal like this lie. It is purely a false and fictitious appeal. The case is simply an attempt to prolong wearisome discussion by appealing to this court from its own decision.

Roberts v. *Cooper*, 61 U. S. 20 How. 481, 15 L. ed. 973; *Stewart* v. *Salamon*, 97 U. S. 361, 24 L. ed. 1045; *Humphrey* v. *Baker*, 103 U. S. 736, 26 L ed. 456; *Mackall* v. *Richards*, 116 U. S. 45, 29 L. ed. 558; *State* v. *Lerelle*, 38 S. C. 216; *Clayton* v. *Mitchell*, 33 S. C. 599; *State* v. *Merriman*, 34 S. C. 576; *Smith* v. *Shaffer*, 50 Md. 136; *Martin* v. *Platt*, 131 N. Y. 641, 40 N. Y. S. R. 761; *Zimmerman* v. *Turner*, 24 Wis. 483.

An appeal from the decision of the court below in accordance with the mandate of the appellate court cannot be maintained.

Aspen Min. & S. Co. v. *Billings*, 150 U. S. 37, 37 L. ed. 988.

Bartch, J., delivered the opinion of the court:

This action was brought in the court below to recover damages for personal injuries alleged to have been sustained by the wrongful acts of the servants of the defendant company. The complaint contained two counts, and at the trial the court directed a verdict to be given for the defendant on the first count; and the cause having been submitted to the jury on the second count, a verdict was returned for the plaintiff. The defendant thereupon moved the court for a new trial on the second cause of action, which motion was granted. The plaintiff then appealed from the action of the court directing a verdict for the defendant on the first count, and also from the order granting a new trial on the second, and the appellate court affirmed the action of the lower court on the first, and reversed its order granting a new trial on the second count, and ordered the original judgment to be reinstated. In pursuance of the mandate of the appellate court, said judgment was reinstated, and from the judgment so entered, the defendant prosecuted this appeal, which is now being considered, on motion to dismiss, on the ground that it is substantially a second appeal on the same state of facts.

The only material question raised by this motion is whether, under the circumstances apparent from the record in this case, an appeal will lie from a judgment entered in pursuance of the mandate of the appellate court. Counsel for the appellant contend that this appeal is proper because the former one was simply from an order granting a new trial, and not from the judgment which was vacated by said order; that after the original judgment was reinstated, it was subject to appeal, to present questions which could not be raised on the appeal from the order granting a new trial; and that the defendant had no previous opportunity to appeal from the judgment. We think the position assumed by the appellant is not well taken. It had an opportunity to appeal from the judgment in the first instance, and all the matters of which it now complains could have been reviewed. Instead of that, it moved for a new trial, which was granted, and then the respondent herein appealed. That appeal brought up the entire record for examination, and with that record before it, the appellate court had power to consider, not only questions respecting the rulings of the court, made in the course of the trial, but also to consider the question, whether or not the verdict was excessive. Utah, Comp. Laws 1888, § 3400. While it is true, as a general rule, that questions respecting the sufficiency of the complaint cannot be considered by the court on motion for a new trial, nor on an appeal from an order granting a new trial, because such questions are not comprehended in the statutory ground for such motion (Utah, Comp. Laws 1888, *supra*; *Jacks* v. *Buell*, 47 Cal. 162; *Mason* v. *Austin*, 46 Cal. 385), still, if the appellant herein seriously doubted the sufficiency of the complaint, it could have been tested, and all the points now insisted upon could have been considered, by an appeal from the judgment, instead of a motion for a new trial. The attempt now to present them for review, on appeal from the judgment which was entered in pursuance of the mandate of the appellate court, must fail, because it is, in effect, an appeal from our

*Headnote by BARTCH, J.

NOTE.—The above case is reported because it is entirely confined to a single question of practice which is not very frequently decided.

own judgment. In deciding this case on the former appeal, this court said: "We are of the opinion from this record that the appellant is entitled to recover from the railroad company, and are not disposed, and do not find it necessary, to put him to the expense and trouble of a new trial. . . . The judgment upon the verdict as to the first count is affirmed, and the order granting a new trial as to the second count is reversed, and the original judgment upon the verdict reinstated as of April 28, 1894, the date of the original entry." This court had the right to direct the lower court to enter a proper judgment or order (Utah, Comp. Laws 1888, § 3006); and while the last sentence quoted is not strictly in the form of a direction, still we think it amounts to that, and it appears that the judgment was entered by the trial court precisely in accordance with our mandate. All the alleged errors now complained of occurred during the proceedings of the trial court before the motion for a new trial was heard, and there is no question made as to any errors having been committed in the proceedings subsequent to the mandate. Nor are we asked to review such proceedings. It is evident that this is an attempt to have another review of the rights of the parties, on the same record which was reviewed on the former appeal, when it was held that the plaintiff had the right to recover. Under such circumstances, an appeal from a judgment entered by an inferior court in pursuance of a mandate of the appellate court cannot be sustained; and this rule is not only in accordance with authority, but is founded on reason and justice, for, if successive appeals were allowed on the same state of the record, there would be no end to litigation and appeals, and the courts themselves could be turned into instruments of injustice by an obstinate litigant. In *Stewart* v. *Salamon*, 97 U. S. 361, 24 L. ed. 1044, where a decree had been entered by the circuit court in accordance with the mandate of the Supreme Court of the United States, and an appeal taken therefrom, in dismissing the appeal the Supreme Court, speaking through Mr. Chief Justice Waite, said: "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error." *Roberts* v. *Cooper*, 61 U. S. 20 How. 467, 480, 15 L. ed. 969, 973; *Humphrey* v. *Baker*, 103 U. S. 736, 26 L. ed. 456; *State* v. *Levelle*, 38 S. C. 216 and 221; *Zimmerman* v. *Turner*, 24 Wis. 483; *Mackall* v. *Richards*, 116 U. S. 45, 29 L. ed. 558; *Aspen Min. & S. Co.* v. *Billings*, 150 U. S. 31, 37 L. ed. 986; *Smith* v. *Shaffer*, 50 Md. 132; *Martin* v. *Platt*, 131 N. Y. 641. Examining the record for the purposes of this motion, we see no error which would entitle the appellant herein to be heard on this appeal.

The appeal is therefore dismissed.

Zane, Ch. J., and **Miner**, J., concur.

NORTH CAROLINA SUPREME COURT.

R. H. COWAN
v.
Al. FAIRBROTHER, Impleaded, etc., *Appt.*

(.....N. C.....)

1. An agreement to refrain from editing or being connected with a newspaper or magazine in the county in which is published a newspaper the goodwill of which is transferred as a part of such agreement is not void as in restraint of trade.

2. The area in which a vendor can be restricted from competition with his vendee is as broad as is necessary to afford ample protection to the latter provided the agreement is not injurious to the public interest.

3. The temporary suspension of a newspaper while reasonably diligent efforts are made to find a suitable editor and continue

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NOTE.—*Constitutional freedom of speech and of the press.*

I. *In general.*
II. *Libels.*
III. *Prevention of speech or publication.*

I. *In general.*

The constitutional right of free speech and free press is for the most part a perpetuation of the law of England on that subject; but inasmuch as it is in this country based on express provisions of the fundamental law, the construction of the language of the constitutions must determine the extent of the right.

Some limitation of the right of free speech and free press is conceded by all so far as respects liability to punishment for its abuse. But it is still uncertain whether or not the prevention instead of the punishment of unlawful speech or publication is constitutional. This matter of prevention is discussed in a later part of this note, division III.

Since the various constitutions nearly all provide expressly that persons exercising liberty of speech or of the press shall be responsible for an abuse of that liberty without specifying what shall constitute an abuse, it is plain that the intent was to leave the legality of any speech or publication to be determined by common-law principles and statutory declaration of the police power.

An ordinance prohibiting any public address upon any public grounds of a city, such as Boston common, is not an unconstitutional interference with free speech. Com. v. Davis, 162 Mass. 510, 26 L. R. A. 712.

A statute against blasphemy is held in Com. v. Kneeland, 20 Pick. 206, to be consistent with the declaration of rights, which declares that the liberty of the press ought not to be restrained.

See also 46 L. R. A. 255; 47 L. R. A. 287.

the business will not defeat the right of the owner to enforce an agreement restricting competition by a former owner of the paper.

4. Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take title in his own name and who does not disclose his agency.

5. The constitutional guaranty of the freedom of the press does not restrict the right of the owner of a newspaper on a sale of it to bind himself against editing or being connected with another journal in the same locality.

(March 24, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Durham County in favor of plaintiff in a suit brought to enjoin defendant from conducting a newspaper in violation of his contract. *Affirmed.*

The original contract was made with John Wilber Jenkins. He assigned his interest to G. W. Watts, who assigned a half interest to B. N. Duke. The paper was then leased to plaintiff.

The contract was as follows:

For value received, $3,500, this day to us in hand paid, the receipt of which is hereby fully acknowledged, we, Al. Fairbrother and Mrs. M. H. Fairbrother, have bargained and sold, and do by these presents, bargain, sell, transfer, assign, set over, deliver, and convey unto John Wilber Jenkins, absolutely free from all claims by us, the Durham Daily Globe and the Durham Weekly Globe, newspapers now published in said county and state; and also all type, printing presses, racks, imposing stones, subscription books and accounts thereon, except those which have already been earned and are now due; one iron safe (Cary), one caligraph, desks, tables, chairs, inks, paper, and all material on hand January 1, 1894; the subscription list of said newspapers and all office furniture and materials now used by us in conducting said newspapers, and all now contained in the office of said newspapers on the northwest corner of Main and Church streets, in the town of Durham; and the goodwill of said newspapers, and the business of conducting the same. And we

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So, a statute prohibiting the use of profane language to the disturbance of the peace is not an interference with the constitutional right of free speech. State v. Warren, 113 N. C. 683.

The use of obscene language is not protected by the constitutional guaranty of the freedom of speech or of the press. United States v. Harmon, 45 Fed. Rep. 414, 13 Crim. L. Mag. 538; Harman v. United States, 50 Fed. Rep. 921; United States v. Bennett, 16 Blatchf. 338. This was decided in respect to the mailing of obscene publications in violation of U. S. Rev. Stat. § 3893, making it a criminal offense to deposit such publications in the mails.

The exclusion from the mails of printed matter which the government deems injurious to the people, such as lottery circulars, is not in violation of the constitutional guaranty of the freedom of speech or of the press. The government does not thereby prohibit the circulation of such publications, but merely declines to become itself an agent in their circulation. *Ex parte* Rapier, 143 U. S. 110, 36 L. ed. 93; Horner v. United States, 143 U. S. 207, 36 L. ed. 126.

So, in *Re* Jackson, 96 U. S. 727, 24 L. ed. 877, it is said: "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

But a city ordinance declaring a certain newspaper called "The Sunday Sun" to be a public nuisance, and prohibiting its circulation within the city, is held to violate the section of the Bill of Rights which declares that "every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." *Ex parte* Neill, 32 Tex. Crim. Rep. 275. The court says: "The power to prohibit the publication of newspapers is not within the compass of legislative action, . . . and any law enacted for that purpose would clearly be in derogation of the Bill of Rights."

On the other hand, in answer to the contention that a statute providing for punishment for publishing a newspaper devoted largely to the publication of scandals and accounts of lecherous and immoral conduct was in violation of the constitutional right of all persons freely to "speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right," the court says: "We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitutional liberties of the press." *Re* Banks, 56 Kan. 242.

These cases are not necessarily inconsistent, although the language used in them may seem so. In the Neill Case, it will be seen, the action taken was by a city council instead of the legislature,—was special, not general, and provided, not for the punishment of an obscene or immoral publication, if made, but for the exclusion from the city of a specified newspaper. In this Neill Case the court proceeds to say that the legislature has prescribed penalties for the abuse of liberty to publish, and adds: "We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the Constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion upon any and all subjects, subject alone to the responsibility for the abuse of such privilege."

The publication of any account of any illegal lottery, game, or device, stating when the same is to be drawn, or the prizes therein or in any of them, or the price of a ticket or share therein, or where any ticket may be obtained, or in any way aiding and assisting in the same, is held, in Hart v. People, 26 Hun, 396, to be within the constitutional power of the legislature to prohibit, especially as the Constitution itself declared that lotteries should not be authorized and that the legislature should pass laws to prevent the sale of lottery tickets. The court said: "An act of the legislature to prevent the press from discussing the legality or propriety of lotteries, or from exposing their existence as violations of law and calling the attention of the public authorities to them, or criticising the acts or neglect of public officials in regard to enforcing the laws against them, would be violations of the constitutional rights and liberties of the press. But it is a very different thing to prohibit the publication of accounts or notices or advertisements which are designed to aid and assist in the promotion of lotteries." The constitutional guaranty is of the right

hereby agree with said purchaser and his assigns, each for himself and herself, that for a period of ten years from and after January 1, 1894, said Al. Fairbrother shall not edit, print, or conduct a newspaper or magazine, nor be in any wise connected with one, printed anywhere in the state of North Carolina, and that for a like period Mrs. M. H. Fairbrother shall not edit, print, or conduct a newspaper or magazine, nor be in any wise connected with one, anywhere in the county of Durham, said state, without the consent of said purchaser or his assigns. And we hereby warrant that all of said above-mentioned property is free and clear from all encumbrances of any kind whatsoever, and that we have good right to convey the same as we have done. Witness our hands and seals this 29th day of December, 1893.

Mr. **William A. Guthrie,** for appellant.
Messrs. **Fuller, Winston, & Fuller, Boone, Merritt, & Bryant,** and **Shepherd, Manning, & Foushee,** for appellee:

Agreements in restraint of trade may be assigned with the business in aid of which the contract was entered into by the parties thereto. *Hedge* v. *Lowe*, 47 Iowa, 137; *Gompers* v. *Rochester*, 56 Pa. 194; *California Steam Nav. Co.* v. *Wright*, 6 Cal. 258, 65 Am. Dec. 511; 3 Am. & Eng. Enc. Law, p. 885, note 3; *Rannie* v. *Irvine*, 7 Man. & G. 969; *Guerand* v. *Dandelet*, 32 Md. 561, 3 Am. Rep. 164; *Pemberton* v. *Vaughan*, 10 Q. B. 87.

Goodwill as property is intangible and merely an incident of other property, and is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity.

Wedderburn v. *Wedderburn*, 22 Beav. 84; Story, Partn. 99; Lindley, Partn. 842; 8 Am. & Eng. Enc. Law, p. 1366; Spelling, Trusts & Monopolies, § 31, pp. 49, 50; *Hitchcock* v. *Coker*, 6 Ad. & El. 438.

If the purchaser wishes to protect himself from the rivalry of his vendor, he must take care to obtain a stipulation to that effect.

Spelling, Trusts & Monopolies, p. 51; 8 Am. & Eng. Enc. Law, pp. 1368, 1369; *Chissum* v. *Dewes*, 5 Russ. Ch. 29.

The value of the goodwill of a newspaper attaches to its name, and is scarcely, if at all, dependent on the place of publication.

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to speak, write, and publish "sentiments" and, while the court does not dwell on or even mention this distinction, it seems plain enough that the publication of newspaper advertisements or notices of a lottery drawing or of lottery tickets is not a publication of "sentiments" within the meaning of the constitutional provision.

A statute declaring that an itinerant vendor of drugs who shall by writing or printing or in any other method publicly profess to treat diseases shall pay a license fee and be guilty of a misdemeanor if he violates the statute is held not to infringe the constitutional right to speak, write, and publish sentiments on all subjects. State v. Blair (Iowa) 60 N. W. 486.

But a statute making it unlawful for a judge of any court, or superintendent of public instruction, or superintendent of schools, or certain other officers specified, to participate actively in politics by making political speeches or actively or officially participating in political meetings, is held, in Louthan v. Com. 79 Va. 196, 52 Am. Rep. 626, to be in conflict with the constitutional provisions that any citizen may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty, and that all citizens have equal civil and political rights and public privileges, and that the general assembly shall not pass any law abridging freedom of speech or of the press. While no stress is laid by the court in this case on any distinction between an expression of sentiments on the one hand and obscene descriptions, illegal advertisements, false and malicious statements of fact on the other hand, yet the distinction seems too plain to be overlooked when we bring the cases into comparison.

II. *Libels.*

The relation of the constitutional right to free speech and a free press to the law of libel and slander may be indicated by saying that the constitutional right does not include the right to indulge in libel or slander. The question what constitutes a libel or slander is outside the range of the present subject. The protection of free speech under the Constitution may often be claimed when the only question really in dispute is the question whether the language in question is libelous or slanderous. If it is, the constitutional provision does not apply. This is made evident by all the decisions.

That libel laws and the punishment of libelers do not infringe the constitutional freedom of the press, is, in substance, declared in Morton v. State, 3 Tex. App. 510; Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Runkle v. Meyer, 3 Yeates, 518, 2 Am. Dec. 393; State v. Morrill, 16 Ark. 384; State, Haskell, v. Faulds, 17 Mont. 140; Respublica v. Dennie, 4 Yeates, 267, 2 Am. Dec. 402; Cobbett's Case, Wharton, St. Tr. 323; Cincinnati Gazette Co. v. Timberlake, 17 Ohio St. 548, 78 Am. Dec. 285, Affirming Timberlake v. Cincinnati Gazette Co. 1 Disney (Ohio) 322; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Sweeney v. Baker, 13 W. Va. 182, 31 Am. Rep. 757, and in all other cases in which the question has been presented.

The meaning of the Bill of Rights and the Constitution of Pennsylvania, declaring "that the freedom of the press shall not be restrained," was considered in Respublica v. Oswald, 1 Dall. (Pa.) 319. This was in 1788. The court said: "The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation . . . and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."

III. *Prevention of speech or publication.*

Already it has been mentioned above that the question of the constitutionality of any attempt to prevent rather than to punish abuses of speech or publication is not yet determined decisively by the decisions of the courts.

General language is found in a considerable number of cases to the effect that the liberty of the press consists in freedom from the necessity of obtaining a license before printing.

Thus, Blackstone says that the liberty of the press is by no means infringed or violated by the punishment of libelers, and that this liberty "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. Com. *152.

So in Ring v. De in St. Asaph, 3 T. R. 431, note, it is said on an indictment for libel: "The liberty of the press consists in printing without any previous license, subject to the consequence of law. The li-

2 Lindley, Partn. 860; 8 Am. & Eng. Enc. Law, p. 1372.

Covenants running with land form a complete analogy to this, and if the subject of the lease were land there can be no question as to the rights of a lessee to the protection to the extent of his estate against breach of such covenants.

Hair v. *Downing*, 96 N. C. 172; *Lewis* v. *Cook*, 13 Ired. L. 193; *Markland* v. *Crump*, 1 Dev. & B. 94, 27 Am. Dec. 230; *Cochran* v. *Ocean Dry Dock Co.* 30 La. Ann. 1365; *Wyman* v. *Farrar*, 35 Me. 64; *Cobb* v. *Lavalle*, 89 Ill. 331, 31 Am. Rep. 91.

If the contract is valid no evasions of it will be tolerated. Such contracts will be specifically enforced in equity and a breach of them be restrained by injunction.

Baumgarten v. *Broadaway*, 77 N. C. 8; *Baker* v. *Cordon*, 86 N. C. 116, 41 Am. Rep. 448; 3 Am. & Eng. Enc. Law, p. 885; 9 Am. & Eng. Enc. Law, p. 884, and notes; 10 Am. & Eng. Enc. Law, pp. 943–946; Spelling, Trusts & Monopolies, § 21; *Rannie* v. *Irvine*, 7 Man. & G. 969.

If there is one thing more than another that public policy requires it is that persons of full age and competent understanding shall have the utmost liberty at all consistent with the public good, of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by the courts of justice.

Printing & N. Registering Co. v. *Sampson*, L. R. 19 Eq. 462; Ray, Contractual Limitations, p. 65; Clark, Cont. pp. 415, 446, 447; Spelling, Trusts & Monopolies, § 21; *Baker* v. *Cordon*, *supra*; *Hitchcock* v. *Coker*, 6 Ad. & El. 438.

All attempts to establish an arbitrary rule as to territorial limits beyond which one may not contract away his right to apply himself to a particular occupation, calling, or enterprise have failed.

Spelling, Trusts & Monopolies, § 14; Pollock, Cont. 316; Patterson, Law of Contracts in Restraint of Trade, pp. 26, 27; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; Clark, Cont. p. 450, note 228; *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall.

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centiousness of the press is Pandora's box, the source of every evil."

Lord Ellenborough, in summing up to the jury in the case of Cobbett's Case, 29 How. St. Tr. 49, said: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary. But, if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal."

Also, in Respublica v. Dennie, 4 Yeates, 267, 2 Am. Dec. 402, it is said on an indictment for libel that the liberty of the press means: "There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths."

Again, in Cobbett's Case, Wharton, St. Tr. 323, McKean, J., says the liberty of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter, when published." This was in a charge to the grand jury on the subject of libel.

Similar words are used in the libel case of Sweeney v. Baker, 13 W. Va. 182, 31 Am. Rep. 757, where the judge says: "The liberty of the press consists in a right, in the conductor of a newspaper, to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that anyone else would be responsible for the publication."

Another court says that the liberty of the press means simply that no previous license to publish shall be required, but not that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter. Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676.

But in none of the cases above mentioned was there any question to be decided as to any attempt to prevent speech or publication; but the above expressions were all used in an attempt to define the extent of the right of free speech or free press rather than the remedy for its abuse. Yet there are a few cases in which the constitutionality of attempts to restrain speech or publication have been considered, and these cases are not in harmony.

In Story on Equity Jurisprudence, vol. 2, § 948*a*, it is said that "courts have never assumed, at least since the destruction of the court of star chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libelous character, and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication. For matters of this sort do not properly fall within the jurisdiction of courts of equity to redress, but are cognizable, in a civil or criminal suit, at law."

An injunction against the publication of a pamphlet which purported to be a literary work, undoubtedly a tale of fiction, on the ground that it was intended as a libel, but which was not shown to injure any property right, was denied by Chancellor Walworth in Brandreth v. Lance, 8 Paige, 24, 34 Am. Dec. 368, in which he said that since the court of star chamber in England was abolished he believed there was but one case on record in England or in this country in which a court had attempted by injunction or order to prohibit or restrain the publication of a libel, as such, in anticipation. The exception mentioned was in the case of Chief Justice Scroggs, mentioned below. But the chancellor's opinion shows that the want of any showing that any property right was injured was deemed material, and leaves room to suppose that he would have sustained an injunction against a publication which injured property rights.

One of the grounds named in the articles of impeachment of Chief Justice Scroggs in 1680 was his order prohibiting the printing of a certain book called "The Weekly Packet of Advice from Rome, or The History of Popery,"—"in a most illegal and arbitrary manner." This impeachment matter was dropped on the prorogation of Parliament, although Scroggs was removed from being Chief Justice, which was done with all the marks of favor and respect, giving him a pension for life. Scroggs' Case, 8 How. St. Tr. 198.

A *dictum* of Lord Ellenborough in the case of Du Bost v. Beresford, 2 Campb. 511, states that an injunction would have been granted on application against the exhibition of a libelous picture.

But in the report of Horne's Case, 20 How. St. Tr. 799, it is said that the promulgation of this doctrine "excited great astonishment in the minds of all the practitioners of the courts of equity, and I apprehended that this must have happened; since I believe there is not to be found in the books any decision or any *dictum*, posterior to the days of the star chamber, from which such doctrine can be

64, 22 L. ed. 315; *Beal* v. *Chase*, 31 Mich. 490; *Diamond Match Co.* v. *Roeber*, 35 Hun, 421, 106 N. Y. 473, 60 Am. Rep. 464; *Herreshoff* v. *Boutineau*, 17 R. I. 3, 8 L. R. A. 469.

If the contract be reasonable when made, subsequent circumstances, such as the covenantee ceasing business so as to no longer need protection, do not affect its operation.

Cook v. *Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Elves* v. *Crofts*, 10 C. B. 241.

Where the public right or welfare would not be injuriously affected by allowing the particular contract to be enforced, such contract being otherwise valid and not inequitable, courts have never assumed to set it aside or refused enforcement merely because a party has imposed upon himself unnecessary restraints in the matter of contracting, engaging in business, or accepting employment.

Spelling, Trusts & Monopolies, § 7; *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522.

The courts will not investigate the inadequacy of the consideration.

Spelling, Trusts & Monopolies, § 10; *Pierce* v. *Fuller*, 8 Mass. 223; *Guerand* v. *Dandelet*, 32 Md. 561, 3 Am. Rep. 164; *Pilkington* v. *Scott*, 15 Mees. & W. 657; *Hitchcock* v. *Coker*, 6 Ad. & El. 456; *Perkins* v. *Clay*, 54 N. H. 518; *McClurg's Appeal*, 58 Pa. 51; *Hall's Appeal*, 60 Pa. 458, 100 Am. Dec. 584; *Linn* v. *Sigsbee*, 67 Ill. 75; *Hubbard* v. *Miller*, 27 Mich. 15, 15 Am. Rep. 153.

We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when tested by such standards as the law affords.

Cooley, Const. Lim. p. 518; Black, Const. Law, p. 473; *Beal* v. *Chase*, 31 Mich. 490.

Avery, J., delivered the opinion of the court:

Where a person acquires a reputation for skill and learning in his profession as a lawyer or a physician, he often creates an intangible but valuable property, by winning the confidence of his patrons, and securing immunity from successful competition for their business. So, where an editor, by reason of his

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deduced, either directly, or by inference or analogy, unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor, Scroggs, and his associates, in the case of Henry Care," referring to the order above mentioned. Yet injunctions against publications which injure property rights are by no means unknown in England.

In the recent case of Dailey v. San Francisco City & County Super. Ct. (Cal.) 32 L. R. A. 273, an injunction against speaking or publishing what is injurious or unlawful is regarded by the majority of the court as a violation of the constitutional right to "freely speak, write, and publish." In that case it was held that the production in a theatre of a play based upon the facts of a criminal case then on trial could not be prevented by injunction, even if the play might interfere with the administration of justice and deprive the accused of a fair trial and constitute a punishable contempt; in short, that a person's mouth "could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right." So far as this constitutional right is concerned it was said: "It is immaterial whether the words be publicly spoken from the stage, or upon the hustings, or go out to the world through the channels of the printing press."

An injunction against the publication by a state board of charities of their proceedings in respect to a juvenile guardian society and its officers, on the ground that their examinations were secret and *ex parte*, and that the testimony of the officers and employees of the society is essentially suppressed or garbled and perverted in the publication, and that the accounts of the proceedings as published are untrue, defamatory, and libelous, was denied in New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly, 188. The court said that the exercise of any such jurisdiction was repugnant to the constitutional right of every citizen freely to speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and that if the publication was libelous the remedy was by civil action or by indictment in the criminal courts.

It is said, in Dopp v. Doll, 13 Week. L. Bull. (Ohio) 335, by the Cuyahoga court of common pleas, that there is a constitutional guaranty of freedom from any censorship or control of the press or of free speech except by an action for damages. This was a case in which an injunction against circulars charging infringement of a patent and warning prospective purchasers against it was denied.

An injunction against the publication of libelous statements injurious to business was denied in Life Asso. of America v. Boogher, 3 Mo. App. 173, on the ground that it was prohibited by the constitutional guaranty of the right to freely speak, write, or print on any subject. The court said: "The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom;" and added "that courts of justice can do nothing by way of judicial sentence which the general assembly has no power to sanction." This was said in answer to the contention that the Constitution did not give a license to wantonly use the right, and that, by the jurisdiction claimed, the right to speak, write, or print is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable. But on this point it may be said that an injunction against defamatory publications which is not granted until the court has decided that they are defamatory does not suspend any right whatever, since when it is determined that the publication is defamatory it is also determined that there is no right to publish it; that is, that the publication is outside of the constitutional guaranty.

Thus it appears that in several cases the courts have held the constitutional provision to be a bar against any prevention of publications by injunction, even where property rights were involved. On the other hand in a considerable number of cases injunctions have been granted against the publication of injurious and wrongful statements.

Thus, in Flint v. Hutchinson Smoke Burner Co. 110 Mo. 492, 16 L. R. A. 243, it is held that an injunction could not be granted against a slander of title or letters patent until the question of slander had been determined in an action at law; but the court expressly says: "After verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander." In a

style, his power, his pathos, his humor, his learning, or of any gift or attainment, attracts subscribers solely by such personal qualities, he imparts a peculiar value to the goodwill and property of a newspaper, which goes with him, to its injury, when he leaves it and lends the talent and accomplishments that have given it patronage and popularity to a rival journal in the same vicinity. Where he owns the press and plant the enhanced value so imparted by him becomes an element of his property, with the same incidental power to dispose of it as attaches to any other of his acquisitions which has a market value. *Beal* v. *Chase*, 31 Mich., at page 529. But it is not like other property, which ordinarily passes by delivery or assignment to the purchaser. Neither an editor, a lawyer, nor a physician can transfer to another his style, his learning, or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business in the same field, by withdrawing as a competitor. So that the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale only to the extent that they are held to injure the public by restraining trade. The one sells his prospective patronage, and the other buys the right to compete with all others for it, and to be protected against competition from his vendor. The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially so as to make it only coextensive with the right to protection on the part of the purchaser. To the extent that the contract covers territory from which the vendor has derived, and will probably in future derive, no profit or patronage, it needlessly deprives the public of the benefit of open competition in useful business, and of the services of him who sells without any possible advantage to his successor. When the reason upon which

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note to this case conflicting authorities are considered, and it is said that the weight of authority as shown by the later cases is to the effect that such an injunction may be granted if the threats to prosecute for an infringement are not made in good faith. About a dozen cases are cited to this effect. These did not directly pass upon the constitutional provision here in question, although in the Hutchinson Case just mentioned, which was based on the constitutional right of trial by jury, the court says: "It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen the law furnishes a remedy." The case merely decides, therefore, that the fact of libel or slander must first be found by a jury, and then an injunction may be granted to restrain the unlawful publication.

In the later case of Shoemaker v. South Bend Spark Arrester Co. 135 Ind. 471, 22 L. R. A. 332, it is expressly decided that the constitutional guaranty of the freedom of the press and of speech is not a protection against equitable interference with the publication of false and injurious statements. This also was a case of injunction against false and malicious claims of title to a patent with threats of an infringement suit.

An injunction against the publication of a receipt book was granted in Beal v. Chase, 31 Mich. 490, where the publication was in violation of a contract by which a person had sold his business, including the right to publish a similar receipt book.

The question has also arisen in proceedings to punish contempt of an injunction.

Thus, a conspiracy to incite the employees of a railroad receiver to leave his service, and a continuance of participation therein after an injunction against it, are held to constitute a contempt of court, in Thomas v. Cincinnati, N. O. & T. P. R. Co. 62 Fed. Rep. 803, 4 Inters. Com. Rep. 788. The court said: "Something has been said about the right of assembly and free speech secured by the Constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be." The decision not only sustains the validity of an injunction against the use of one's tongue to further an unlawful conspiracy, but punishes a violation of such injunction as a contempt.

Reviewing the above cases, it appears that several have denied an injunction against publications, and others have granted such relief. Of those that deny, some imply that publications wrongfully injuring property rights may be enjoined; others grant injunctions in such cases, while in the note above referred to (16 L. R. A. 243) are found still other cases granting such injunctions in which no question was raised as to the constitutional right of the freedom of the press.

Not only injunctions like the above, but every injunction against an infringement of copyright, and at least most injunctions against infringement of trademarks and tradenames, do to some extent interfere with freedom of publication, as does also the injunction in COWAN V. FAIRBROTHER against publishing a newspaper. Yet it does not appear that such infringing publications have ever been thought to be within the constitutional protection of the freedom of the press. Thus, without expressly deciding it, the courts in all such cases have assumed that an abuse of the liberty of speech or of the press could be constitutionally restrained in anticipation, and that unlimited license of unlawful speech or publication, without any check or hindrance except by way of punishment for commission of the offense, is not guaranteed by the Constitution.

On the question of the right to express opinions or comments without misstating facts, the authorities are analyzed in a note to St. James Military Academy v. Gaiser (Mo.) 28 L. R. A. 667. The literal statement of the constitutional guaranty, when it is anything more than a general declaration of freedom of speech and of the press, does not, in most constitutions, extend beyond the free expression of "sentiments" or "opinions." It seems plain that there is a distinction between the expression of an opinion or sentiment and the making of false statements of fact, and it is by no means certain that the constitutional protection is not entirely limited to the expression of comments, opinions, sentiments, or something equivalent thereto. As well defined in the above case of COWAN V. FAIRBROTHER it is a guaranty against "stifling just criticism or muzzling public opinion." If this is so, malicious and false statements of fact are altogether outside of the constitutional protection. Thus construed the Constitution would not prevent an injunction against injurious and libelous misstatements of fact any more than it prevents the punishment of them after their publication.

It is certain that the courts have not yet clearly settled the application of these constitutional provisions, and it is suggested that a final settlement of them will be aided by considering carefully what is included among the "sentiments," "opinions," or equivalent words used in the constitutional provisions on this subject. B. A. R.

a law is founded ceases, the rule itself ceases to operate. The older cases in which the courts attempted to fix arbitrarily geographical bounds, beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed. *Nordenfelt* v. *Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 535; *Hitchcock* v. *Coker*, 6 Ad. & El. 438; *Herreshoff* v. *Boutineau*, 17 R. I. 3, 8 L. R. A. 469; *National Benefit Co.* v. *Union Hospital Co.* 45 Minn. 272, 11 L. R. A. 437; *Beal* v. *Chase*, 31 Mich. 490; *Tallis* v. *Tallis*, 1 El. & Bl. 391, 18 Eng. L. & Eq. 151; *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; 10 Am. & Eng. Enc. Law, p. 947, note; 3 Am. & Eng. Enc. Law, p. 885, note; *Gibbs* v. *Consolidated Gas Co.* 130 U. S 396 32 L. ed. 979. Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right to compete has been held good in one or more instances where it extended throughout the world, and in other cases where it applied to a state, or to a boundary including several states. In *Nordenfelt* v. *Maxim Nordenfelt Guns & A. Co. supra*, the plaintiff had covenanted with the respondent company "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company." On appeal to the House of Lords the case of *Horner* v. *Graves*, 7 Bing. 743, was cited, and the validity of such contracts was declared to depend upon the question "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." Lord Herschell, L. C. said further: "'Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable.' The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held to be too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in some cases be requisite and justifiable." In *Beal* v. *Chase*, 31 Mich., at page 530, Judge Campbell quotes with approval the language of Chief Justice Chapman in *Morse Twist Drill Mach. Co.* v. *Morse*, 103 Mass. 77, 4 Am. Rep. 513, where he said: "In this country there are periodical publications that have a very wide circulation, and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value, unless he can obtain from the vendor a valid restriction against competition, which restriction shall be as extensive as his interest requires, though it may cover the whole of a state, or the whole country. The same would be true as to some books. For example, the author of a popular school book could not sell its proprietorship for its full value, unless he could bind himself not to prepare another book which should be used in competition with it."

The rule which concedes the right to make the area in which the vendor is to be restricted from competition as broad as is necessary to afford ample protection to the purchaser is subject to the qualification that no agreement will be upheld which is injurious to the public interest. *Nordenfelt's Case* [1894] A. C., at page 549. There are two familiar classes of contracts that will in no event be enforced, because contrary to public policy, and these constitute exceptions to the general rule governing sales of the right of competition: (1) A quasi-public corporation cannot disable itself by contract from performing the public duties which it has undertaken to discharge in consideration of the privileges granted to it. *Logan* v. *North Carolina R. Co.* 116 N. C. 940; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 410, 32 L. ed. 984. (2) Any agreement in contravention of the common or statute law generally, or any combination among those engaged in a business impressed with a public or quasi-public character, which is manifestly prejudicial to the public interest, is void as against public policy; and, upon the same principle, no agreement tending to create a monopoly, or designed to utterly destroy fair competition amongst public carriers, will be enforced. *State, Atty. Gen.*, v. *Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145; *Emery* v. *Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, and note; *Hooker* v. *Vandewater*, 4 Denio, 349, 47 Am. Dec. 258. But the contract of which the plaintiff claims the benefit, as assignee through John Jenkins, is one which in no way affects the public, unless it unreasonably deprives the people of the state of the benefit of the industry of the defendants, or unnecessarily precludes them from supporting their family by pursuing their occupation. *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall., at page 68, 22 L. ed. 318. The stipulation was that the defendant Fairbrother "would not edit, print, or conduct a newspaper or magazine, nor be in any wise connected with one printed anywhere in the state of North Carolina, and that for a like period Mrs. Fairbrother shall not edit, print, or conduct a newspaper or magazine, nor be in any wise connected with one, anywhere in the county of Durham, said state, without the consent of said purchaser or his assignees." This contract was assigned to Watts and Duke by Jenkins, and the assignees who own the property have leased to the plaintiff, Cowan, who is now publishing the Globe newspaper, and seeks to enjoin the defendant Al. Fairbrother and the other defendant from publishing another newspaper in Durham, as it is conceded they purpose to do if the court should not interfere. Since the use of steam, space has been, in a measure, annihilated; and it is a fact, of which the courts may take notice, that a newspaper may be carried by mail to the most remote parts of the state within from twenty four to forty-eight hours. So that, if there has ever been a time in the history of the state when an editor could not acquire a repu-

tation for excellence in some particular line of that business which would enable him to give a paper with which he might be connected popularity throughout its limits, there is no reason to doubt now that one who would rid himself of a competitor in that business is not describing an unreasonable boundary when he extends the restriction against competition to the state lines. No better proof of that fact could be adduced than is set forth in the uncontradicted affidavits of the defendants themselves,—that they injured their successor, John Jenkins, in the conduct of the Durham Globe, after the contract was entered into, by publishing a paper in Lynchburg, Va. If the right to compete for popularity as an editor may become valuable, and pass by a contract of sale, like the goodwill of a newspaper, it follows necessarily, as a logical sequence, that the purchaser may sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the transaction would be held valid for the same reason that renders the original sale enforceable. 3 Am. & Eng. Enc. Law, p. 885, and note, with authorities collected; *Beal* v. *Chase, supra; Perkins* v. *Clay*, 54 N. H. 518; *Hedge* v. *Lowe*, 47 Iowa, 137; *Gompers* v. *Rochester*, 56 Pa. 194. It is settled law that such contracts in restraint of trade as are valid may be enforced in equity, like other contracts, and that breaches of them will be restrained by injunction, on the ground that no other remedy is adequate. 3 Am. & Eng. Enc. Law, p. 885, and note; *Thompson* v. *Andrus*, 73 Mich. 557. A covenant on the part of a publisher not to publish a paper is considered in the same light as a contract to sell a particular business, or the right to practice a profession in a given area, and courts of equity will interpose in order to prevent a violation of the one as well as of the other. 10 Am. & Eng. Enc. Law, p. 947, note.

The plaintiff's lessors swear that they had never abandoned at any time the purpose to continue the publication of the newspaper, and that during the suspension they kept up continual negotiations with that end in view. They say, further, that the suspension was prolonged by giving an option to one with whom they had good reason to expect they might conclude a contract to again issue it regularly. A review of all the cases where it has been held that parties have abandoned rights will furnish no analogy to support the contention that the benefit of a contract like that which is the subject of the action must be deemed in law abandoned for failure to find a suitable editor for so short a time, especially where it appeared that reasonably diligent efforts were being made to have the business continued. The concealment by Jenkins of the fact that he was buying for another was not *per se* a fraudulent act, and there is no allegation on the part of defendants that he practiced any fraud upon them. Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take title in his own name. If the defendants had set up a state of facts which in law amounted to fraud, and had asked the court to rescind the contract upon the principle that he who asks equity must do equity, they would have been required to offer to return the money received. In order to avail themselves of that remedy, they should have brought suit to set aside the agreement upon the discovery of the fraud, if there was fraud, and should have offered to place the purchasers *in statu quo*. *California Steam Nav. Co.* v. *Wright*, 8 Cal. 585, 592.

It is contended for defendants that the contract is illegal and void because it is in contravention of the provision of the Constitution (art. 1, § 20) which guarantees the freedom of the press. When the framers of our Constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical exertions, had become his property. This right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to protect others from libel and slander. In its broadest sense, "freedom of the press" includes, not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion. Black, Const. Law, pp. 472, 473; Cooley, Const. Lim. pp. 517, 518; Ordronaux, Constitutional Legislation, pp. 236 *et seq.*; 3 Story, Const. p. 731.

An indefinite number of authorities might be added to show the universal interpretation placed upon the provision in the Constitution of the United States that the freedom of the press shall not be abridged, and upon similar clauses in state constitutions. It has never been held anywhere that these provisions could be made engines of oppression, by construing them as restrictions upon the right to sell anything of value that is the creature of one's brain, provided society would not be made to suffer by the transaction.

Upon a review of all of the assignments, we discover no error in the rulings below, and *the judgment is therefore affirmed.*

INDIANA SUPREME COURT.

Hiram C. DAUGHERTY, *Appt.*,
v.
Adam HERZOG.

(.....Ind.....)

Negligence of a contractor in reconstructing a building will not render him liable to a third person who is injured in consequence thereof after the work has been completed and accepted by the owner of the building.

(June 10, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Tippecanoe County in favor of defendant in an action brought to recover damages for the death of plaintiff's daughter by reason of the fall of defendant's building. *Affirmed.*

The facts are stated in the opinion.

Messrs. **C. E. Lake, William B. Wood,** and **George P. Haywood** for appellant.

Mr. **R. P. Davidson** for appellee.

Monks, Ch. J., delivered the opinion of the court:

While passing along a sidewalk on Main street, in the city of Lafayette, appellant's daughter was killed by the falling of the front wall of a building which stood upon the street line, adjacent to the sidewalk. This action was brought by appellant against appellee to recover damages for loss of services occasioned by her death. Appellee's demurrer was sustained to each paragraph of complaint, and, appellant refusing to plead further, judgment was rendered for appellee. The facts alleged, essential to the decision of the question presented, are as follows: One O'Ferrall for many years had been the owner of the three-story brick building, on the north line of Main street, which caused the accident, consisting of two ground floor business rooms, one of which was occupied by one Lohman as a drug store. The other room becoming vacant, Lohman desired it also, and wished the two rooms thrown into one, by the removal of the partition brick wall. To this O'Ferrall consented, and thereupon O'Ferrall or Lohman, or both, employed the defendant, Herzog, this appellee, who was a builder and contractor, by an independent contract, to remove the wall and remodel the building to Lohman's wishes. This work he completed, and turned the building over to Lohman, who recccupied it as a drug store from 1890 until 1892, when the disaster occurred which took the life of the appellant's daughter. It is alleged that the appellee did his work unskilfully and defectively, put in iron posts not sufficiently secured upon the under wall, and did not sufficiently fasten and tie together the iron or steel beams resting on the tops of these posts, and in some other respects negligently did his work, and that, because of this negligent and imperfect reconstruction of the building, it fell. The only error assigned calls in question the action of the trial court in sustaining the demurrer to the complaint.

The rule is that an action for negligence will not lie unless the defendant was under some duty to the injured party, at the time and place where the injury occurred, which he has omitted to perform. *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221, 222, 50 Am. Rep. 783; *Indianapolis* v. *Emmelman*, 108 Ind. 530, 532, and cases cited; *Faris* v. *Hoberg*, 134 Ind. 269, 274; *Louisville, N. A. & C. R. Co.* v. *Treadway*, 142 Ind., on pages 485 and 486. If appellee failed to repair the building in conformity with his contract, he was liable to respond in damages therefor to the other contracting party. But is he also liable to appellant for the injury to his daughter, sustained on account of the defective construction alleged, when neither appellant nor his daughter were parties to the contract? Appellee was not liable under the contract, for the reason that such liability could only exist between the contracting parties. If liable at all, it can only be for the violation of some duty. *Faris* v. *Hoberg, supra; Evansville & T. H. R. Co.* v. *Griffin, supra;* Shearm. & Redf. Neg. § 8. The only person to whom appellee owed any particular duty was the one with whom he contracted. *State, Travelers' Ins. Co.*, v. *Harris*, 89 Ind. 363, 365, 366, 46 Am. Rep. 169. Appellee was not in possession of the building. The repairs had been completed and accepted long before appellant's daughter was injured. The rule in this class of cases is thus stated in Wharton on Negligence, 2d ed. § 439: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition, between the negligence and the hurt, of any independent human agency. Thus, a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end to suits. But a better ground is, that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent responsible agent, breaking the causal connection. In *Winterbottom* v. *Wright*, 10 Mees. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with the postmaster general; and that, because of its defective construction, plaintiff sustained an injury. And the court denied a recovery upon the ground that the

NOTE.—For liability of contractor to third persons for defects in his work after its completion and acceptance, see *note* to First Presby. Cong. v. Smith (Pa.) 26 L. R. A. 504.

coach maker owed plaintiff no duty. Lord Abinger, in the course of his opinion, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." To the same effect was the statement of Justice Clifford in *National Sav. Bank* v. *Ward*, 100 U. S. 195, 25 L. ed. 621, that "there would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect." In *Losee* v. *Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer and builder of a steam boiler is only liable to the purchaser for defective materials, or for any want of care or skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs, in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, on account of such injury, against the manufacturer. In *Dale* v. *Grant*, 34 N. J. L. 142, it was held that an action would not lie in favor of a customer against a wrongdoer who stopped the machinery of a manufactory, and prevented the proprietor from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: "But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs who have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*." The cases of *Winterbottom* v. *Wright*, *Dale* v. *Grant*, and *Losee* v. *Clure*, *supra*,—were cited with approval by this court in *Hoosier Stone Co.* v. *Louisville, N. A. & C. R. Co.* 131 Ind. 575, and *State, Travelers' Ins. Co.*, v. *Harris*, 89 Ind. 363, 46 Am. Rep. 169. It was held in *Curtin* v. *Somerset*, 140 Pa. 70, 12 L. R. A. 322, that a contractor for the erection of an hotel building, who uses improper material in its construction, and in other respects departs from the specifications embodied in his contract, so that when the building is completed it is structurally weak and unsafe, by which an accident occurs after it is accepted and possession taken, is liable to the owner therefor, but not to a guest of the hotel for an injury caused to him by such defective construction. The court said: "In *Thomas* v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labeled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer. . . . If the contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned." In *Necker* v. *Harvey*, 49 Mich. 517, the defendant manufactured, and put up in the factory of a soap company, an elevator, under a contract that it would lift at least 2,000 pounds. The elevator fell, by reason of a defective shaft, in three days after it had been put in place, and injured a workman in the employ of the soap company. The court, by Cooley, J., said: "The statement of facts so far makes out no cause of action in favor of this plaintiff. It discloses a duty on the part of the defendant to construct an elevator which would lift 2,000 pounds; but the duty was to the soap company, and not to anybody else. Nothing is better settled than that an action will not lie in favor of any third party upon a breach of this duty." There is a class of cases, however, where the law imposes a duty to third persons, independent of the contract, as in sales of dangerous goods, poisonous drugs, or explosive oils. *Thomas* v. *Winchester*, *supra*; *Walton* v. *Booth*, 34 La. Ann. 913; *Callahan* v. *Warne*, 40 Mo. 131; *Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64; 2 Jaggard, Torts, § 261. In this class of cases the vendor owes a duty to the public, for the reason that the articles sold were necessarily and inherently dangerous to human life, and did not in any manner disclose their dangerous character. The cases cited by appellant fall within this class, and are therefore not in point. It is clear, we think, from the authorities, that a contractor, in a case like the one in hand, is not liable, for mere negligence, to a third party to whom he owed no duty. The conclusion we have reached is also fully sustained by *Heizer* v. *Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821, and cases cited in note 424, p. 908, 2 Jaggard, Torts.

Judgment affirmed.

Albert SMITH *et al.*, *Appts.*,
v.
Robert C. PEDIGO *et al.*

(.....Ind.....)

1. The majority of a church which has abandoned the religious faith on which the church was founded cannot hold the church property against the minority, which adheres to the original doctrines.

NOTE.—For division of church, see also Krecker v. Shirey (Pa.) 29 L. R. A. 476; Bear v. Heasley (Mich.) 24 L. R. A. 615; Philomath College v. Wyatt (Or.) 26 L. R. A. 68; Schlichter v. Keiter (Pa.) 22 L. R. A. 161, and Mt. Zion Baptist Church v. Whitmore (Iowa) 13 L. R. A. 198.

As to power of local church to withdraw from general body, see *note* to Fuchs v. Meisel (Mich.) 32 L. R. A. 92.

2. The excommunication by a majority faction of a church of the minority members who still adhere to the original faith and claim to be the church, cannot affect the rights of the minority to the church property.

3. The minority members of a church, acting in harmony with its ecclesiastical laws and adhering to the faith, constitute the church as against a majority which has departed from the faith.

4. The "means" doctrine, to the effect that conversions and salvation may be aided by the use of human means, is a departure from the faith of a "regular Baptist church," which is strongly Calvinistic.

5. Historical facts showing an irreconcilable conflict between Calvinistic and Arminian doctrines are within judicial notice.

6. An answer to a complaint by trustees of a church denying that they are trustees and averring that defendants instead are trustees, wherefore judgment is demanded for costs and all proper relief, does not raise an issue as to the legal election of the trustees.

(*Howard, J., dissents.*)

(June 17, 1896.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Boone County in favor of defendants in an action brought to recover possession of certain real estate. On petition for rehearing. *Rehearing denied.*

For former opinion see 19 L. R. A. 433.

McCabe, J., delivered the opinion of the court:

Appellees have presented what they call a "petition for a rehearing." It is, however, not a petition, measured by rule of this court No. 37. It is but an elaborate printed brief or argument of sixty-two closely-printed pages. The rule requires a petition "setting forth the cause for which the judgment is supposed to be erroneous." The same rule also requires a brief in support of the petition. We would be justified in disregarding the so-called "petition," but the importance of the questions involved induces us to carefully reconsider the questions discussed in such brief. The entire argument therein is confined to four propositions: (1) That the opinion is based on an incorrect statement of the facts established by the evidence, to the effect that the appellees and those represented by them had departed from the original faith upon which the church was founded; (2) that it was wholly immaterial if they had so departed so long as they constituted a majority of the membership of the church; (3) that appellants could not recover, because all their interest in the church property, and the interest of those they represent, had ceased, by reason of their expulsion from the church before the suit was brought; and (4) that they could not recover, even if all other questions of law and fact were decided in their favor, for the reason that appellants were not legally elected trustees, there being no vacancy in the offices of trustees of said church, and those electing them not being members of the church, by reason of such expulsion, and not being a majority of the church.

The leading case cited in support of the proposition that the majority of a church divided into two conflicting bodies may hold the church property, though such majority have abandoned the religious faith on which it is founded, is *Watson* v. *Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666. That was a case where the Third or Walnut Street Presbyterian Church, of Louisville, Ky., became divided into two conflicting bodies, each claiming to be the church, and each claiming the right to the control and possession of the church edifice and property. The case has no application here, because the division there did not arise out of any difference in religious faith or belief, nor was there any claim that either side had changed their religious belief from that on which the church was founded. But the division was solely on account of differences in political belief. One side adhered to the cause of the Union during the war of the rebellion, and the other side adhered to the cause of the rebellion. Appellees' counsel quote most of the following passage in the opinion in that case in support of their contention: "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members, or by such local organizations as it may have instituted for the purpose of ecclesiastical government and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it, in the hands of the church, than it is for the use of that congregation as a religious society. In such a case, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to use the property. If there be within the congregation officers in whom are vested the powers of church control, than those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This rule admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who, by regular succession and order constitute the church, because they have changed in some respect their views of religious truth." There was not only no case before the court of a church divided into two factions on account of one of them having abandoned the original faith on which it was founded, but the court was not speaking of such a case, nor a violation of a trust arising out of such a case by the use of the house

of worship by the departing majority. The existing religious opinions, the right of inquiry into which is denied in the opinion, have no reference to the original faith on which the church was founded, but have reference rather to the conflicting views of the two opposing bodies as to the Christian duty to adhere to the lawful government of the country in time of war of rebellion. There was no pretense that the original faith on which the church was founded, in that case, made any declaration on that subject. There are many differences of opinion as to religious duty and practice among the members of the same denomination, and even of the same church, upon which the confession of articles of faith are silent; for instance, the propriety of attending balls or dances, playing cards, washing each other's feet, maintaining musical instruments in public worship, and the like, which differences ordinarily furnish no ground for a charge of a desertion of faith. It was such differences that led to the separation of the Third or Walnut Street Church, in Louisville, and it was that class of differences the court had in mind in the use of the language above quoted. That it was not intended to apply the language to all cases is rendered clear by another passage in the opinion, which counsel did not quote, and make no mention of. It reads thus: "In such case if the trust is confined to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of a new and conflicting doctrine. A pious man, building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same. And though the task may be a delicate one, and a difficult one, it will be the duty of the court, in such cases, when the doctrine to be taught, or the form of worship to be used, is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust." Therefore that case not only does not lend any sanction to the appellees' contention, but is against it.

The next case cited by appellees' counsel in support of the proposition in question is *Keyser* v. *Stansifer*, 6 Ohio St. 363. That also was a suit for possession of a church-house property by Keyser and others, a small faction of a Baptist church who had separated themselves from the church about a matter that had nothing whatever to do with the original faith upon which the church was founded. And it was held, in accordance with the rule laid down in the last-mentioned case, that, in such a division of a church, the property, as in ordinary voluntary associations, is held at the will of the majority. The division in the Ohio case was caused by the church's excluding Keyser on charges preferred against him in the course of discipline for misconduct. He afterwards got another member, named Cox, and some married women, to join him to sue for the church edifice. The ground on which he and his associates claimed that they were the real church was that some time after Keyser had been excluded the church adopted new articles of faith, or a creed, and abolished the old. But there was no pretense that the church had abandoned the original doctrine or faith upon which it was founded. The division arose entirely out of the exclusion of Keyser from the church in the course of discipline, and had no reference to any change or departure by the majority from the original faith on which the church had been founded.

The next case cited in support of the right of the majority to rule in matters of this kind is *Shannon* v. *Frost*, 3 B. Mon. 253. Counsel complainingly remark that "this case was cited by appellees in their original brief, . . . but no mention is made of it in the opinion rendered herein. It did not receive the cold respect of a passing glance." Counsel must speak from actual knowledge, in making this charge. One of them happens to know that all his statements are true, except that that case was in the original brief, because he knows that that case was not cited in the original brief, but was cited on a separate piece of paper, filed nearly a month after the original brief was filed. That paper contained nothing else but a citation of that case, and was filed on the same day the opinion was handed down, and after the case had been decided. Then the writer of the opinion pasted that paper fast to appellees' original brief. He knows it was too late then to give the case even the cold respect of a passing glance, after the cause in which it was cited had been decided. However, this court is not bound to cite and comment on all cases cited by counsel. Such citations may not be worthy of such notice. But the case has not the slightest bearing on the question of the rights of the majority faction of a divided church, who have departed from the original faith on which the church was founded, as against a minority faction adhering to such faith. It would be very much in point if there had been a division of the church in that case on a difference of religious belief, but there was no such division in that case. In that case seven members of a Baptist church in Frankfort, Ky., were regularly excommunicated from the church, presumably for immoral conduct. The expelled members, associating themselves with some other persons professing the same religion, organized themselves into a separate community of professed Christians, and elected trustees, which election was ratified by the county court of Franklin county. Afterwards, insisting on their right to enjoy to some extent the house of worship built for, and still occupied by, the original church, they took possession, and made periodical uses of

it, without the consent and in defiance of the prohibition of the church. To settle the controversy the members of the original church sued to enjoin them. The defendants did not claim to own the church edifice, but claimed the right to use it a part of the time, under a statute of Kentucky. That statute provides for the election of trustees by religious societies, and, among other things, regulates the power and control by such trustees of the house of worship belonging to such church or society. It is also provided therein that in case of a division in any congregation or church, from any other cause than immorality of its members, the trustees are not to prevent either of the parties so divided from using the house or houses of worship for the purposes of devotion a part of the time, proportioned to the number of each party. It was under this provision that the defendants justified their attempted use of the house. There was no question of a difference of religious belief involved in the case between the two parties. The court of appeals held that the statute did not apply. The only other point decided was as to the legality of the election of the trustees by the plaintiffs constituting themselves into a new society. That point we shall notice further on.

The next case cited in support of the proposition in question is *Petty* v. *Tooker*, 21 N. Y. 267. That case does squarely hold that a religious society incorporated under the act of the legislature of 1813, in the state of New York, had power, through its trustees elected under that act, to change from a Congregational to a Presbyterian church, even over the protest of the minority of the members, and carry the church property with them. But that was owing to the peculiar provisions of the statute mentioned, and the peculiar construction placed upon it by the court of appeals of that state. Yet, at the same time, in cases of divided churches incorporated under previous statutes of that state, it was held uniformly by its courts, in harmony with all authority elsewhere, that a majority could not carry or divert the church property to a contrary doctrine and faith, against the objection of a minority of the membership of the church adhering to the original faith on which the church was founded. *Miller* v. *Gable*, 2 Denio, 492; *Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. 439. But that statute has been since modified, in a subsequent act of the legislature of that state. In *Isham* v. *First Presby. Church*, 63 How. Pr. 465, it was said: "As the act of 1813 has been construed, the members of the congregation of a religious corporation were, under its provisions, left at liberty to divert the church property from the dissemination of the views of the persons acquiring it to that of any other view, whether religious or secular, which might be sanctioned and adopted by a voting majority of the congregation (*Robertson* v. *Bullions*, 11 N. Y. 243; *Petty* v. *Tooker*, 21 N. Y. 267; *Burrel* v. *Associate Reformed Church*, 44 Barb. 283). This was an extreme construction of the terms in which the carefully guarded act of 1813 was enacted, and by chapter 79 of the Laws of 1875 the legislature undertook its correction, and for that purpose provided and declared that the trustees of a religious society incorporated under the act of 1813 should administer its temporalities, and hold its property and revenues for the benefit of the corporation, according to the discipline, rules, and usages of the denomination to which the corporation belongs. Laws 1875, p. 79, § 4. This enactment was preserved, and in terms extended, by chapter 176 of the Laws of 1876. The plain purpose of these acts was to abrogate the rule which had grown out of the preceding construction given to the act of 1813, and to deprive the congregation, as well as the trustees of the society, of the power afterwards to divert the church property from the promotion and dissemination of the religious views of the persons obtaining and acquiring it, to the promulgation and maintenance of any different systems of religious belief. Instead of holding the property subject simply to the disposition of the voting majority of the congregation, the trustees were henceforward required to hold and devote it to the uses and purposes of the denomination of Christians in which the society should be included that obtained and acquired it. . . . It was manifestly unjust to allow persons becoming members of a religious society, formed for the purpose of inculcating particular views, by their subsequent votes to appropriate the property they might have done nothing to acquire to the promotion of views of an entirely different character from those entertained by the persons through whose contributions the property may have been obtained. This was the practical abuse which the laws of 1875-76 were designed in the future to prevent, and they are required to be so construed as to carry that policy into effect." To the same effect are *First Reformed Presby. Church* v. *Bowden*, 10 Abb. N. C. 1, 14 Abb. N. C. 356; *Isham* v. *Fullager*, 14 Abb. N. C. 363; *Field* v. *Field*, 9 Wend. 395. It thus appears that *Petty* v. *Tooker*, *supra*, so confidently relied on for a rehearing, is no longer the law or authority either in or out of the state of New York.

Counsel for appellees cite and quote from *First Baptist Church* v. *Witherell*, 3 Paige, 296, 24 Am. Dec. 223, without definitely stating what point it is designed by it to support, the following passage: "All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves." If it is meant by this to support the proposition that the majority, departing from the faith, can hold the property against the minority, adhering thereto, in case of a division, the answer is that that case was one where the church was incorporated under the act of 1813, and like *Petty* v. *Tooker*, *supra*, was governed and controlled by that statute, and hence is no longer authority in the state of New York or elsewhere. But, if it was intended to support the proposition that the action of the judicatories of the Regular Baptist Church are absolutely binding upon the courts, then it is against the appellees, because the undisputed evidence shows that three several judicatories of that denomination had decided that appellees had departed from the faith, as expressed in the articles of faith adopted at the foundation of the church, though such decisions were only advisory.

And now, having examined all the cases cited in support of the proposition that the majority of a divided church may repudiate the original faith and hold the property, and having shown that those cases lend no support to such proposition whatever, and that there is no authority to that effect anywhere, we proceed to examine the third proposition, namely, whether the appellants, and those represented by them, ceased to have any interest in the church property by their alleged expulsion from the church. The case last referred to, together with *Lawyer* v. *Cipperly*, 7 Paige, 281, are both referred to as authority that appellants were no longer members of the church; but those cases do not lend any support to the proposition, nor to any proposition urged by counsel. The contention amounts to this: The church becoming divided into two factions on account of a difference in religious belief and faith, the majority being accused by a minority of departing from the original faith, they sit in judgment in their own case, and pass solemn judgment in their favor,—that they, being a majority, and hence the church, had a right to change the faith, and hence are not guilty of the charge. Appellees assume the position that the majority had the right to act as the judicatory for themselves, and pass solemn judgment upon their own acts, and adjudge that they are not guilty of a departure from the faith. And they condemn and exclude the minority from the church, and thus seek to preclude the civil courts from inquiring into the charge against them. And now they coolly ask this court to adjudge that their action while acting as judges in their own case shall be conclusive —not only on the opposite party, but conclusive on the courts as well—that the majority had not departed from the faith, and that the minority were out of the church, and could not raise the question of departure, and are not and were not members of the Regular Baptist Church of Mt. Tabor when the litigation begun. This, too, in the teeth of the decision of three of the church judicatories to the contrary. The language employed by the supreme court of Iowa in the case of *Mt. Zion Baptist Church* v. *Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, referred to in the original opinion, is so much in point here that we appropriate it: "The minority lay at the door of the majority the charge of heresy. The majority says: 'We constitute the church. All power is vested in the church, and hence in us. We determine that the charge is false.' This is the precise claim made by the appellees as to the power of a majority, and it is the precise action taken by the appellees, as a majority in Mt. Zion Baptist Church, after which the council was called, the action of which it would now repudiate. . . . The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of, and the widest departure from, the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it, where the result is to divert trust property from its proper channel." This position of appellees at once assumes the truth of the very proposition that is in dispute, namely, the claim that the majority faction is the real and true Mt. Tabor Regular Baptist Church. Having assumed that as a fact, they seek to prove it by showing that such majority has excluded the minority from the church, and then argue that the appellants, being such excluded minority, cannot raise the question as to the title to the church property, elect trustees, or dispute the claim of the majority that they are the church, because appellants, being such excommunicated minority, are no longer members of the church, and have no interest in the question as to who constitutes the church, or who owns the church property. The only thing that can rescue this claim from the charge of unmitigated assumption, pure and simple, is the contention that a majority faction of a church divided into two conflicting bodies on account of differences as to the standard of faith is the real and true church. That contention, we have seen, has no foundation in law or authority. To permit such majority, under such groundless assumption, to exclude or excommunicate the minority, who still adhere to the original faith, and claim to be the church, so as to affect property rights, would be a reproach to the law. It would be the law making the title to the property turn upon a mere trick. Such action is vastly different from the action of the church in excommunicating members before it had become divided into two conflicting bodies on account of such differences in religious belief. The minority that succeeded in the Iowa case referred to above had been excluded from the church by the majority because of their difference in religious belief from the majority, and yet the claim of the minority that it constituted the real Mt. Zion Baptist Church was sustained by the supreme court of Iowa. There were three churches in Wisconsin. The denominational name by which they were known was "Koshkonong's Lutheran Congregations in Dane and Jefferson Counties." The three churchs were served by one pastor. One was known by the name of the "Eastern Church," another by the name of the "Western Church," and the other by the name of the "Liberty Prairie Church." The three churches in many things acted jointly in their business affairs. Each one of the congregations became divided on the doctrine of election. The different factions in each congregation became known as "Missourians" and "Anti-Missourians." In an action by one faction against the pastor, representing the other, for the possession of the church property, the question of the validity of the exclusion of one faction by the other (being in the majority) became involved in the case; being the case of *West Koshkonong Cong.* v. *Ottesen*, 80 Wis. 62, referred to in the original opinion. The court there said: "But it is here objected that, even if a corporation was created by these proceedings, it was simply a corporation of the anti-Missourian faction, and did not represent nor succeed to the rights of the pre-existing voluntary organization known as

the 'Eastern Church'; in other words that the anti-Missourian faction had not only seceded from, but had been expelled from, the Eastern Church, and consequently could form no corporation which would include, or become the legal successor of, the voluntary organization known as the 'Eastern Church.' This objection demands careful consideration, because, if the anti Missourians were not members of the Eastern Congregation, they could not give the notice required by § 1990, Rev. Stat., nor execute the certificate required by the following section, which must be executed by members of the society. The question is, Were the members of the anti-Missourian minority still members of the Eastern Church? It is undeniably true that they were members of that church up to the time of the troubles in 1885 or 1886. Have they lost their membership since that time? Now, if they have lost their membership, it must be in one of two ways,—either by voluntary withdrawal, or by expulsion. . . . We cannot entertain for a moment the idea that the action of the Missourian faction in the Eastern Church in March, 1887, by which they attempted to declare the anti-Missourians as withdrawn or suspended from the church, has in fact affected the rights of the anti-Missourians in the least." The same legal principle, under like circumstances, is distinctly recognized in *Nance* v. *Busby*, 91 Tenn., at page 317, 15 L. R. A. 801.

This is sufficient to dispose of all the cases counsel cite in support of the proposition that civil courts are not authorized to determine whether the church judicatories decided right or wrong, and hence cannot, in this case, determine whether the minority was wrongfully or rightfully expelled from the church. They quote from *Shannon* v. *Frost*, *supra*, among others, the following passage: "We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church as no longer members of that church, or entitled to any rights or privileges incidental to or resulting from membership therein." They cite, as sustaining this proposition, *Chase* v. *Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *White Lick Quarterly Meeting of Friends* v. *White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Lamb* v. *Cain*, 129 Ind. 486, 14 L. R. A. 518, and *Bouldin* v. *Alexander*, 82 U. S. 15 Wall. 139, 21 L. ed. 71. There is no question but that the proposition stated is thoroughly settled law. But it is equally true that, in the case from which the proposition was quoted, there was no question made, and none arose or existed in the case, as to the authority of those that performed the act or adopted the resolution or order of expulsion. It was not denied that it was done by the church. There was no division of the church on account of differences in religious belief, and there was no division on any other account. Simply the church expelled seven members, and they, uniting with others, formed a new organization, and claimed the right to use the church house a part of the time, contending that they had been wrongfully expelled, but did not deny that the church had expelled them. But here it is denied that the expulsion was by the church. We agree that no judicial inquiry can be made as to whether the act of the church in expelling members is right or wrong, fair or unfair, so long as such act is in harmony with the law of the church. Nor can any such inquiry be allowed as to whether the laws, usages, practice, or faith of the church are right or wrong. That belongs to the exclusive province of the church to fix, order, and establish. And, when the church acts within its sphere or province, such act or acts are universally held binding and conclusive, not only upon the members of the church, but also on the secular or civil courts, even where the rights of property are involved, and are dependent upon the action, rules, or orders of the church. But it must be the act of the church, and not the act of persons who are not the church. In this case it was not denied that the church had become divided into two conflicting bodies,—the minority charging that the majority had departed from the standard of faith set up at the foundation of the church,—and that both factions were claiming to be the church, and both acting accordingly, when the expulsion took place. The evidence shows that each faction thus claiming to be the church expelled the other. How absurd it is, then, to say, as counsel do in this case, that there can be no inquiry, beyond the fact of expulsion, to determine whether appellants are still members of the church!

Appellees' proposition is that appellants are not members because they have been expelled by the church. It is not sufficient to make good this claim to prove the mere act of expulsion, because that only proves one part of the claim. The other part is that the act of expulsion was done by the church, not merely by persons claiming to be the church, but by those who were really and truly the church. If the evidence falls short of proving both parts of the claim, then the evidence does not prove the claim that appellants are not members of the church. It is conceded that they were members, unless the church has expelled them. The evidence showing that there were two conflicting bodies, each made up of members of this church; and each claiming to be the only real and true Mt. Tabor Regular Baptist Church, and each of such bodies having expelled all the members of the other from that church, as shown by the evidence, it inevitably follows that the court must judicially investigate the question which of the two conflicting bodies is the real and true church, before it can determine that any body has been expelled therefrom, and ceased to be a member or members thereof. When such investigation results in establishing that one of these bodies is the real church, that ends the whole controversy in this case, without any inquiry about expulsions. That is so because the expulsions occurred after the division. Appellees' counsel, with tireless ingenuity, put the cart before the horse by first attempting to show that appellants were expelled, in order to reach a resting ground for the claim that appellees, and those represented by them, are the church. But no rational man can say that either of the expul-

sions mentioned have changed the relations of either body to the church, unless such expulsion was the act of the church. It was quite unnecessary for appellees' counsel to resort to or rely on the act of expulsion, if their other oft-repeated claim was well founded, namely, that the majority of a church divided on account of religious differences is the church. It is conceded that the church was so divided, each of the two bodies claiming to be the only true and real Mt. Tabor Regular Baptist Church. Both claims cannot be admitted. Hence judicial investigation must inevitably be resorted to, to ascertain which is the true church, and expulsions since the separation by either side can throw no light upon that investigation. What is the touchstone that tests which of the conflicting claimants is the true Mt. Tabor Regular Baptist Church? This court, in *White Lick Quarterly Meeting of Friends* v. *White Lick Quarterly Meeting of Friends*, in 89 Ind. 136, furnished an answer. It is there said: "The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, principles, and practices, which were accepted and adopted by the church before the division took place, constitute the standard for determining which of the contesting parties is in the right. *Watson* v. *Jones*, *supra*; *McGinnis* v. *Watson*, 41 Pa. 9; *Winebrenner* v. *Golder*, 43 Pa. 244; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Roshi's Appeal*, 69 Pa. 462, 8 Am. Rep. 275." And again, in *Lamb* v. *Cain*, 129 Ind., at page 510, 14 L. R. A. 518, this court further answered the question thus: "Where it is alleged, in a cause properly pending, that property thus dedicated is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, however delicate and difficult it may be, it is the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance with that intended as to defeat the objects of the trust, and, if the charge is found true, to make such orders in the premises as will secure a faithful execution of the trust confided. *Watson* v. *Jones*, *supra*; *Miller* v. *Gable*, 2 Denio, 492; *Atty. Gen.* v. *Pearson*, 3 Meriv. 353; *Watkins* v. *Wilcox*, 66 N. Y. 654; *Atty. Gen.*, *Abbott*, v. *Dublin*, 38 N. H. 459; *Happy* v. *Morton*, 33 Ill. 398; *Fadness* v. *Braunborg*, 73 Wis. 257." The rule as stated by the supreme court of Illinois in *Ferraria* v. *Vasconcellos*, 31 Ill. 54, 55, and recognized by a great many decisions in courts of last resort in other states, is as follows: "As a matter of law, as I understand the decisions, the rule is that where a church is erected for the use of a particular denomination or religious persuasion, a majority of the members of the church cannot abandon the tenets and doctrine of the denomination and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if but a single member adheres to the original faith and doctrine of the church. This rule is founded in reason and justice, and is not departed from in this case. Church property is rarely paid for by those alone who there worship, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship, or to promote the promulgation or teachings of particular doctrines or tenets of religion, which, in their estimation, tend most to the salvation of souls; and to pervert the property to another purpose is an injustice of the same character as the application of other trust property to purposes other than those designed by the donor. Hence it is that those who adhere to the original tenets and doctrines for the promulgation of which a church has been erected are the sole beneficiaries designed by the donors, and those who depart from and abandon these tenets and doctrines cease to be beneficiaries, and forfeit all claim to the title and use of such property. These are the principles on which all these decisions are founded, and, so long as we keep these principles distinctly in view, we can have no great difficulty in applying them to the facts of each particular case. . . ." The same rule was stated by the supreme court of Iowa in *Mt. Zion Baptist Church* v. *Whitmore*, *supra*, as follows: "Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is by said church or association held in trust for that purpose, and any member of the church or association less than the whole, may not divert it therefrom." Accordingly, it was said by Sharswood, J., speaking for the supreme court of Pennsylvania in *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415, cited in the original opinion, that, "in church organizations those who adhere and submit to the regular order of the church, . . . though a minority, are the true congregation and corporation, if incorporated." Chief Justice Shaw, speaking for the supreme court of Massachusetts in a similar case (*Stebbins* v. *Jennings*, 10 Pick., at page 181), said: "That an adhering minority of a local or territorial parish, and not a seceding majority, constitutes the church of such parish, to all civil purposes, was fully settled in the case of *Baker* v. *Fales*, 16 Mass. 503, and *Deacons of First Church of Sandwich* v. *Tilden*, Id. note, there cited." To the same effect is *Roshi's Appeal*, *supra*, and many other cases too numerous to cite. Therefore it follows that if the minority were acting in harmony with the ecclesiastical laws of the church, and were adhering to the faith, and the majority were not, the minority, in law, was the real and true Mt. Tabor Regular Baptist Church. In one of the very cases relied upon by appellee's counsel (*Bouldin* v. *Alexander*, 82 U. S. 15 Wall., at pages 139, 140, 21 L. ed. 71, 72), the Supreme Court of the United States said: "It may be conceded that we have no power to revise or question ordinary acts of church discipline, or excision from membership. We have only to do with rights of property. As was said in *Shannon* v. *Frost*, 3 B. Mon. 253, we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the act of the

church, or of persons who were not the church, and who consequently had no right to excommunicate others."

It follows, as conclusively as that two and two make four, that appellants, and those acting with them, did not cease to be members of the church by the act of the majority in expelling them, if we were right, in the original opinion, in holding that such majority had departed from the chosen faith declared in the articles of faith adopted at the foundation of the church, and were teaching doctrines contrary thereto, because the unbroken line of judicial authority everywhere, as we have seen, declares the law to be, in such case, that such majority were not the real and true Mt. Tabor Regular Baptist Church, and could not expel anybody from it, but that the minority, represented by the appellants, were that church, because they were acting, as we there held, in accordance with the law of the church, in adhering to the faith, and teaching the doctrines expressed in such articles of faith.

This brings us, in the natural order, to the first proposition on which a rehearing is asked, namely, that our former conclusion that the evidence shows such departure from the faith by the appellees, and those represented by them, the majority, is based on an incorrect statement of the facts established by the evidence. The conflicting doctrines held by the two bodies are known as the "means doctrine," held to by the majority, and the "anti-means doctrine," held to by the minority. The epitome of the two doctrines may be stated thus: The "anti-means" doctrine is a belief and faith that conversions of sinners to Christianity, and the salvation of human souls, is not, and cannot be, brought about or aided by any human means or effort whatever, but that the same must be, and is, wholly and entirely the work of the Lord. The "means doctrine" is a belief and faith in the exact opposite,—that such conversions and salvation may be aided by the use of human means. There is no controversy about the meaning of the two terms, "means" and "anti-means," nor as to the conflicting beliefs, as above expressed; but the strange charge is now made that the "anti-means" party are the ones that have departed from the faith, and that the "means doctrine" was the original doctrine of the church. And, out of the vast volume of about 600 pages of evidence, appellees' learned counsel are only able to point to these lines in evidence, as establishing that fact, in the testimony of Elder Shirley, to wit: "It [Mt. Tabor Church] has always been 'means' since my knowledge of it. So far as I know of its church history, it has been 'means' since the beginning of its constitution." Counsel say of this evidence that "on the other hand, the appellants did not introduce a single witness to contradict the testimony of Elder Shirley on that proposition, or prove that Mt. Tabor Church was, or ever had been, 'anti-means,' in its doctrines or teachings, and not a single witness so testified. In the evidence of all the witnesses examined during the protracted trial of this case, there was not a word from any one of them to sustain the assumption on which this opinion is predicated,—that the 'means' party had departed from the faith on which Mt. Tabor Church was constituted." This sweeping and startling declaration is made in defiance of, and by ignoring, the conclusive documentary and other evidence adduced. It treats the articles of faith put in evidence as having no force, and it ignores the evidence of the solemn decisions of two councils of the churches, and the decision of the Danville Association, that the majority or 'means' party had departed from the faith, as expressed in the articles of faith, and that the "anti-means" party, the minority, were still adhering to that faith, and were the real and true and only Mt. Tabor Regular Baptist Church. It is true, the decisions of these three ecclesiastical tribunals, recognized judicatories of that church, were not conclusive on the parties, according to the governmental policy of the church, but advisory only; but nevertheless, as was said by the Supreme Court of the United States in *Bouldin* v. *Alexander*, *supra*, such decisions "are persuasive evidence" of the facts thus decided. And here, we notice, counsel urged that appellants relied hitherto on the theory that the decision of the Danville Association was conclusive evidence of such departure; and we having decided that it was not conclusive, but advisory only, appellants, it is contended, must succeed on that theory, or fail. The theory on which the appeal was sought to be maintained is that the finding was contrary to law, in that it was contrary to the evidence. Appellants' contention that the decision of the Danville Association was conclusive evidence of the charge of departure was not inconsistent with the specification in the motion for a new trial that the finding was contrary to the law and the evidence in the case. It was not essential to that theory that the evidence, or one item of it, should be conclusive against appellees; but it was a sufficient maintenance thereof that the finding was contrary to the evidence, without showing that any particular item of it was conclusive of the fact it tended to prove. Two of the articles of faith read thus: "Fourth. We believe in the election by grace according as He has chosen us in Him before the foundation of the world, that we should be holy and without blame before Him, in love, having predestinated us to the adoption of children by Jesus Christ, to crown us according to the good pleasure of His will. Fifth. We believe that sinners are justified by the righteousness of God which is in Christ Jesus imputed to them by divine and supernatural operation of the spirit of God, and that they are kept by the power of God through unto salvation." In all this long controversy, it has never been hinted by a single witness that this declaration of faith was consistent with the "means" doctrine; nor have counsel for appellees, in all their long and earnest argument, either on the original hearing or on this petition for rehearing, claimed that the decisions by the three several judicatories of the church had wrongly construed the articles of faith to be in conflict with the "means doctrine." Nor is there a scintilla of evidence that there was ever but the one construction put upon this declaration of faith. What, then, was this long protracted hearing of evidence about,—occupying about ten days,—if the item of evidence

we have quoted was uncontradicted? Why, it was all, except that item, devoted to an effort on the part of appellees to prove that the majority in a church with a congregational form of government, as here, could change at pleasure their standard of faith. Hence it was that the discussion of the item of evidence in question in appellees' original brief occupied only two lines, and in the present brief, of over sixty pages, only a little over a page is devoted to this item of evidence. The whole evidence proceeded on the theory of a conceded departure in faith by the majority, and an attempted justification thereof on the ground that the majority had the right to change or alter the faith and doctrine of the church, unless the item of evidence in question can be construed as a denial of such departure by the majority. That theory still occupies all of appellees' elaborate brief, except a page or two. But there is still another item of evidence, of a very vital and controlling character, that counsel ignore; and that is that the church record put in evidence shows that when the church was organized it was named a "Regular Baptist Church," and its denominational name has never been changed. No principle is better settled than that property conveyed to trustees for the use of a church by its denominational name, as was the case here, creates a trust for the promulgation of the tenets and doctrines of that denomination. *Hale* v. *Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Ferraria* v. *Vasconcellos*, *Kniskern* v. *Lutheran Churches*, *First Reformed Presby. Church* v. *Bowden*, and *Miller* v. *Gable*, *supra*. History records that one of the denominations or sects known as the "Baptists" is what is known and called "Regular Baptists." History says that they are strongly Calvinistic in doctrine. 1 American Church History, p. 19. A summary of their articles of faith by the same history is stated as follows: "Articles 1 and 2 state the doctrine of the Trinity and accept the Old and New Testament as the Word of God and only rule of faith and practice. Article 3 declares that God chose his people in Christ Jesus before the foundation of the world, 'and predestinated them unto the adoption of children;' article 4, that man is a sinner, and consequently in a lost condition; article 5, that he has no power, of his own free will, and ability to recover himself from his fallen state; article 6, that sinners are justified in the sight of God only by the righteousness of Jesus Christ; article 7, that the elect are 'called and regenerated by the Holy Spirit, through the Gospel;' article 8, that nothing can separate true believers from the love of God and that they shall be kept by the power of God through faith unto salvation." Id. (1893) p. 21. This is Calvinistic doctrine, and corresponds exactly to the doctrine designated in the evidence as "anti-means doctrine." Tylor, Ecclesiastical Law, §§ 830, 831. The doctrine designated in the evidence as the "means doctrine" corresponds exactly to what is known as "Arminian doctrine." *Ibid.* These two doctrines, in the light of historical facts of which courts take notice, are recognized as in irreconcilable conflict in *Miller* v. *Gable*, *supra*.

But there is another item of vital and controlling evidence which counsel ignore. It is evidence which shows that appellees, and the majority acting with and represented by them, construed the articles of faith and the denominational tenets of the Regular Baptist Church to be in conflict with the "means doctrine" just as the two councils and the association had. After a two years struggle by the contending factions seeking recognition and admission to the Danville Association, to which the church belonged, and each claiming that it was the only true Mt. Tabor Regular Baptist Church, the majority party was disowned and refused admittance because of such departure from the faith and the minority party received and recognized as the church. The majority party went home and organized a new association, and after grave deliberation they named it the "Mount Tabor Means Baptist Association." Thus it will be seen that the denominational name of "Regular Baptist" was changed by dropping out the word "Regular," which distinguishes that denomination of Baptists in the United States from twelve or thirteen other denominations of Baptists, and in the place of the word "Regular" they substituted the word "Means." 1 American Church History, p. 18. There is no such church known to history as "Means Baptists." If the church was and always had been a "means" church,—if the denominational faith and belief was in the "means" doctrine,—then the denominational name of "Regular Baptists" carried that idea with it, and there was no cause for changing it. As was said in *Hale* v. *Everett*, *supra*: "A society which should take for its name 'The First Society of Roman Catholics in C,' or 'The First Society of Presbyterians in C,' or 'The First Society of Quakers in C,' would be understood as made up of persons of the sect which the name of the society indicated; and if a donation of a church had been made to certain persons, . . . to be forever subject to the control of the First Society of Roman Catholics in C, . . . the trust would have been held to be subject to the control of such of the society, and such only, as adhered to the fundamental doctrines of the society as indicated by the name, even though they might be a minority of those who at first were numbered among its members." By dropping out the very word, and the only word, from the denominational name that distinguished the denomination from twelve or thirteen other sects of Baptists, and substituting in its place the word "Means," about which the whole trouble had arisen, is an act that as plainly construes the articles of faith and the tenets of the denomination to be in conflict with the "means" doctrine as any act could be on the part of the majority. If the "means" doctrine was taught in the articles of faith,—if it belongs to the tenets of the denomination—the majority would have refused, to the last, to change the name. This change was a frank confession on the part of the majority at a time, perhaps, when the uppermost thought in their minds was to express their belief that the denominational name, "Regular Baptist Church," did not carry with it a correct expression of their religious faith and belief, and that the articles of faith did not do so. And the act of the minority in adhering to the old name is equally significant. Thus it is that the majority, represented by the ap-

pellees, have, by an unequivocal act, placed the same construction upon the articles of faith and the tenets of the denomination that the minority, the two councils, and the association have, in deciding that the "means" doctrine is a departure from the faith as expressed in the articles of faith. And the civil courts accept the construction placed upon the ecclesiastical laws of an ecclesiastical body by such body as binding on the civil courts. *Lamb* v. *Cain*, *White Lick Quarterly Meeting of Friends* v. *White Lick Quarterly Meeting of Friends*, and *Mt. Zion Baptist Church* v. *Whitmore*, *supra*. Here both the conflicting bodies, as well as the ecclesiastical court of the denomination, have so construed the articles of faith and the denominational tenets as to hold, impliedly at least, that the "means" doctrine is a departure therefrom. That construction is binding on this court. The articles of faith, being a solemn written compact, are conclusive on the question of faith. If the item of testimony quoted from Elder Shirley was in conflict with the articles of faith, thus construed, his testimony being oral only, it cannot be considered in opposition to the written compact. *Robinson* v. *Snyder*, 97 Ind. 60, 61; *Oiler* v. *Bodkey*, 17 Ind. 602; *Symmes* v. *Brown*, 13 Ind. 320–322. But aside from that, his testimony, when examined, may be harmonized with all the other evidence, which it is the duty of the court or jury to do, if that can be reasonably done. He was speaking from his standpoint. He and all the witnesses on that side were testifying that the majority constituted the church,—as the learned counsel have, in the brief on this petition, repeated nearly fifty times, that the majority is the church, and the church is the majority. He said, "So far as I know of its church history, it has been 'means' since the beginning, in its constitution;" that is, according to all the witnesses on that side the majority is the church. Therefore he means that the majority, so far as he knows, believes in the "means" doctrine. That fact was not denied. How it was at the constitution of the church, he does not state. What did he know? He was speaking more than fifty years after the church was founded, and only spoke so far as he knew. He testified that he was but a boy in 1859, which was twenty-four years after the church was founded. He did not profess to know what the original faith was on which the church was constituted. Such testimony, it has been held, affords no information as to what the original faith was on which the church was founded, and the faith at that time is the vital and turning point. *Kniskern* v. *Lutheran Churches*, and *Roshi's Appeal*, *supra*. So that there is really no conflict between the item of testimony in question and the articles of faith, and other evidence as to what the original faith of the church was; but, if there was such conflict, the solemn written compact must be held conclusive.

The fourth and last proposition made is that appellants were not legally elected trustees by the minority, because there was no vacancy in such offices, and that a minority could not elect, and hence appellants could not maintain this suit. In *Schnorr's Appeal*, *supra*, Sharswood, J., speaking for the court, said: "The corporation or society are trustees, and can no more divert the property from the use to which it was originally dedicated, than any other trustees can. If they should undertake to divert the funds, equity will raise some other trustee to administer them, and apply them according to the intention of the original donors or subscribers." That was a case where both factions, as here, had elected trustees. To the same effect are several of the cases cited in this and the original opinion. But there is another, and perhaps a more conclusive, reason why the legality of the election of the appellees in this case is not to be considered; and that is that there was no issue under which the authority of the appellants, as trustees, to sue, could be inquired into. The complaint shows on its face that appellants sued in their capacity as trustees of Mt. Tabor Regular Baptist Church. The only answer to the complaint reads thus: "The defendants in the above case, for answer, say that the said Albert Smith, Samuel Schenck, and Thomas Shepherd are not the trustees of the Mt. Tabor Regular Baptist Church, and were not at the time of the commencement of this action; that the defendants Robert G. Pedigo, Preston Smith, and Levi Shirley are the trustees of said church and corporation, and were so at the time of the commencement of this suit; and the said defendants deny each and every allegation in said complaint contained. Wherefore they demand judgment for costs and all proper relief." This answer was verified. But it was a palpable attempt to defeat the merits by dilatory matter in abatement that has nothing to do with the merits, by commingling them together. They sought to try the merits under cover of matter in abatement, and, failing in their defense on the merits, fall back on the matter in abatement, and insist, not on abating the suit, but on a finding and judgment in their favor on the merits. The common law would not permit this to be done, and for a long time our Code was construed not to have changed the common law in this respect, but it was afterwards construed to have modified the common law so as to allow matter in abatement and in bar to be pleaded together in the same answer. But immediately thereafter the legislature enacted the following: "Pleadings denying the jurisdiction of the court, or in abatement of the action, and all dilatory pleadings, must be supported by affidavit. The character or capacity in which a party sues or is sued and the authority by virtue of which he sues, shall require no proof on the trial of the cause, unless such character, capacity, or authority be denied by a pleading under oath, or affidavit filed therewith. An answer in abatement must precede, and cannot be pleaded with, an answer in bar, and the issue thereon must be tried first and separately. If the issue be found against the answer, the judgment must be that the party plead over, and for all costs of the action up to that time." Rev. Stat. 1894, § 368 (Rev. Stat. 1881, § 365). It was held before the enactment of this statute that the authority of a party to sue could only be put in issue by a plea in abatement verified. *Nolte* v. *Libbert*, 34 Ind. 163. It has also been held by this court that at common law, as well as under this provision of the Code, matter in abatement must precede, and cannot be pleaded

with, matter in bar. *Field* v. *Malone*, 102 Ind. 251; *Driggins* v. *Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Moore* v. *Harmon*, 142 Ind. 555. It was frequently held, prior to the enactment of the provision of the Code above quoted, that a plea in abatement along with one in bar is a waiver of the matter in abatement, and that such matter in abatement cannot be considered by the court. *Kenyon* v. *Williams*, 19 Ind. 46, 47; *Jones* v. *Cincinnati Type Foundry Co.* 14 Ind. 90 92; *Keller* v. *Miller*, 17 Ind. 207. And since that enactment the same rule was applied in *Field* v. *Malone*, 102 Ind., at pages 256, 257, where this court said: "The appellee insists that the plea in abatement, having been filed with the general denial, and forming the second paragraph of the same answer, cannot be considered. . . . And this unquestionably was the rule under the common law, and is the rule under the present Code." The answer here did not ask to abate the action, but asked judgment on the merits for the defendants. Therefore, under the statute and the previous decisions of this court, the matter in abatement was waived, thus making it wholly unnecessary to prove the character or capacity in which appellants sued.

Petition overruled.

Howard, J., dissenting:

With the greater part of the original opinion in this case, as well as of the principal opinion on the petition for a rehearing, I fully concur. There can be no question that those who retain the original faith of a church or congregation are entitled to retain also the property acquired by, or given to, such church or congregation. Those who fall away from the original faith, whether the majority or the minority, can have no right to take with them any of the property of the church. The property having been given to the church, or acquired by it, for the purpose of sustaining or spreading the belief and practice in its doctrines, it would be manifestly inequitable that members afterwards rejecting the faith should have any part in the property used in disseminating the same faith. I am of opinion, however, that there was evidence in this case quite sufficient to sustain the finding of the trial court, and, this being the case, that we have no right to disturb the judgment so rendered. The evidence, as I read it, and even the original articles of faith and practice, and the code of rules adopted by the church on its organization, sustain the finding that Mt. Tabor Regular Baptist Church taught from the beginning the faith now professed by the appellees,—that it was a "means" church from its foundation. The decisions of the various councils and of the Danville Association are all confessedly but evidence of what was the original belief of the church. But, besides this evidence, there was ample evidence, also, given by many learned teachers and doctors of the Baptist Church, going to show that the Mt. Tabor Church was always a "means," and not an "anti-means," church; in other words, as its articles of belief and rules of decorum seem to show, that while the church believed in election by grace, and justification by the righteousness of God, yet it also believed that they that have done good shall rise to eternal life, and that they that have done evil shall descend to eternal damnation, and that men may be brought to God by human means, God so making use of the instrumentality of man. Much evidence was also given to show that by the original constitution of this church the form of government is that the majority vote is the voice of the church, even in articles of faith; that each church must put its own construction upon the Scriptures; and that this must be done by a majority vote. There is no appeal to any other authority. The local church is supreme. The record further shows that, as a matter of fact, the "anti-means" minority was not expelled for any belief, or want of belief, but "for disorderly conduct, in declaring an unfellowship for a portion of the members of Mt. Tabor Church." The evidence here referred to was believed by the trial court, who therefore found that the "means" majority were the true Mt. Tabor Church, and rightfully entitled to the church property. I am at a loss consequently, to know how we can, consistently with the rules of this court, disregard the finding so made, and reverse the judgment based upon it. For the reasons here given, I must dissent from the conclusion reached by the majority of my brethren.

Louise E. HENNEGER, *Appt.*,
v.
Byron LOMAS.

(.....Ind.....)

1. **Marriage with her seducer extinguishes** the right of action for damages for seduction, which is given by Rev. Stat. 1881, § 263 (Rev. Stat. 1894, § 264), to any unmarried woman, and she cannot maintain an action against him therefor after a divorce.
2. **A marriage procured by fraud is voidable** at the suit of the injured party independent of any provisions of the divorce law.
3. **A merely formal marriage** entered into without intent to perform the marriage vows, but only to avoid imprisonment for bastardy and prosecution for seduction, and which is followed by a desertion of the wife, may be declared void by a judicial decree at the instance of the wife.
4. **A decree of the nullity of a marriage between a woman and her seducer** establishes her right to sue him for her seduction under the Indiana statute, notwithstanding the form of marriage between them, which, if it were valid, would have defeated the action.

(June 11, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court of Allen County in

NOTE.—The above case is not only a novel one in respect to the nature of the cause of action which is given by statute, but it very sharply distinguishes between the effect of a divorce and an annulment of marriage.

For jurisdiction of chancery to decree nullity or dissolution of marriage, see *note* to Ridgely v. Ridgely (Md.) 25 L. R. A. 800.

favor of defendant in an action brought to recover damages for seduction. *Reversed.*

The facts are stated in the opinion.

Mr. **Samuel M. Hench** for appellant.

Messrs. **Randall & Doughman** for appellee.

Monks, Ch. J., delivered the opinion of the court:

Appellant brought this action against appellee to recover damages for her own seduction, under the provisions of § 263, Rev. Stat. 1881 (Rev. Stat. 1894, § 264). Appellee's separate demurrer to each paragraph of the amended complaint for want of facts was sustained. Appellant refused to plead further, and judgment was rendered against her. This action of the court is assigned as error. It is urged by appellee that the specifications in the assignment of errors are not directed to the ruling on each paragraph, but to the complaint as an entirety. While the specifications in the assignment are not as certain as they could have been made, yet we think they call in question the ruling of the court upon each paragraph of the complaint. The question presented by the demurrer to the first and second paragraphs of the complaint is whether a woman under the age of twenty-one years, who has been seduced, and marries her seducer, and afterwards procures a divorce, has, after said divorce is granted, a cause of action against him for damages for said seduction, under the provisions of § 263, Rev. Stat. 1881 (Rev. Stat. 1894, § 264). Section 263, Rev. Stat. 1881 (Rev. Stat. 1894, § 264), provides that "any unmarried female may prosecute as plaintiff an action for her own seduction and may recover therein such damages as may be assessed in her favor." It was held by this court in *Dowling* v. *Crapo*, 65 Ind. 209, that an action for the seduction of an unmarried female was not barred by her subsequent marriage to a person other than her seducer; that the term "unmarried," used in the statute, relates to the time of the seduction, and not to the time of the commencement or trial of the action. At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended, or merged in that of the husband. 1 Bl. Com. 442, 443; Co. Litt. 112*b*; 2 Kent, Com. p. 129; Schouler, Husb. & W. § 6. The husband, by virtue of the marriage, was entitled to all the personal property and choses in action of his wife, which when reduced to possession, became his absolute property, and was also entitled to the exclusive possession, use, and control of her real estate during their joint lives. The marriage extinguished all debts and causes of action for antenuptial wrongs between the parties. *Long* v. *Kinney*, 49 Ind. 235; *Flenner* v. *Flenner*, 29 Ind. 564; *Burleigh* v. *Coffin*, 22 N. H. 118, 53 Am. Dec. 236; 9 Am. & Eng. Enc. Law, p. 795, and note 5. They could not sue one another, nor did any cause of action arise in favor of either by reason of any injury to the person or character committed by the other. *Phillips* v. *Barnet*, L. R. 1 Q. B. Div. 436; *Kujek* v. *Goldman*, 9 Misc. 34; *Abbott* v. *Abbott*, 67 Me. 304, 24 Am. Rep. 27; note to *Com.* v. *Barry*, 2 Green, Crim. Rep. 286; *State* v. *Oliver*, 70 N. C. 60; *Peters* v. *Peters*, 42 Iowa, 182; *Libby* v. *Berry*, 74 Me. 286, 43 Am. Rep. 589; Dicey, Parties, *173. The husband was liable for his wife's antenuptial torts and contracts, and also for her torts committed during coverture, including those committed out of his presence, and without his directions. *Ferguson* v. *Collins*, 8 Ark. 241; *Phillips* v. *Richardson*, 4 J. J. Marsh. 212; *Brown* v. *Kemper*, 27 Md. 666; *Hubble* v. *Fogartie*, 3 Rich. L. 413, 45 Am. Dec. 775; *Allen* v. *McCullough*, 2 Heisk. 174, 5 Am. Rep. 27; *Heard* v. *Stamford*, 3 P. Wms. 409; *Hawk* v. *Harman*, 5 Binn. 43; *Ball* v. *Bennett*, 21 Ind. 427, 83 Am. Dec. 356; *Baker* v. *Young*, 44 Ill. 42, 92 Am. Dec. 149; 9 Am. & Eng. Enc. Law, pp. 823, 825; Dicey, Parties, p. 477, chap. 30, rule 107. For choses in action accruing to the wife during coverture, the husband could sue alone, but for her antenuptial choses he was required to join his wife as a coplaintiff in the suit. *Tucker* v. *Gordon*, 5 N. H. 564; *Boozer* v. *Addison*, 2 Rich. Eq. 273, 46 Am. Dec. 43, and note, 47–51; *Thompson* v. *Ellsworth*, 1 Barb. Ch. 624; *Rumsey* v. *George*, 1 Maule & S. 176; *Checchi* v. *Powell*, 6 Barn. & C. 253; *Milner* v. *Milnes*, 3 T. R. 631. For injuries to the person or character of the wife, whether committed before or after the marriage, she could bring no action for redress without her husband's concurrence. Such action could only be brought in the name of both for her injuries, and the damages recovered were the property of the husband, and not of the wife. *Throgmorton* v. *Davis*, 3 Blackf. 383; *Long* v. *Morrison*, 14 Ind. 595, 77 Am. Dec. 72, and note; *Rogers* v. *Smith*, 17 Ind. 323, 79 Am. Dec. 483, and note, 484, 485; *Barnett* v. *Leonard*, 66 Ind. 422; *Thomas* v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Smalley* v. *Anderson*, 2 T. B. Mon. 56, 15 Am. Dec. 121; *Ballard* v. *Russell*, 33 Me. 196; *Shaddock* v. *Clifton*, 22 Wis. 114, 94 Am. Dec. 588, and note, 591–594; *Gibson* v. *Gibson*, 43 Wis. 23, 28 Am. Rep. 527; *Kaime* v. *Ormo*, 49 Wis. 372; *Reader* v. *Purdy*, 41 Ill. 279; *Anderson* v. *Anderson*, 11 Bush, 327; Dicey, Parties, p. 297, chap. 16, rule 67; *Southworth* v. *Packard*, 7 Mass. 95. Any settlement made or discharge given by the husband in such case bound the wife. *Ibid.*; *Beach* v. *Beach*, 2 Hill, 260, 38 Am. Dec. 584; *Ballard* v. *Russell* and *Shaddock* v. *Clifton*, *supra*. For the loss of the service and society of his wife, caused by such injuries, the right of action was in the husband alone, and the action to recover therefor could only be brought in his name. *Long* v. *Morrison*, *supra*; *Brockbank* v. *Whitehaven Junction R. Co.* 7 Hurlst. & N. 834; *Rogers* v. *Smith*, *supra*; *Pollard* v. *New Jersey R. & Transp. Co.* 101 U. S. 223, 25 L. ed. 840; and note to *Shaddock* v. *Clifton*, 94 Am. Dec., on page 591. For the reason that the marriage extinguished antenuptial rights of action for tort or upon contract, between husband and wife, the wife could not, after divorce from her husband, or his death, maintain an action against him or his estate for any injury to her person or character committed by him before their marriage, or during coverture. *Peters* v. *Peters*, *Abbott* v. *Abbott*, and *Libby* v. *Berry*, *supra*; *Main* v. *Main*, 46 Ill. App. 106; 9 Am. & Eng. Enc. Law, p. 795, and notes 9, 10; Schouler, Husb. & W. § 81. These rules of

the common law are founded upon the principle that the husband and wife are one in law, and not upon the theory that the wife is under a legal disability. *Barnett* v. *Harshbarger*, 105 Ind. 410; *Phillips* v. *Barnet, supra.*

The rules of the common law have been greatly relaxed in this state by legislative enactment. It is provided by § 5116, Rev. Stat. 1881 (Rev. Stat. 1894, § 6961), enacted in 1852, that "no lands of any married woman shall be liable for the debts of her husband, but such lands and the profits therefrom shall be her separate property as fully as if she were unmarried; provided, that such wife shall have no power to encumber or convey such lands except by deed in which her husband shall join." Section 2488, Rev. Stat. 1881, enacted in 1853, provides that "the personal property of the wife held by her at the time of her marriage or acquired during coverture by descent, devise, or gift shall remain her own property to the same extent and under the same rules as her real estate so remains, and on the death of the husband before the wife such personal property shall go to the wife, and on the death of the wife before the husband shall be distributed in the same manner as her real estate descends and is apportioned under the same circumstances." This section was amended in 1891 (Rev. Stat. 1894, § 2649), but the provision concerning personal property owned by the wife at the time of her marriage remains unchanged. Section 254, Rev. Stat. 1881 (Rev. Stat. 1894, § 255), provides that "a married woman may sue alone: First. When the action concerns her separate property. Second. When the action is between herself and her husband; but in no case shall she be required to sue or defend by guardian or next friend except she be under the age of twenty-one years." Under this section it is clear that a married woman may, as sole plaintiff, sue her husband, or any other person, concerning her separate property. *Adams* v. *Sater*, 19 Ind. 418; *Gee* v. *Lewis*, 20 Ind. 149; *Mills* v. *Winter*, 94 Ind. 329. The effect of § 254, Rev. Stat. 1881 (Rev. Stat. 1894, § 255), was to leave the common-law rule in force, except as to the cases mentioned in said section in which the wife was authorized to sue alone. *Hamm* v. *Romine*, 98 Ind. 77, 80. This court held that said § 254, Rev. Stat. 1881 (Rev. Stat. 1894, § 255), did not change the common-law rule that, in all actions to recover injuries to the person or character of a married woman, the husband and wife must join as plaintiff. *Barnett* v. *Leonard, Rogers* v. *Smith*, and *Long* v. *Morrison, supra.* Section 5131, Rev. Stat. 1881 (Rev. Stat. 1894, § 6976), which was first enacted in 1879, provides that "a married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character the same as if she were sole; and the money recovered shall be her separate property, and her husband in such case shall not be liable for costs." While the statutes in this state have removed the disabilities of married women, until ability is now the rule and disability the exception, yet all her disabilities have not been removed. *Barnett* v. *Harshbarger*, 105 Ind. 410; *Rosa* v. *Prather*, 103 Ind. 191. As we have shown, the common law rule that marriage extinguished all rights of action in favor of the wife against the husband, for antenuptial injuries by the husband to her person or character, was founded upon the principle of the unity of husband and wife, and not upon the theory that the wife was under a legal disability. This rule of the common law is in force in this state, unless it has been changed by statute. This court has held that the same has not been abrogated. In speaking of this rule of the common law in *Barnett* v. *Harshbarger*, on page 413, 105 Ind., this court said: "Our decisions declare that it has not been abrogated. In the carefully considered case of *Dodge* v. *Kinzy*, 101 Ind. 102, it is affirmed that the general rule of the common law respecting the unity of husband and wife has not been overthrown. The decision in *Mathes* v. *Shank*, 94 Ind. 501, recognizes the rule of the common law, and affirms that it exists except as changed or modified by statute. The doctrine of the supreme court of Massachusetts, declared in *Lord* v. *Parker*, 3 Allen, 127, was adopted in *Haas* v. *Shaw*, 91 Ind. 384, 46 Am. Rep. 607." And this court quoted with approval from *Lord* v. *Parker, supra*, the following observations upon the effect of the enabling statute: "They are in derogation of the common law, and certainly are not to be extended by construction. . . . It is for the legislature, and not for the courts, to destroy the rule of the common law declaring the unity of husband and wife. . . . The unity which a settled rule of law has recognized through so many years cannot be disregarded, and it prevents the operation of the general statutes removing the disabilities of married women. . . . The question is not whether disabilities have been removed, but whether the long-prevailing rule of the law, declaring husband and wife to be one person, in legal contemplation, has been annulled." The same doctrine is declared in *Grant* v. *Green*, 41 Iowa, 88; *Mewhirter* v. *Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *Peters* v. *Peters, supra.* Until this rule is annulled, all rights of action for antenuptial wrongs of the husband to the wife are extinguished by their marriage. Statutes relating to the estate or property of the husband and wife do not affect their personal relations. They only change the status and rights of the husband so far as may be necessary to secure to the wife the enjoyment of the rights conferred by such statutes. Section 254, Rev. Stat. 1881 (Rev. Stat. 1894, § 255), authorizes a wife to sue alone where the cause of action relates to her separate property, and under said section she may sue her husband, or any other person or persons, concerning such property. *Wilkins* v. *Miller*, 9 Ind. 100; *Scott* v. *Scott*, 13 Ind. 225; *Flenner* v. *Flenner*, 29 Ind. 564. Said section changes the procedure, but confers no new right on the wife, and does not, therefore, entitle her to sue her husband for a personal injury to herself, committed by him either before or after their marriage, for the reason that whether a husband is liable to his wife therefor is not a mere question of procedure, but of substantial right. *Peters* v. *Peters*,

Libby v. *Berry*, *Abbott* v. *Abbott*, *Phillips* v. *Barnet*, *Mewhirter* v. *Hatten*, and *Grant* v. *Green*, *supra*. It is clear that § 5131, Rev. Stat. 1881 (Rev. Stat. 1894, § 6976), authorizing the wife to bring and maintain an action in her own name for any injury to her person or character, the same as if she were sole, merely changes the procedure but gives no new right, and only applies to such causes of actions as could only be maintained by the husband and wife as coplaintiffs before said section took effect. The wife could not, therefore, maintain an action in her own name, under this section, against her husband, for any injury to her person or character. Besides, the section provides that the husband in such case shall not be liable for costs; and this, in express terms, indicates that the wife cannot maintain an action in her own name against her husband, under said section. In 1860 the legislature of New York passed an act (Laws 1860, chap. 60, p. 158), by § 7 of which it was provided: "Any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character the same as if she were sole, and the money received upon settlement of any such judgment shall be her sole and separate property." This section was amended by an act passed in 1862 (Laws 1862, chap. 172), but not in respect to the wife's right to bring an action as provided in the act of 1860. It was held in *Freethy* v. *Freethy*, 42 Barb. 641, that a wife could not maintain an action against her husband to recover damages for slander uttered by him; and it was declared that the legislature did not intend by the laws of 1860 and 1862, to which reference has been made, to change the common-law rule as to the unity of husband and wife. In *Longendyke* v. *Longendyke*, 44 Barb. 366, it was held, under the same section, that the wife could not maintain an action against her husband for an assault and battery. In *Schultz* v. *Schultz*, 89 N. Y. 644, the court of appeals followed the foregoing cases, and held that the wife could not maintain an action against her husband to recover damages for assault and battery. Section 7 of the Acts of 1860 and 1862, of New York, was more comprehensive than § 5131, Rev. Stat. 1881 (Rev. Stat. 1894, § 6976), because it did not exclude the right of the wife to sue the husband, by providing that he should not be liable for costs.

It is evident from what we have said, and the authorities cited, that appellant's right of action against appellee for her seduction was extinguished by their marriage, and that she could not maintain an action against him therefor after her divorce. To the same effect are the cases of *Peters* v. *Peters*, *Libby* v. *Berry*, *Abbott* v. *Abbott*, *Mewhirter* v. *Hatten*, and *Grant* v. *Green*, *supra*. But counsel for appellant insists "that she obtained the divorce from appellant on the ground that the marriage on the part of the appellee was fraudulent, and that she has a cause of action after said divorce, against him, for her seduction." It is true that it is alleged in the first and second paragraphs of the complaint that appellee fraudulently married appellant to avoid imprisonment, and that he did not intend to live or cohabit with her as a husband, or to keep his marriage vows, but to desert her, and that he did, immediately after said marriage, leave, abandon, and desert her, and never lived or cohabited with her after said marriage, and refused to support appellant, although he was able to do so; but it is not alleged that the divorce was granted on this ground. Without such an averment, it must be presumed that the word "divorce" was used in its ordinary sense, and that such divorce was granted appellant for some statutory cause. *Miller* v. *Miller*, 33 Cal. 353. If, however, it was alleged in said paragraphs that the divorce was granted to appellant on the part of appellee on account of the alleged fraud on the part of appellee, it would be equivalent to an allegation that the court had granted appellant a decree of nullity, and adjudged that said marriage was void. Substance, not names or form, controls in determining the meaning, character, and effect of a pleading, or the judgment or decree of a court. Fraud is not a cause of divorce, but a marriage voidable on the ground of fraud may be adjudged void by a court of competent jurisdiction. While the term "divorce" is not properly applicable to a decree of nullity, yet such a decree is often called a "divorce." 14 Am. & Eng. Enc. Law, p. 532; 1 Bishop, Mar. & Div. (ed. 1881) § 166. In 2 Bishop, Mar. & Div. (ed. 1891), it is said: "Not infrequently the judicial declaration of nullity is called a 'divorce.' It is properly so where the marriage it declares void was only voidable. For example, it is common and correct language to speak of impotency as a cause for divorce. And Blackstone writes that 'divorce *a vinculo matrimonii* must be for some of the canonical causes of impediment. But the expression 'sentence' or 'decree of nullity' equally will indicate the legal avoidance of a voidable marriage; and it seems more significant, and less liable to be misunderstood, than the other, and somewhat better in accord with modern usage." The question presented by the demurrer to the third paragraph of the amended complaint is whether a woman who has been seduced and marries her seducer, and the court afterwards, on her application, adjudges that said marriage was void, can, after such decree, bring and maintain an action against him for said seduction, under § 263, Rev. Stat. 1881 (Rev. Stat. 1894, § 264). An action for divorce is brought for the purpose of dissolving a marriage, while a nullity suit is brought for the purpose of having a void marriage declared void, or a voidable marriage judicially made void. In the divorce suit the marriage is recognized as valid, and adjudged to be dissolved from the date of the decree; but in the nullity suit the marriage is not recognized, but is adjudged void,—that is, that there was no marriage,—and the rights of the parties are the same as if the marriage had never taken place. 1 Bishop, Mar. & Div. (ed. 1891) §§ 259, 271. It follows that the rule established in this state, that all property questions between husband and wife are presumed to be adjudicated in the decree of divorce, does not apply to a decree of nullity, and can therefore have no application to this case. A marriage which is procured by fraud is voidable at the suit of the injured party, and may be declared void by judicial decree. The courts

have jurisdiction of such actions, independently of any provision of the divorce law. *Bishop* v. *Redmond*, 83 Ind. 157; *Tefft* v. *Tefft*, 35 Ind. 44, 50, and cases cited; *Mason* v. *Mason*, 101 Ind. 25, 28; *Clark* v. *Field*, 13 Vt. 460, 472; *Le Barron* v. *Le Barron*, 2 Am. L. Reg. N. S. 212; *Ferlat* v. *Gojon*, Hopk. Ch. 478, 14 Am. Dec. 554; *Gillett* v. *Gillett*, 78 Mich. 184; *Smith* v. *Smith*, 51 Mich. 607; *Tomppert* v. *Tomppert*, 13 Bush, 326, 26 Am. Dec. 197; *Lyndon* v. *Lyndon*, 69 Ill. 43; *True* v. *Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Robertson* v. *Cole*, 12 Tex. 356; *McKinney* v. *Clarke*, 2 Swan, 321, 324, 58 Am. Dec. 59; *Willard* v. *Willard*, 6 Baxt. 297, 32 Am. Rep. 529; *Carris* v. *Carris*, 24 N. J. Eq. 516; 2 Bishop, Mar. & Div. (ed. 1891) § 803; 1 Bishop, Mar. & Div. (ed. 1891) §§ 471–473, 476, notes 1 and 2; Id. §§ 477, 543, 544; Reeve, Dom. Rel. 206; 2 Kent, Com. 767; Schouler, Dom. Rel. 35.

In England the power to annul marriages was exercised by the ecclesiastical courts, and the principles and practice concerning such jurisdiction constituted a part of the common law of that country, and was therefore adopted as the law of this state by statute. Section 236, Rev. Stat. 1881 (Rev. Stat. 1894, § 236); *Tefft* v. *Tefft*, *supra*. Courts having the jurisdiction of courts of equity, under the general power to annul fraudulent contracts, have also jurisdiction to annul a marriage on account of fraud. *Clark* v. *Field*, *supra*; *Keyes* v. *Keyes*, 22 N. H. 553; *Burtis* v. *Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Carris* v. *Carris*, *supra*. In *Bishop* v. *Redmond*, *supra*, appellee charged in her complaint that Redmond, one of the appellants, married her in the evening, and abandoned her the next morning; that prior to the marriage he seduced her, and that she was the mother of a bastard child begotten by him; that after he had seduced her he conceived the fraudulent scheme of cheating her by marrying and abandoning her, and by conveying before marriage all of his property; that Jacob Bishop, his co-appellant, conspired with him in this fraudulent design, and, for the purpose of aiding in carrying it into effect, received a conveyance of land from him; that the conveyance was without consideration, and was made to and received by Bishop for the sole purpose of giving effect to the fraudulent scheme to defraud appellee. Prayer that a divorce be granted, alimony awarded, and the fraudulent conveyance set aside. This complaint did not state any statutory cause for a divorce, but did state facts sufficient to entitle appellee to a decree of nullity on the ground of fraud. It was only upon this theory that the action of the trial court could be sustained. The difference between that action and the one at bar is that in that action the injured party sought and obtained the decree of nullity and damages (incorrectly called "alimony" in the complaint and the decree of the trial court) in the same action, while in this the decree of nullity was first procured, and the action for damages brought afterwards. It was shown by the evidence in that case that Elijah Redmond had carnal knowledge of appellee in June, 1879; that while appellee was pregnant with child by said Redmond, he conveyed the real estate described in the complaint to his co-appellant, Bishop, in November, 1879; that the bastard child was born in March, 1880, and appellee was married to Redmond, the father of said child, in November, 1880; and that the allegations of the complaint heretofore set out were true. The court below rendered a decree of nullity in favor of appellee, calling it as is often done, a "divorce," and a judgment for damages against her seducer, and a decree setting aside the conveyance of the real estate to Bishop, and that the same be sold, which was affirmed by this court on appeal. The court in that case held that where a conspiracy is formed for the purpose of defeating the claim of a woman for her seduction, in which a fraudulent purpose to marry and then abandon her enters into and forms a part thereof, the claim for damages for the seduction is not defeated by the marriage entered into for the purpose of carrying such scheme into execution. The court said: "The eleventh instruction given by the court was correct. It informed the jury that if the evidence satisfied them that the conveyance was made to and accepted by Bishop for the purpose of defrauding the appellee out of any judgment that might be obtained against his grantor, they might find the conveyance to be fraudulent. As we have seen, in examining the complaint, the appellee was a creditor from the time (June, 1879) the right to legal redress accrued in her favor, and if the conveyance was made for the fraudulent purpose of preventing the collection of a judgment rendered in vindication of that right, she was entitled to have it set aside. It is argued that the evidence shows a marriage, and that this had the effect of canceling the prior right, and that, therefore, the rule declared in the instruction is not applicable. There was, however, evidence fully justifying the inference that the marriage was, as the complaint charges, one of the steps in the fraudulent scheme to defeat the claim of the appellee, and was contracted solely for the purpose of carrying it into effect. If the marriage was entered into for this corrupt purpose, and there was an abandonment of the appellee pursuant to the preconceived design to defraud her, it did not defeat the claim for damages for the original wrong." What was the original wrong? The seduction of appellee by Redmond, one of the appellants. Of course, the right of appellee to recover damages against Redmond, and set aside the conveyance to Bishop, depended upon whether a decree of nullity (called a "divorce" in the complaint and decree) was granted to him. If appellee in the case at bar, as alleged, did not intend to live and cohabit with appellant, or have any sort of marital intercourse with her, when the marriage ceremony was performed, but merely went through the formalities to avoid imprisonment for bastardy and prosecution for seduction, and immediately left, and did not perform his marriage vows, the marriage was voidable, at the election of appellant, upon the discovery of such fraud; and she was entitled to bring an action against appellee, and have the same declared void by judicial decree. *Bishop* v. *Redmond*, *supra*, and authorities cited above; 1 Bishop, Mar. & Div. (ed. 1891) §§ 473, 476, note 2; Id. §§ 327–339, 477. After such decree had been rendered,

she had the right to sue appellee for her seduction, the same as if she had never been married to him.

It also appears from the allegations in the third paragraph of the amended complaint that appellant was, when married to appellee, under the age of sixteen years, and was therefore incapable, on that account, of contracting such marriage with appellee. Section 5324, Rev. Stat. 1881 (Rev. Stat. 1894, § 7289). It is provided by § 1025, Rev. Stat. 1881 (Rev. Stat. 1894, § 1037), that when either of the parties to a marriage shall be incapable, from want of age, of contracting such marriage, the same may be declared void, on application of the incapable party, by any court having jurisdiction to decree divorces. It is clear that appellee was also entitled to have her marriage to appellant annulled on this ground, unless she ratified said marriage after she arrived at the age of sixteen years. 14 Am. & Eng. Enc. Law, pp. 487–489. *Shafher* v. *State*, 20 Ohio, 1; *McDowell* v. *Sapp*, 39 Ohio St. 558; *Holtz* v. *Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; Stewart, Mar. & Div. §§ 57, 58. It is the policy of the law, in this state, however, that children born or begotten during the existence of a voidable marriage are considered legitimate, even though such marriage is adjudged to be void by a court of competent jurisdiction. Section 1025, Rev. Stat. 1881 (Rev. Stat. 1894, § 1037). It is not material, however, upon what ground the decree of nullity was granted to appellant; for the court had jurisdiction, and the decree, even if erroneous, is binding on appellant and appellee, and cannot be questioned in this case. Nothing in the opinion is in conflict with the doctrine declared in *State* v. *Otis*, 135 Ind. 267, 21 L. R. A. 733, cited by appellee. In that case this court held that in case of the seduction of a female under the age of twenty-one years under promise of marriage, in violation of the provisions of § 1992, Rev. Stat. 1881 (Rev. Stat. 1894, § 2078), the subsequent marriage of the parties was a bar to the further prosecution for such crime. The wife in that case had not attempted to have the marriage set aside for fraud, and the marriage was therefore binding upon the parties and all other persons, including the state, until its nullity was declared by a competent tribunal. *Tomppert* v. *Tomppert*, *supra*. If the wife in that case had obtained a decree of nullity against Otis, it would have been a judgment of the court that no marriage had ever existed between them, and the fact that there had been a marriage voidable at the election of the wife would not have been available as a defense by Otis after such decree of nullity.

It follows that the court erred in sustaining the demurrer to the third paragraph of the amended complaint.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of the amended complaint, with leave to file an amended and additional paragraph of complaint, if desired, and for further proceedings in accordance with this opinion.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.
Joseph N. SMITH, *Plff. in Err.*

(.....Mich.....)

1. A statute requiring emery wheels to be provided with blowers to carry away the dust arising from their operation is, at least so far as it applies to dry wheels and to the protection of persons continuously employed over them, a constitutional exercise of the police power.

2. A statute permitting certain uses of a dry emery wheel without a blower, while requiring a blower for other uses, is not class legislation as between operatives when the rules apply to all persons equally.

(March 3, 1896.)

NOTE.—*Police power to protect health of employees.*

The exercise of the police power to secure the safety of employees against accidents by statutes requiring various precautions, such as guards around dangerous machinery, is more common than the exercise of the same power for the protection of the health of employees, and the constitutionality of such statutes does not seem to have been contested. Only the statutes for the protection of health are considered in this note, with reference to statutes for the prevention of accidents only so far as they may be aimed also against dangers to health. These are not numerous but are very important.

A statute to compel street railway companies to protect employees from exposure to the inclemency of the weather when engaged on any part of an electric, cable, or steam car except the rear platform, by providing an inclosure within which they may work, is upheld in State v. Smith, 58 Minn. 35, 25 L. R. A. 760. The court says that "when going at the rate of 8 or 9 miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life."

And a similar statute in Ohio is sustained in State v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317, in which it is said: "The act is clearly authorized as a police regulation to protect the health and promote the comfort of those engaged in operating electric cars."

A statute prohibiting the employment or exhibition of girls under fourteen years of age as dancers or in theatrical exhibitions is upheld, in People v. Ewer, 141 N. Y. 129, 25 L. R. A. 794, as an exercise of the power of the state as *parens patriæ* to protect the physical, mental, and moral welfare of the child. The court said: "The scanty dress of the ballet dancer, the pirouetting and the various other described movements with the limbs and the vocal efforts cannot be said to be without physical prejudice to the physical condition of the child," although still more stress was laid on the danger to the mind and morals of the child.

The Pennsylvania law requiring more than one

See also 47 L. R. A. 52.

ERROR to the Circuit Court for Wayne County to review a judgment convicting defendant of violating a statutory provision regulating the use of emery wheels. *Affirmed.*

The facts are stated in the opinion.

Mr. **Arthur Webster,** with *Messrs.* **Corliss, Andrus, & Leete,** for plaintiff in error:

The act of the legislature here in question is unconstitutional because it deprives the owner of a factory operating emery wheels of his liberty and property without due process of law. Mich. Const. art. 6, § 32; *Re Jacobs*, 98 N. Y. 115, 50 Am. Rep. 636.

Those who voluntarily subject themselves to the inconveniences of any certain employment do not need and cannot demand the protection of the law.

Tiedeman, Pol. Power, 122*b*, p. 432.

The use of emery wheels has always been a legitimate occupation, but now the state makes it a crime unless certain conditions are complied with. It is not the business of the legislature to keep guard over the health or comfort of the individual citizen.

St. Louis v. *Fitz*, 53 Mo. 582; Tiedeman, Pol. Power, p. 433, § 122*c*.

The law, if constitutional, must necessarily deprive the proprietor of the small workshop of his constitutionally guaranteed liberty.

1 Bl. Com. p. 139.

It is unequal, partial, and discriminating in its operation.

Sears v. *Cottrell*, 5 Mich. 251; Cooley, Const. Lim. p. 481; *Schreveport* v. *Levy*, 26 La. Ann. 671, 21 Am. Rep. 553; Sutherland, Stat. Constr. p. 162; *Hammer* v. *State*, 44 N. J. L. 667. See also *Hudson County Freeholders* v. *Buck*, 51 N. J. L. 155; *Allen* v. *Pioneer-Press Co.* 40 Minn. 117, 3 L. R. A. 532; *Cobb* v. *Bord*, Id. 479; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382.

Messrs. **Allan H. Frazer** and **Ormond F. Hunt,** for defendant in error:

The only limitation upon the legislative power is whether the provisions are reasonable.

Hurst v. *Warner*, 102 Mich. 238, 26 L. R. A. 484; *People* v. *Phippin*, 70 Mich. 6; *People* v. *Bellet*, 99 Mich. 151, 22 L. R. A. 696; *Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710.

Hooker, J., delivered the opinion of the court:

The defendant was convicted of a violation of the statute requiring emery wheels to be provided with blowers to carry away the dust arising from their operation. Pub. Acts 1893, p. 151, and 3 How. Anno. Stat. § 1690*zl*. Counsel for the defendant assert that they care to raise but one question, *viz.*, the constitutionality of this law. It is not disputed that the state may regulate the use of private property, when the health, morals, or welfare of the public demands it. Such laws have their origin in necessity. Prentice, Pol. Powers, 4–8, 52, 54, 161, 433. Counsel say that this law is

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means of ingress and egress to persons employed in mining and a metal tube from top to bottom of a shaft through which communication may be had, with other requirements, including that of ventilation of mines, is held constitutional, in Com., Williams, v. Bonnell, 8 Phila. 534; and Com. v. Wilksbarre Coal Co. 29 Phila. Leg. Int. 213. But in this case the statute seems to be more for the safety against accidents than for the health of the employees.

In England there are enactments to secure ventilation and safety of mines, but no question as to the constitutionality of these acts of Parliament can arise.

The Illinois act of May 28, 1879, requiring an escapement shaft in every coal mine worked by or through a shaft, slope, or drift and in which more than ten miners are employed in each twenty-four hours is declared, in Loose v. People, 11 Ill. App. 445, to be enacted to protect the health and insure the safety of the persons employed in the mines, and not for the benefit of mine owners.

In Com., Williams, v. Bonnell, *supra*, the court says of the Pennsylvania act: "Of its constitutionality we have not the slightest doubt,"—and describes it as nothing more nor less than "a mandate to the operators of coal mines that they shall so work them as not to injure the health nor endanger the lives of persons employed in and about them."

Cases involving statutory regulations for the protection and safety of workmen in mines are treated in a *note* to Consolidated Coal & M. Co. v. Clay (Ohio) 25 L. R. A. 848.

A declaration that the eight-hour law applicable to mines, factories, and smelting establishments would not be constitutional is made in *Re* Eight-Hour Law (Colo.) 39 Pa. 328, but nothing is said therein as to the police power in respect to health, and the decision is based on the doctrine against class legislation.

In denying the validity of an act prohibiting the manufacture of cigars or the preparation of tobacco in any form in tenement houses, the court said, in *Re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636: "This law was not intended to protect the health of those engaged in cigar making, as they are allowed to manufacture cigars everywhere except in the forbidden tenement houses;" and again: "It is plain that this is not a health law, and that it has no relation whatever to the public health."

A statute making ten hours the limit of a day's labor for railroad employees, and declaring them entitled to extra pay for any additional time, is held unconstitutional as class legislation, in Wheeling Bridge & T. R. Co. v. Gilmore, 8 Ohio C. C. 658, 1 Ohio Dec. 390. But the court says: "Nor have we reason to doubt the constitutionality of statutes prohibiting the employment of minors under eighteen years of age, and women in certain employments for more than ten hours per day."

A provision in a city charter that employees of contractors doing work for the city shall not be allowed to work more than eight hours per day is held constitutional in People v. Warren, 77 Hun, 120, but nothing is said in the case as to any intent to protect the health of such employees. The court quotes the case of United States v. Ollinger, 55 Fed. Rep. 959, construing a similar provision in an act of Congress as to employment on public works of the government or of the District of Columbia, and says: "We are not aware that the constitutionality of that act has ever been questioned."

But in *Re* Kubach, 85 Cal. 274, 9 L. R. A. 482, the validity of an ordinance limiting labor of employees in carrying out a contract with a city to eight hours per day, is denied, yet the court says that "if . . . the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation," and quotes from Cooley's Constitutional Limitation as follows: "Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and for-

invalid because it does not apply to all, not even to all who use emery wheels, because some may use with water, and others may not work continuously. Again, it is contended that it is invalid because it prohibits a man from running his own machine continuously without protection. We need not concern ourselves with the last objection, because we have not the case before us, and for the reason that the law may be valid to the extent that others are protected, and invalid in the particular mentioned, if such a construction is unavoidable. For the purposes of this case, it may be said that all persons who are given continuous employment over dry emery wheels are within the provisions of this act. This singles out no class, as it applies to all persons who use emery wheels in that manner. Necessarily the practical application is limited to those who engage in such business, but such is the case with many laws. All criminal laws apply only to those who choose to break them. This law applies to all who choose to use the emery wheel. The legislature has seen fit to permit certain uses of the dry wheel without a blower, while in other cases it is required. This is competent, and is not class legislation, as between operatives. It fixes the limits of use without a blower, and requires it after such limits are passed; but the rules apply to all. The vital question in this case is the right of the state to require the employer to provide, and the employee to use, appliances intended for the protection of the latter. Laws of this class embrace provisions for the safety and welfare of those whom necessity may compel to submit to existing conditions involving hazards which they would otherwise be unwilling to assume. Among them are provisions for fire escapes, the covering or otherwise rendering machinery safe, the condition of buildings, ventilation, etc. In the main, where the necessity is obvious, they commend themselves to those who have at heart the welfare of their fellows, and should be upheld if they do not contravene private rights. The Constitution secures to the citizen the rights of life, liberty, and private property, and, as the only value in the latter consists in its use, it follows that the right to use private property is within the provision. There can, however, be no doubt that the use of private property may be regulated by law. No one would think of questioning the validity of laws regulating the manufacture, use, and sale of dangerous drugs or explosives, or laws designed to insure safety in railway travel. The inspection of boilers, fire escapes upon hotels, means of exits from churches and other buildings which the public are wont to frequent, are familiar instances of the exercise of the police power. These rules are defended upon the ground that they are

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bidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated."

A statute prohibiting the employment of persons under eighteen years of age, or of women, in any manufacturing establishment more than sixty hours per week is held in Com. v. Hamilton Mfg. Co. 120 Mass. 383, to be sustainable as a health or police regulation.

But on the other hand it is held, in Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, that a statute prohibiting the employment of females in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week is unconstitutional, not only as partial and discriminating, but also as a purely arbitrary restriction upon the fundamental right of the citizen to control her own time and faculties. The court admits that, "as a general thing, it is the province of the legislature to determine what regulations are necessary to protect the public health and secure the public safety and welfare;" but adds that, "inasmuch as sex is no bar, under the Constitution and the law, to the endowment of woman with the fundamental and inalienable rights of liberty and property which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights, unless the courts are able to see that there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare proposed to be secured by it." It is not clear from the opinion whether or not the court intends to deny the power of the legislature to limit to any degree the hours of labor for women in any employment, although it quotes from Tiedeman on Limitations of Police Power the statement that "there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron-smelting works, because the lives of the men so engaged are materially shortened."

But statutes requiring fire escapes on factories, the guarding of dangerous machinery, and many other precautions against accident or injury to health of employees, are numerous and their constitutionality usually acquiesced in. It is because the freedom of contract is interfered with that the constitutionality of such statutes is denied in the case of Ritchie v. People. Yet the freedom of contract is by no means unlimited. That of infants and married women has always been limited for their own protection. That of other persons also has been limited in some cases solely for their own benefit such as in cases of usury and of contracts with pension attorneys. Likewise, a shipper is denied the right to contract with a common carrier against the latter's liability for negligence for the reason, at least in part, that they are not deemed to be on the same footing. The degree of the danger and of the harm to be avoided seems to be the true test of the right of the legislature to interfere with the freedom of acts or contracts of individuals. If this be true, it is a question of police power and of public policy for the legislature and not for the courts to decide, as declared in the main case of PEOPLE v. SMITH.

The power to protect employees against their own contracts is involved, not only in the cases above mentioned, but in respect to their contracts as to the medium of payment of their wages, as to which, see *note* to Avent-Beattyville Coal Co. v. Com. (Ky.) 28 L. R. A. 273; and also as to the time of payment of wages, as to which see *note* to *Re* House Bill No. 1230 (Mass.) 28 L. R. A. 344. The conflict of decisions on this question of the power to limit contracts between master and servant is marked, and the question is far from settled.

B. A. R.

necessary to the safety of the public; not the entire populace, but such persons as shall lawfully place themselves in a position requiring such protection. Where the law is aimed at acts or conditions which threaten contagion,—as where sewers, disinfection, or quarantine is required,—the necessity of and the power to make such laws are obvious. But at first blush they may not be so apparent where there is no direct danger to others than the party whose business is sought to be regulated, and those with whom he contracts. It is contended in this case that neither the public welfare nor health is involved, inasmuch as the protection sought to be afforded is limited to the individual employee, who, by his contract of employment, signifies a willingness to use the machine in its dangerous condition, and therefore cannot be heard to complain. It is the law that a manufacturer may provide inferior and even dangerous machinery, tools, and utensils; and enterprises more or less hazardous are common and lawful. Men may contract to use such machinery, or to perform dangerous service, and have no remedy if injured. But we are not aware that the police power is limited by such contracts. As between the parties themselves, the contract may cut off legal redress for injuries sustained; but we are not satisfied that the authority of the state is limited to the protection of those who do not sustain contract relations with each other. In the absence of a law requiring fire escapes, one who works in a high building and is injured may be held to have assumed the risk incident to his employment, but we know of no rule that precludes the state from making a regulation requiring fire escapes to be placed upon high buildings, though the only object be to facilitate the escape of employees who are under contract to work there without such appliances for escape. Fire escapes in hotels, and means of exit in theaters and public halls are required by law for the benefit of patrons, who are there by virtue of contract relations with the proprietor. So long as the rule is general, and the danger to the public—*i. e.*, that portion of the public who are subjected to the danger—is clear, it is a proper subject for legislative intervention. In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, is cited to sustain the proposition contended for, but it cannot be said to have decided the question, although allusion is made to voluntary submission to alleged dangerous conditions. The case does not dispute the power to regulate the business of private persons where the public welfare requires, but does deny the power of regulation in the absence of such necessity, where the law has no relation to the public welfare or health. See also Tiedeman, Pol. Power, § 122*c*, pp. 433–436. The case of *People, Nechamcus*, v. *Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, is an interesting one upon this question, and although the decision there laid down is criticised (perhaps justly) by Mr. Justice Peckham in a dissenting opinion, concurred in by two of his associates, the power to regulate private affairs where the public necessity exists is asserted in an exhaustive opinion by the same learned judge in the case of *Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, in the course of which the power to regulate the appliances for manufacturing is asserted. 145 N. Y. 43, 44, 27 L. R. A. 714. The opinion says: "Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories,—all these were required by the legislature from such owner and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health as against all owners of such property unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character and to mistake the foundation upon which they are placed." The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the validity of such laws may be tested. Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable? In the present case no controversy is raised over the first of these. Hence we are not called upon to discuss it. As is implied by what has been said, the constitutional right to use property without regulation is plain, unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regulate it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where the question of the constitutionality of acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the state is a serious question. If it is a necessary regulation, the law should be sustained, but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the opera-

tive, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall; otherwise it should stand. Applying this test, we think the law constitutional, and *the judgment is therefore affirmed.*

The other Justices concur.

A petition for rehearing was subsequently filed, in response to which the following opinion was handed down:

Per Curiam:

Our attention is called to the fact that under the opinion heretofore filed the act as originally passed might be held unconstitutional, inasmuch as it does not discriminate between dry and wet wheels, which last, it is said, cannot possibly produce dust, and therefore do not require the blower. This question was necessarily passed upon in the former opinion, as the amendment could not be sustained if the original act was invalid. In addition to what was said in the former opinion, we may say that two sufficient reasons may be given for not holding the first act void: First. We are not able to say that a wheel may not be run with or without water at pleasure, in which case it would seem proper that the blower should be required as an efficient means of preventing its being run without water. Second. If this were not so, the act might be construed as applicable only to wheels capable of producing dust, as the language of the act clearly shows that it was intended to reach such, and an act should always be so construed as to bring it within the Constitution, if it can be reasonably done. *Coit & Co.* v. *Sutton*, 102 Mich. 324, 25 L. R. A. 819, 4 Inters. Com. Rep. 768.

MISSOURI SUPREME COURT.

Cecilia THOMAS, *Appt.*,
v.
R. H. HUNT *et al.*, *Respts.*

(.....Mo.....)

1. **Ejectment by the owner of the fee of a public street** will lie to recover possession thereof, subject to the public easement, from one who has placed a permanent obstruction thereon.

2. **A statutory dedication of land for a street,** by a plat filed under Rev. Stat. 1855, p. 1536, § 8, declaring that such plat "shall be a sufficient conveyance to vest the fee . . . for public use, . . . and for no other use or purpose," gives the public only an easement and, at least where the dedicator owns the land on both sides of the strip, leaves the fee to vest in abutting owners respectively to the center of the street when they subsequently acquire title to lands abutting thereon.

(May 5, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County granting a new trial after a verdict in her favor in an ejectment suit to recover land which had formed part of a public street. *Reversed.*

The facts are stated in the opinion.

Mr. **Frank Titus,** for appellant:

Title to land used for purposes of street or highway is in the adjacent proprietors.

Henry Gaus & Sons Mfg. Co. v. *St. Louis, K. & N. W. R. Co.* 113 Mo. 309, 18 L. R. A. 339; *Snoddy* v. *Bolen*, 122 Mo. 479, 24 L. R. A. 507; *Hannibal Bridge Co.* v. *Schaubacher*, 57 Mo. 582; *Thurston* v. *St. Joseph*, 51 Mo. 512; *Ferrenbach* v. *Turner*, 86 Mo. 419; *Peck* v. *Smith*, 1 Conn. 103; *Ford* v. *Chicago, & N. W. R. Co.* 14 Wis. 610; *Peck* v. *Denniston*, 121 Mass. 18; Angell & D. Highways, 3d ed. §§ 313-315; 9 Am. & Eng. Enc. Law, p. 275; Elliott, Roads & Streets, 549.

The action in form of ejectment will lie by a lot owner against an occupant of an abutting highway.

St. Louis v. *Missouri P. R. Co.* 114 Mo. 13; *Henry Gaus & Sons Mfg. Co.* v. *St. Louis, K. & N. W. R. Co. supra; Cummings* v. *St. Louis*, 90 Mo. 264; *Pemberton* v. *Dooley*, 43 Mo. App. 176; *Terre Haute & S. R. Co.* v. *Rodel*, 89 Ind. 128, 46 Am. Rep. 164; *Indianapolis* v. *Kingsbury*, 101 Ind. 211, 51 Am. Rep. 749; *Carpenter* v. *Oswego & S. R. Co.* 24 N. Y. 655; *Cohoes* v. *Delaware & H Canal Co.* 134 N. Y. 397; *Smeberg* v. *Cunningham*, 96 Mich. 378; *Earll* v. *Chicago*, 136 Ill. 277; Elliott, Roads & Streets, 536; *Harrison* v. *Duke Rutland*, 68 L. T. Rep. N. S. 35; 24 Am. & Eng. Enc. Law, p. 38.

The dedication of land to public uses may be either statutory or a common-law dedication.

Heitz v. *St. Louis*, 110 Mo. 618; *Buschman* v. *St. Louis*, 121 Mo. 523; *Cohoes* v. *Delaware &*

NOTE.—As to ejectment for land which is subject to easement of public street, see *note* to Hancock v. McAvoy (Pa.) 18 L. R. A. 781.

See also 33 L. R. A. 245; 39 L. R. A. 722; 41 L. R. A. 335.

H. Canal Co. supra; Bauman v. *Boeckeler*, 119 Mo. 189.

And until the street is actually opened and used, and the authority of the city exercised thereon, the city is not held to any public accountability.

Hunter v. *Weston*, 111 Mo. 177, 17 L. R. A. 633.

Nor until such exercise of power by the city can it sue an obstructor of such street.

Moundsville v. *Ohio River R. Co.* 37 W. Va. 106, 20 L. R. A. 161; *Com.* v. *McNaugher*, 131 Pa. 55; *Jackson* v. *People*, 9 Mich. 111, 77 Am. Dec. 491; *Bryans* v. *Atmand*, 87 Ga. 564.

Nor is the legal status of the highway impaired by failure of the city to exercise authority thereon or to improve it.

St. Louis v. *Missouri P. R. Co.* 114 Mo. 13.

The statute of limitation does not run against a public use; and no adverse claim or possession whatever of a highway can confer title.

St. Louis v. *Missouri P. R. Co. supra;* Mo. Rev. Stat. 1889, § 6772; *Williams* v. *St. Louis*, 120 Mo. 403; Angell & D. Highways, § 324; *Com.* v. *Moorehead*, 118 Pa. 344.

Nor does nonuser constitute an abandonment of the public use.

Roanoke Invest. Co. v. *Kansas City & S. E. R. Co.* 108 Mo. 50.

If the land is not a street then it must have ceased to be such by force of the order of the county court of June 4, 1878.

Such vacation cannot be legal when the city was not a party.

Glasgow v. *St. Louis*, 107 Mo. 198; *Aldridge* v. *Spears*, 101 Mo. 400; Elliott, Roads & Streets, 661; 2 Beach, Pub. Corp. § 1469.

An obstructor of a public street cannot defend on the ground of owning the fee.

St. Louis, K. & N. W. R. Co. v. *Clark*, 121 Mo. 181, 26 L. R. A. 751.

Mr. **John W. Snyder,** for respondents:

On July 29, 1858, the dedication of the plat of Ranson & Tally's addition vested the fee as well as the easement to the 30 feet then called George street and afterwards Tracy avenue in the county of Jackson.

Rev. Stat. 1855, § 8, p. 1536; Gen. Stat. 1865, § 8, p. 248; *Hannibal* v. *Draper*, 15 Mo. 639; *Ragan* v. *McCoy*, 29 Mo. 366; *Reid* v. *Edina Bd. of Edu.* 73 Mo. 304; *Glasgow* v. *St. Louis*, 87 Mo. 682, Affirming 15 Mo. App. 123.

But if it did not so vest the fee it is manifest that the three platters of said addition kept the fee themselves.

Campbell v. *Kansas*, 102 Mo. 339, 10 L. R. A. 593.

In neither event could the fee to the east 15 feet of this 30-foot strip by this act of dedication have "floated" so to speak across the way and immediately vested in the owner of the land just east of this 30-foot strip.

George street was properly vacated in strict conformity to legislative provisions.

Laws 1866, p. 200; Laws 1877, p. 186.

If it was not vacated, still no suit in ejectment can be brought in Missouri for street property by an adjoining property owner. When, as here, the fee is in the city, the city brings the suit.

Hannibal v. *Draper, supra; California* v. *Howard*, 78 Mo. 88; *Armstrong* v. *St. Louis*, 69 Mo. 309, 33 Am. Rep. 499; *St. Louis* v. *Missouri P. R. Co.* 114 Mo. 13.

On petition for rehearing.

This suit of ejectment cannot be sustained in law unless the abutting property owner does own the soil in the street and the presumption that he owns it is overcome by the proof that neither he nor any owner of the lot ever became seised of the soil in front of the lot, by the old-fashioned, iron-clad rules governing the alienation of real estate.

The platters in dedicating the 30 feet as Tracy avenue as the eastern boundary of their addition sold nothing to the owner on the east side of said strip and consequently this owner (plaintiff's grantor) got nothing from the platters of Ranson & Tally's addition (by the law of appurtenances or otherwise), for he bought nothing of them.

Subject to the easement of the public, the exclusive ownership of the soil—the freehold and all the profits—remains in him who owned the ground before the highway was laid out, and he may maintain trespass or waste, or recover possession subject to the easement.

Hare & Wallace's note in 2 Smith, Lead. Cas. 8th ed. pt. 1, p. 167, appended to the case of *Doraston* v. *Payne.*

If without the statute the owners keep their property, and with the statute lose it, the disseisin is worked by the statute. Therefore the statute should be absolutely precise in declaring its purpose to work said result, since it not only overturns the common law but the fundamental legal conceptions of property rights.

It conveys an easement to the county or, if more is conveyed, it is all conveyed to the county.

Snoddy v. *Bolen*, 122 Mo. 491, 24 L. R. A. 507.

What the lot owner has is not vested in him by the statute, but is in the lot owners notwithstanding the statute; in short, left there by the statute, not put there by statute. The statute certainly does not undertake to impoverish the generous dedicator of his freehold rights.

The dedicators of boundary streets own all of them, and their grantees take, not simply to the center of the street, but to the opposite edge.

Healey v. *Babbitt*, 14 R. I. 533; *Re Robbins*, 34 Minn. 99; *Taylor* v. *Armstrong*, 24 Ark. 102; *Watrous* v. *Southworth*, 5 Conn. 305.

Macfarlane, J., delivered the opinion of the court:

The action is ejectment to recover a strip of land 15 feet wide and 120 feet long, in Ranson & Tally's addition to Kansas City. The petition was in the usual form, and the answer was a general denial. Ranson & Tally's addition was duly platted, and the plat recorded in 1858. Tracy avenue was the eastern boundary of the addition, and was marked on the plat as being 30 feet wide. In June, 1878, an order was made by the county court of Jackson county purporting to vacate said avenue. The land lying east of and adjoining Tracy avenue was known as "Land 16," and was owned by the proprietors of the platted addition. In 1880 land 16 was duly platted as Primrose Hill addition. This plat shows Tracy avenue, but no part of it is upon the land platted. Lot 1 of said addition, 120 feet

deep north and south, abuts on the east side of Tracy avenue. In 1886 an ordinance was passed by the council of the city of Kansas City, entitled "An ordinance to widen and establish Tracy avenue from Sixth street to Independence avenue." This ordinance purported to establish an avenue 50 feet wide, the east side of which corresponds with the west side of said lot 1, and to condemn land therefor. Plaintiff is the owner of said lot 1, having acquired title thereto in 1889, and the land she sues to recover is a strip 15 feet in width lying west of and adjoining her lot, and being the east part of the land heretofore designated as Tracy avenue. Tracy avenue lies north and south between Sixth street on the south and Independence avenue on the north. The land in controversy is of that part of Tracy avenue immediately south of Independence avenue. The last-named avenue is graded and improved, while the land in suit, or the top of it, is from 25 to 40 feet above the grade of Independence avenue, and is inaccessible from it, though from Sixth street north it is graded nearly to the land in dispute. The evidence tends to prove that immediately after the order of the county court vacating Tracy avenue was made defendants took possession of the land in issue, fenced it, and have continued to hold the actual possession. There was also evidence tending to prove that defendants had not held possession for ten years before the suit was commenced. It is not disputed that defendants occupied the land by buildings when the suit was commenced, and that plaintiff's access to the street was thereby cut off. The question of defendants' right to a verdict by reason of their adverse possession of the premises was submitted to the jury upon instructions to which no objection is now made. Defendants asked an instruction to the effect that upon the pleadings and evidence plaintiff could not recover. This the court refused. The court gave a number of instructions asked by defendants, upon which the case was submitted to the jury, whose verdict was for plaintiff. A motion for a new trial, assigning as grounds therefor the ruling of the court in giving and refusing instructions, was filed by defendants. This motion was sustained, upon the ground, as stated by the court, that "plaintiff had not shown any right to recover." From the order granting a new trial, plaintiff appealed.

According to the opinion of the court, necessarily implied from its ruling in granting a new trial, the instruction in the nature of a demurrer to the evidence should have been given. The question, then, is whether, under the pleadings and evidence, plaintiff established a right upon which he might recover.

1. It is contended by defendants, in the first place, that ejectment will not lie as a remedy to the owner of land abutting upon a public street for special injury caused by the permanent obstruction by a third person of the surface of the street adjacent to his property. We find no case in this state in which the question as thus presented has been directly passed upon, and the decisions in the courts of other states are not in entire harmony. It is, however, well settled in this state that such an owner has rights to a highway peculiar to himself, and which are not possessed by the public generally, and for a violation of which he may maintain an action, notwithstanding the wrong done also affects the public *Cummings* v. *St. Louis*, 90 Mo. 264; *Henry Gaus & Sons Mfg. Co.* v. *St. Louis, K. & N. W. R. Co.* 113 Mo. 315, 18 L. R. A. 339; *Rude* v. *St. Louis*, 93 Mo. 414. One of the private rights of an abutting owner is that of free access to his premises from the street. Dillon says: "A person owning or in possession of premises abutting on a public highway or street, whose right of access to the same is unreasonably or unlawfully obstructed, may recover from the person causing such obstruction damages for the private injury he sustains where such damages are particular, direct, and substantial." Mun. Corp. vol. 2, § 730. But the principles announced in these authorities do not answer the question. An action of ejectment is a possessory remedy, and a judgment therein for a plaintiff entitles him to the possession of the premises recovered. It is insisted, therefore, that the execution of such a judgment would, as to the public, be the mere substitution of one wrongdoer for another. The leading authority in support of this position is *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452, in which the right to a remedy by ejectment was denied on the ground that the plaintiff, by invoking that remedy, seeks to be put in actual possession of the land, and this would subject him to indictment for a nuisance, the private right of possession being in direct hostility with the easement or use to which the public is entitled, and taking possession subject to the easement being utterly impracticable. Sedgw. & W. Trial of Title to Land, § 131. Certain provisions of our statute on ejectment, such as the right of plaintiff to recover rents and of a defendant to recover for improvements, appear to be also inconsistent with the rights and obligations of an abutting owner. But it is the settled doctrine, both at common law and in this state, that the owner of premises abutting on a public street is presumptively the owner of the fee to the center thereof, subject to the easement to which the land is devoted. *Snoddy* v. *Bolen*, 122 Mo. 483, 24 L. R. A. 507; *Grant* v. *Moon*, 128 Mo. 49, and cases cited in each. The grantee of the easement is not the owner or occupant of the land over which the easement extends, but presumptively has a mere right of use for the purposes for which the grant was made. The owner has the right to the use of the land for all purposes not inconsistent with the grant. *Snoddy* v. *Bolen*, 122 Mo. 493, 24 L. R. A. 512; *Gamble* v. *Pettijohn*, 116 Mo. 377. "The right to the fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons." Sedgw. & W. Trial of Title to Land, § 132. As these interests are independent, each owner should have all remedies necessary and appropriate for securing their enjoyment, and, when permanent occupation is taken of the land, thus depriving the owner of his right to its qualified use, no remedy would be so adequate as that of ejectment. An action for the trespass might be maintained, but by that remedy damages for the injury could only be recovered. The cause of the wrong could not be abated, or plaintiff

restored to his right to the land. Repeated actions for damages would afford very inadequate redress.

It is true, the owner could only recover the land subject to the easement, and should not be authorized by the judgment to continue a public nuisance in the street, but the extent of the recovery could be regulated by the judgment. The character of the right would also determine the proper elements of damages. As the owner could not himself apply the land to uses inconsistent with the rights of the public, neither could he authorize others to do so, and therefore the rental value could not be recovered by way of damages. Neither could defendants recover under the name of improvements for the value of obstructions placed in the streets which constitute a public nuisance. The re-erection of such improvements could not be attended with the good faith which is necessary to entitle a defendant in ejectment to recover their value.

No good reason can be seen why ejectment should not lie, and that it does lie has been affirmed generally by the text-writers and courts. Angell & D. Highways, § 320; Sedgw. & W. Trial of Title to Land, *supra;* Elliott, Roads & Streets, 536; *Goodtitle* v. *Alker*, 1 Burr. 133; *Carpenter* v. *Oswego & S. R. Co.* 24 N. Y. 655; *Smeberg* v. *Cunningham*, 96 Mich. 378; *Taylor* v. *Armstrong*, 24 Ark. 105; *Wright* v. *Carter*, 27 N. J. L. 76; *Ayer* v. *Phillips*, 69 Me. 50. The recent case of *Snoddy* v. *Bolen*, *supra*, is a clear recognition of the right of the owner to a remedy by ejectment against a third person of premises which are subject to an easement. That suit was ejectment to recover possession of the minerals beneath the surface of the street. The right to the remedy was not questioned, and a judgment for possession was affirmed. The remedy was thus approved, though there was no discussion of the point. It is true that the rights asserted and the wrongs complained of in that case and the judgment demanded could not affect or interfere with the public easement, but there is no difference in the principle involved in that case and this one. The distinction lies in the character of the relief to be granted. The relief must be so qualified as not to cause an interference with the easement. We are of the opinion that ejectment is a proper remedy.

2. But it is claimed by defendants that, inasmuch as Tracy avenue was the limit of Ranson & Tally's addition on the east, the title to the entire street remained in the original proprietors of the adjacent lots and their grantees, and the east half of the street did not pass, by virtue of the plat, to the owners of the land on the east side, which now constitutes lot 1. The conveyance of a lot or tract of land bordering on a street or road presumptively carries the title to the center of the road or street if the title of the grantor extends that far. "The presumption is that the grantor did not intend to withhold any interest in the street or highway." "The presumption may be overcome," says Judge Black, "but it must be overcome by something stated in the deed which shows distinctly an intention to withhold an interest in the street." *Snoddy* v. *Bolen*, *supra*. But it is held that, if the street is the limit of the dedicator's title, a conveyance of an abutting lot will carry the fee in the street to the opposite boundary thereof. *Snoddy* v. *Bolen*, 122 Mo. 485, 24 L. R. A. 507, and 122 Mo. 493, 24 L. R. A. 512, and cases cited. But the presumption only extends to common-law dedications, to streets condemned for public uses, and to statutory dedications, where the quantity of interest is not prescribed. The presumption is founded on considerations of public policy in order to avoid controversies between owners of adjacent land over property in which the public has an interest, and may also become involved. There can be no doubt that for the same considerations of policy it is entirely competent for the legislature to prescribe the legal effect of voluntary dedications of streets, and to prescribe the quantity of interest in the streets the dedicator parts with as well as that taken by the public. Angell & D. Highways, § 308. The statute in force when the plat was filed provided that such plats "shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public use in the county in which such town, village, or addition is situate, in trust, and for the uses therein named, express or intended, and for no other use or purpose." Rev. Stat. 1855, p. 1536, § 8. Under this statute it has been held that the fee passes from the owner by the dedication. *Hannibal* v. *Draper*, 15 Mo. 634; *Reid* v. *Edina Bd. of Edu.* 73 Mo. 304. It has also been held that the fee held by the city was subject to the trusts contained therein or intended thereby, from which it could not be diverted. *Belcher Sugar Ref. Co.* v. *St. Louis Grain Elevator Co.* 82 Mo. 121; *Ferrenbach* v. *Turner*, 86 Mo. 419. Considering the policy of the law, as before stated, to be that the owners of property abutting on a street own the fee also to the center of the street, subject to the easement, it is clear to us that the statute was intended to effect the same purpose; that is, while the fee passed out of the dedicator, and vested in the county, the public only secured an easement, and the abutting owners, respectively, the beneficial right in the land to the center of the street. This seems to be the view taken in the *Snoddy Case*, 122 Mo. 491, 24 L. R. A. 507, and 122 Mo. 493, 24 L. R. A. 512, though what is there said may be considered only *dicta*. We are therefore of the opinion that by the statutory dedication of Tracy street the fee to the land passed out of the dedicators, and the ownership, subject to the easement, vested in the abutting owners, respectively, to the center of the street.

3. What is said in the foregoing paragraph answers the contention that Tracy avenue was vacated by order of the county court. But it may be said that the statute authorizing county courts to vacate streets expressly provided that 'all title thereto shall vest in the person owning the property on each side thereof in equal proportions, according to the length or breadth of such ground as the same may border on such street." Acts 1866, p. 200; Acts 1877, p. 186. So, when the street was vacated, the title to the east half of it vested in the owners of the land on that side. Such an adjustment of the title, in order to avoid further controversies, was required by the statute, subject to which only was the vacation authorized. The

statute is founded upon the same principle of public policy as the rule which, under other circumstances, vests in the abutting owners, respectively, the title to the center of the street. Upon the theory of the defense, then, that the street was vacated by order of the county court, plaintiff has title to the land sued for, and is entitled to the possession.

4. But, though the street may have been vacated, it seems to have been re-established by an ordinance of the common council of the city of Kansas City. That ordinance provided for the assessment of damages for the property taken, and for the assessment of benefits against the adjacent owners to pay the same. If the damages were paid, and the proceedings became complete, then the land became a street, and the easement over it vested in the city, and the ownership to the center of the street, subject to such easement, became vested in plaintiff as abutting owner. In any event, it seems to us that plaintiff made out a case upon which she is entitled to recover. It may be proper to say that the entire proceedings, either for the vacation of the street or for re-establishing it, are not before us, and we express no opinion as to their sufficiency to accomplish the purposes intended. As plaintiff asserts her rights upon the theory that the land is a part of the street, we have so treated it. So, also, we have considered the claim of defendants on the theory that it was vacated.

Judgment reversed, and cause remanded, with directions to set aside the order granting a new trial, and enter a proper judgment for plaintiff upon the verdict.

All concur, except **Barclay, J.**, who does not sit.

Rehearing denied.

MICHIGAN SUPREME COURT.

Lavina GAVETT, *Plff. in Err.*,
v.
City of JACKSON.

(.....Mich.....)

A city is not liable for a thin strip of ice 3 feet wide and 1½ to 2 inches thick across a sidewalk, where it was formed by the discharge of water from a pipe which had been put up to take water from a sag in an eaves trough.

(*Montgomery and Moore, JJ., dissent.*)

(May 26, 1896.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries received by falling upon ice which defendant was alleged to have negligently permitted to accumulate on a sidewalk. *Affirmed.*

The facts are stated in the opinions.

Messrs. **Pringle & Hewett,** for plaintiff in error:

The legislature in using the word "defective" in the title of the act did not intend to exclude defects in ways which were caused by obstructions or by anything which made them unsafe for travel.

Bowen v. *Detroit City R. Co.* 54 Mich. 496, 52 Am. Rep. 822; *Wallace* v. *Detroit City R. Co.* 58 Mich. 231; *Laughlin* v. *Street R. Co.* 62 Mich. 220.

The statute makes the city not only liable for injuries occurring through neglect to keep the streets in repair, but also for such as occur by reason of the neglect of the city to keep its streets in a condition reasonably safe and fit for travel.

Joslyn v. *Detroit*, 74 Mich. 458; *Shippy* v. *Au Sable*, 85 Mich. 280; *Southwell* v. *Detroit*, 74 Mich. 438; *Merkle* v. *Bennington Twp.* 58 Mich. 157, 55 Am. Rep. 666; *Bolinger* v. *St. Paul & D. R. Co.* 36 Minn. 418; *Detroit* v. *Chaffee*, 70 Mich. 80.

The maxim *Qui hæret in litera hæret in cortice*, is applicable to remedial statutes as well as to what judges have declared to be the common law.

Fowler v. *Padget*, 7 T. R. 509; Broom, Legal Maxims, 612, 613.

The intent of the law must always be kept in view.

Jackson, L. & S. R. Co. v. *Davison*, 65 Mich. 416.

The intent of the law under which this action was brought must have been to secure the repairing, safety, and fitness for travel of the public ways.

Hill v. *Fond du Lac*, 56 Wis. 242.

The reasonable necessity of keeping sidewalks clear from ice is greater than that for keeping the streets clear.

Cloughessey v. *Waterbury*, 51 Conn. 405, 50 Am. Rep. 38.

If the cause producing the danger to the way was such a cause as the city might have controlled, it was equally its duty to have done so as though it were a part of its own construction, and the city is equally bound by notice of the dangerous cause.

Todd v. *Troy*, 61 N. Y. 506; *Gillrie* v. *Lockport*, 122 N. Y. 403; *Hall* v. *Lowell*, 10 Cush. 260; *Allison* v. *Middletown*, 101 N. Y. 667; *Pomfrey* v. *Saratoga Springs*, 104 N. Y. 459; *Weston* v. *Troy*, 139 N. Y. 281; *Corbett* v. *Troy*, 53 Hun, 228; *Baltimore* v. *Marriott*, 9 Md. 160; *Taylor* v. *Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Ring* v. *Cohoes*, 77 N. Y. 88, 33 Am. Rep. 574; *Stanton* v. *Springfield*, 12 Allen, 566; *Chase* v. *Lowell*, 151 Mass. 422; *Hughes* v. *Lawrence*, 160 Mass. 474.

The duty of the city included that of constant watchfulness so long as the cause of the danger was permitted to remain. Whatever fairly put the city upon inquiry was sufficient notice. It was chargeable with notice of having the means of knowledge it did not use therein.

Converse v. *Blumrich*, 14 Mich. 109, 90 Am.

NOTE.—As to municipal liability for ice on sidewalks or streets, see *note* to Housmann v. Madison (Wis.) 21 L. R. A. 263.

Dec. 230; *Medina Twp.* v. *Perkins*, 48 Mich. 67; *Fulton Iron & E. Works* v. *Kimball Twp.* 52 Mich. 146; *Stebbins* v. *Keene Twp.* 55 Mich. 552; *Woodbury* v. *Owosso*, 64 Mich. 239; *Moore* v. *Kenockee Twp.* 75 Mich. 332, 4 L. R. A. 555; *Dotton* v. *Albion*, 50 Mich. 129; *Campbell* v. *Kalamazoo*, 80 Mich. 655; *O'Neil* v. *Westbranch*, 81 Mich. 544; *Fuller* v. *Jackson*, 92 Mich. 197; 16 Am. & Eng. Enc. Law, p. 795, and cases cited in note 1.

An officer from whom ministerial duties are required by law is liable to individuals injured by reason of his neglect to perform such duties. *Raynsford* v. *Phelps*, 43 Mich. 342.

This rule is applied to private corporations. *Bowen* v. *Detroit City R. Co.* 54 Mich. 496, 52 Am. Rep. 822.

This rule was not at common law applied to political subdivisions except to cities where the grant of a charter was sometimes construed to be upon condition of keeping the ways in repair.

Russell v. *Devon County*, 2 T. R. 667.

Legislation in the United States generally made it the duty of commissioners of highways to make repairs of the ways, and gave to aldermen of cities and villages the power and imposed the duties of highway commissioners, and they were held liable if injuries were received by reason of their neglects.

Bartlett v. *Crozier*, 17 Johns. 439, 8 Am. Dec. 428.

In New York the courts held cities and villages liable for the neglects of their officers.

New York v. *Furze*, 3 Hill, 612; *Conrad* v. *Ithaca*, 16 N. Y. 158; *Weet* v. *Brockport*, Id. 161 note; *Hickok* v. *Plattsburgh*, 15 Barb. 427.

Mr. **William E. Ware,** for defendant in error:

The circuit judge held the case ruled by *McKellar* v. *Detroit*, 57 Mich. 158, 58 Am. Rep. 357, and directed a verdict for the defendant.

There is no common-law liability resting upon the city for injuries sustained on account of defects in its sidewalks or streets, nor for its failure to keep the same in condition reasonably safe and fit for public travel.

Niles Twp. Highway Comrs. v. *Martin*, 4 Mich. 557; *Roberts* v. *Detroit*, 102 Mich. 66, 27 L. R. A. 572.

The bench and bar of the state have generally understood the *McKellar Case* as precluding recovery in similar cases.

Kannenberg v. *Alpena*, 96 Mich. 53; *Rolf* v. *Greenville*, 102 Mich. 545; *Hutchinson* v. *Ypsilanti*, 103 Mich. 12.

Grant, J., delivered the opinion of the court:

I think that the instruction of the circuit judge was correct. The sidewalk was about 10 feet wide, and in good repair. The building, which stood on or near the line of the street, was provided with an eaves trough, which had sagged near the center, so that the accumulated water would flow over to the annoyance of the tenants. To remedy this, a pipe, 2 inches in diameter, had been put up, to take the water from the sag. This came down to the ground, and discharged its water about 2 feet from the sidewalk, and part flowed over the walk, resulting in the thin strip of ice, 3 feet wide, and 1½ to 2 inches thick. *Todd* v. *Troy*, 61 N. Y. 506; *Pomfrey* v. *Saratoga Springs*, 104 N. Y. 459, and *Hall* v. *Lowell*, 10 Cush. 260, cited by my Brother Montgomery, evidently make no distinction between accumulations of ice and snow caused by natural and by artificial means. In *Pomfrey* v. *Saratoga Springs* the water had fallen from the roof of a barn situated near the street, and the ice and snow had accumulated on the walk to the depth of 3 feet.

What are the artificial means, as distinguished from natural ones, for which municipalities must be held liable? People have the right to erect buildings from which the water must flow to the ground, and, if it comes faster than the ground can absorb it, it must flow onto the sidewalks. Is the city to be held responsible, under the prior decisions of this court, for this rightful and natural flow of water, when the weather has intervened and frozen it? People have the right to conduct the water from the roofs of their buildings to the ground by means of gutters, eaves troughs, and conductors. This water must seek the street gutters, to be carried away. This is done in all villages and cities where direct communication is not made from the conductor to the sewer. Why should the city be held liable for accumulations caused by the action of the weather in these cases, and not liable for accumulations, just as dangerous, resulting from other causes, such as snow from sidewalks and street-car tracks, which was the case in *Hutchinson* v. *Ypsilanti*, 103 Mich. 12, or ice formed in consequence of the stoppage of a catch basin, causing the water to flow over the sidewalk, which was the case in *Kannenberg* v. *Alpena*, 96 Mich. 53? Many, and probably most, houses are built higher than the sidewalk, with sloping yards in front. Under the rule sought to be established in this case, municipalities would be liable for the natural flow of the water from such buildings over the yards to the sidewalks. Such is the doctrine in *Pomfrey* v. *Saratoga Springs*. Such holding is not consistent with the former decisions of this court. The nonliability for the natural flowing and spreading of water, as it comes from conductors, is recognized in *Hughes* v. *Lawrence*, 160 Mass. 481. In that case a gutter had been constructed across the sidewalk. It was claimed that the water had been collected in this gutter, and frozen, to the height of a foot or more, and that upon this the plaintiff fell. It was claimed by the defendant that the water had spurted from holes in the conductor over the sidewalk, forming a thin coating of ice, upon which the plaintiff fell. It was held competent for the jury to find that the former constituted an obstruction, but that the latter did not. I think that the logical conclusion from our former decisions is that the defendant is not liable.

Judgment affirmed.

Long, Ch. J., concurred with **Grant,** J.

Hooker, J., concurring:

I concur with my brothers Long and Grant in the affirmance of the judgment in this

cause. Unless we are to say that it is the duty of the owners of all lots that are higher than the adjoining highways to prevent the flow of water therefrom, or promptly remove any ice that may form by reason of the escape of water from their buildings upon the adjoining highways, and, further, that the city must at its peril see that such duties are performed, we must hold that the plaintiff should not be permitted to recover in this cause. If a liability exists, it is because of a defect in the highway; and, if ice frozen upon a sidewalk is a defect when it is caused by water flowing from a roof, why should it not be when it flows from a vacant lot, or when it falls upon the walk, or is caused by the melting of snow upon or adjoining such walk? If the liability of a city for damages resulting from a failure to keep its highways in a reasonably safe condition for travel extends to cases where such condition is not ascribable to defects in the construction and maintenance of the way, or where the action of the officers of the city or their negligence in the performance of a duty is the cause, it may be contended that cities must cause the streets to be patroled, in search of bricks or coals that fall from wagons, for the treacherous banana peel upon which the unwary are sure to slip, and for tacks or bits of glass or other rubbish, which puncture the tires of bicycles. I think such are not defects in the highway.

The presence of the water upon the walk was due to no act of the city or its officers. It is manifest that it must escape from the premises across the walk if it is to reach the gutter. Were there no building there, and the lot of uniform grade, the whole surface of the walk might be expected to be covered with ice; while, if undulating so as to form a valley, the water might flow over the walk within limited bounds, no wider than in this case. Shall we say that because the water falls upon a roof instead of the ground, or because it finds its way through a conductor instead of a valley, to a given point, that there is a liability upon the city? Is it desirable to omit the eaves trough, and shed the water uniformly upon the walk, making it wet and icy throughout, rather than at one point, where the presence of the conductor may indicate the possible presence of ice? Unless we are prepared to say that the city must see that water does not flow upon the sidewalk at all by so constructing its ways, walks, sewers, and other devices as to prevent it, or that it must remove all ice from walks seasonably, I do not see how we can hold the city liable in this case. There is not even the gutter across the walk (which walk the city had the responsibility of keeping in repair) that—in the case of *Hughes* v. *Lawrence*, 160 Mass. 481 — the court said "it was competent for the jury to find . . . constituted a defect in the way, and that its construction was such as to cause a special deposit of ice at that particular place;" thus distinguishing between the gutter, which the city was responsible for, and the conductor, admittedly defective, with which, as in this case, it had nothing to do. The trend of Michigan decisions has been against the theory that every obstruction in a highway is a defect for which the city is to be mulcted in damages by persons meeting with accidents by reason thereof. In *Agnew* v. *Corunna*, 55 Mich. 428, a bowlder 4 feet high, taken from the roadbed, and placed by the side of the road, was held not to be a defect in the way, which was said to be in good repair. *McKellar* v. *Detroit*, 57 Mich. 158, 58 Am. Rep. 357, upon which case the learned circuit judge relied, emphasizes this rule in an ice case. The case differs from this chiefly as to the manner in which the water came upon the walk, being in that case caused by the melting of snow which fell there. The case of *Joslyn* v. *Detroit*, 74 Mich. 459, should not be overlooked. This was where a lot owner placed a pile of sand in the way, by consent of the city authorities, which was the cause of a buggy being overturned, to the injury of the occupant. A verdict for the plaintiff was sustained, Mr. Justice Campbell dissenting. In *Hutchinson* v. *Ypsilanti*, 103 Mich. 12, Mr. Justice Grant distinguished *Joslyn* v. *Detroit*, *supra*, and *Hayes* v. *West Bay City*, 91 Mich. 418, showing that the city was an active agent in causing obstruction. I think the judgment of the circuit court should be affirmed.

Montgomery, J., dissenting:

This action is brought to recover for injuries received by plaintiff while traveling on a sidewalk in Mill street, in the city of Jackson, the cause of the injury being a formation of ice, consisting of a ridge from 1½ to 2 inches thick in the center, and sloping from the center either way, and in all covering about 3 feet in width. The evidence disclosed that this ice was formed by the freezing of a discharge of water carried by a conductor pipe of an adjoining building, and that this pipe had been in use for seven or eight years before the accident, and that the common result was for ice to form at this point whenever freezing weather followed mild weather; that this particular ridge of ice had been there in its then condition for two or three days, and, as one witness stated it, perhaps a week, before plaintiff received her injuries. The circuit judge, being of the opinion that the case was ruled by *McKellar* v. *Detroit*, 57 Mich. 158, 58 Am. Rep. 357, withdrew all questions from the jury, and directed a verdict for defendant. The occasion of the fall in *McKellar* v. *Detroit* was a ridge of ice caused by the tramping of snow and melting and freezing, until the surface became uneven; obviously, the result of climatic influence, combined with the ordinary and proper use of the street. *Rolf* v. *Greenville*, 102 Mich. 544, depended upon a state of facts precisely analogous to that in *McKellar's Case*. *Hutchinson* v. *Ypsilanti*, 103 Mich. 12, was held to be within the doctrine of *McKellar's Case*, on the ground that the use of the street to accumulate snow thrown from the walk or street-railway track was reasonable, and the city should not be liable because ice formed on the uneven parts of the snow thus found. In *Kannenberg* v. *Alpena*, 96 Mich. 53, it appears that the city had

made provision for carrying off the water by gutters, and by supplying catch basins; that, on the occasion in question, the catch basin had become stopped up, so that the water was not carried off. As was stated, no fault was found with the catch basin's construction, and it was held that there was in that case no liability. It was said in that case: "Some cases have been cited in support of the plaintiff's claim, but they relate to instances where, by neglect of the hydrants or water spouts, water was permitted to drop upon the walk, where it froze. These cases are clearly distinguishable from the case before us." It will be seen that no case has been before this court involving the precise question presented. We are well satisfied with the doctrine advanced by the court in the *McKellar Case* and those which have followed it; and the doctrine that a failure to provide against a formation of ice in the usual way, as a result of freezing, cannot in this climate be deemed a result of want of due care or a defect in the street, is too fully settled to be open to question. But it does not follow from this that a walk cannot be constructed so as to make the accumulation of ice unnecessary at a particular point, and unnecessary and unnatural, in a sense that it may be treated as a defect in the way. Much less can it be said that a city may permit water to be carried on the walk by artificial means, in such manner that the inevitable result is the formation of ridges of ice, and, without using any precaution to prevent this dangerous impediment to travel, shield itself under the claim that the climate is the real cause of the difficulty. *Todd* v. *Troy*, 61 N. Y. 506; *Pomfrey* v. *Saratoga Springs*, 104 N. Y. 459; *Hall* v. *Lowell*, 10 Cush. 260; Elliott, Roads & Streets, 459; *Scoville* v. *Salt Lake City*, 11 Utah, 60. And see the true distinction noted in *Stanton* v. *Springfield*, 12 Allen, 566, and again in *Hughes* v. *Lawrence*, 160 Mass. 474; *Corbett* v. *Troy*, 53 Hun, 228. See also *Canfield* v. *Chicago & W. M. R. Co.* 78 Mich. 356.

We think the plaintiff made a case entitling her to have the jury determine whether the walk was reasonably safe for public travel, and whether the defect had existed for such length of time as that the city authorities, in the execise of reasonable supervision, should have known of and remedied the defect, by removing the accumulation of ice; and, in the determining of this question, the jury had the right to take into consideration the fact, if proved, that the waterspout in question had for years been the occasion of ice formations at this point, as this would have a direct bearing upon the degree of diligence required by the city in removing the ice accumulation in question.

Judgment reversed, and a new trial ordered.

Moore, J., concurred with **Montgomery, J.**

END OF CASES IN BOOK 32.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

I. Public, Official, and Statutory Matters.
II. Contractual and Commercial Relations.
III. Corporations and Associations.
IV. Domestic Relations; Personal Capacity.
V. Fiduciaries.
VI. Torts; Negligence; Injuries.
VII. Property Rights.
VIII. Civil Remedies; Rules and Principles.
IX. Criminal Law and Practice.

I. Public, Official, and Statutory Matters.

See also *infra*, IX.

The ownership of the fee of land under the Great Lakes is held to be in the state, and not in the riparian owners, and the state is held to have power to dedicate a portion thereof as a public hunting ground subject to rights of navigation, on which it is unlawful to cut rushes or other vegetation. (Mich.) 694.

Police regulation of business.

Numerous provisions in an ordinance regulating junk dealers and pawnbrokers are held valid and reasonable, among them the power to revoke the license arbitrarily. (Mich.) 116.

An ordinance making it unlawful to bring any secondhand clothing or bed furniture into a town for sale is held void as an attempt absolutely to prohibit a lawful business. (N. C.) 122.

A statute requiring the weighing of coal hoisted from mines, but applying only to mines whose product is shipped by rail or water, is held unconstitutional for arbitrary discrimination, and also as interfering with the freedom of contract between the employer and employees. (Ill.) 445.

A statute prohibiting mine owners from digging within 5 feet of a division line without consent of the adjoining owner is held to be within the police power of the legislature. (W. Va.) 800.

The constitutionality of a Sunday law prohibiting business by barbers, without applying to any other class of business, is denied in Illinois on the ground of its discrimination. (Ill.) 659.

In agreement with the Illinois decision, and contrary to the decision in New York, a California case holds that a Sunday law applicable only to barbers is unconstitutional. (Cal.) 664.

The use of a blower for dry emery wheels is held to be within the constitutional power of the legislature to require. (Mich.) 853.

Abatement of nuisance.

Seizure and destruction of nets used in unlawful fishing, by officers in obedience to a statute, is held not to violate the constitutional rights of the owner. (Wis.) 380.

Game laws.

A statute making it unlawful to ship deer, elk, etc., by a common carrier to any commission merchant or sale market, is held constitutional on the ground that property in such game is subject to all police regulations. (Minn.) 131.

Civil rights.

A drug store in which soda water is sold is held not to be a place of public accommodation and amusement within the Illinois civil rights act. (Ill.) 566.

Carrying weapons.

The constitutional right to keep and bear arms is held not to be violated by a statute prohibiting unauthorized bodies of men to drill and parade as a military organization, even if certain independent military bodies are exempted therefrom. (Mass.) 606.

Statutes.

The right to impeach an enrolled bill properly signed and promulgated by legislative journals is denied on review of the authorities. (Ky.) 203.

Elections.

A striking instance of the effect of holding a statute unconstitutional is discussed in a case which refuses to grant an injunction to prevent an election under an unconstitutional statute, where the effect would be to prevent any subsequent election of a legislature. (Ind.) 578.

Some interesting questions as to ballots are decided in case of an election for school directors; among them the decision that the words "long term" after one of two names on a ballot are sufficient to satisfy a statute requiring the office to be designated, where the election is only for school directors and but one of them for a long term. (Ill.) 656.

The sufficiency of a petition for a county-seat election is held not subject to question after the election has been held and the vote given in favor of a change. (N. D.) 723.

Civil service law.

The Massachusetts statute attempting to give veterans the right to appointment without ex-

amination on their sworn statement of their own qualifications, with a certificate of three reputable citizens, is held unconstitutional. (Mass.) 253.

County board.

A constitutional provision that courts shall be open is held inapplicable to a county board of revenue in passing on claims or awarding contracts. (Ala.) 520.

Hiring officer.

The payment of money to a member of a school board as compensation for his loss of time in attending a meeting to pass upon a proposed contract is held fatal to the contract when his vote was necessary to its adoption. (W. Va.) 413.

Official bond.

On the disputed question of the liability of the bondsmen of an officer for money lost by a bank failure, the Nebraska court decides that such loss or theft of the money is no defense. (Neb.) 223.

License.

A license of $50 per quarter for retailers of goods having no fixed places of business in the municipality is sustained, although this is a heavier license than is charged upon regular dealers at fixed places of business. (Cal.) 527.

A license tax of $4 per month on the business of selling secondhand clothing is held valid, although general merchants were taxed only $1 per month. The constitutional rule of uniformity is held not to be violated, since the tax is uniform on each class. (N. C.) 123.

A license tax of which a part of the proceeds goes to the county is held not to be within the meaning of the Montana Constitution prohibiting the legislature to impose taxes in any county for county purposes. (Mont.) 635.

Excise money.

The constitutionality of the New York excise tax law of 1896 is sustained against objections that the provision for giving part of the proceeds to cities and towns was an appropriation of public money, and that because of discrimination between cities according to population it was within the constitutional provisions as to general and special city laws. (N.Y.) 344.

Taxes.

The value of a water power made by a dam in a river between towns is held apportionable between the lands in the different towns covered by the water, although the power is all used in one town only. (N. H.) 621.

The right of the legislature to tax credits in the hands of trustees of nonresidents is sustained. (Mich.) 439.

An exemption of the property of a corporation not actually and in fact within the state, and the stock held by its stockholders, precludes the imposition of a franchise tax on the company, laid upon all its capital except that which is invested in the state. (N. J.) 643.

Public use.

A statute providing for a subway under the streets of a city, to be occupied by a street-railway company under a lease, is held to be for a public use for which taxation may be authorized. (Mass.) 610.

Sewer assessment.

One who has refused to pay an invalid assessment for a sewer is held properly chargeable with his share of the expense as a condition of the right to use it, when other property owners have paid the assessments on them. (Ohio) 734.

Interest on sewer assessments cannot be collected unless the law so provides; and the city cannot require it by by-law unless power to make the by-law is conferred upon it. (Conn.) 822.

Ferries.

The validity of a ferry license is sustained against various objections, and held to be exclusive within specified limits. (S. D.) 315.

Jurisdiction.

The power of a court on foreclosure of a railroad mortgage is held to extend to a part of the road extending into another state and which was formerly owned by another company which had been merged by consolidation. (Ga.) 208.

The jurisdiction on constructive service merely, to grant alimony and custody of children in a divorce suit, is denied where defendant and the children, although domiciled in the state, are absent from it and do not appear. (Cal.) 82.

Municipalities.

The provision that resident owners only shall be allowed to appeal from the annexation of territory to a city is sustained against the claim that it is unconstitutional. (Ind.) 586.

A municipal contract, the performance of which extends over a series of years, and payments of which are to be made annually, is held not to create an indebtedness for the total amount, but only for the amount falling due each year, within the meaning of a provision limiting indebtedness. (Mo.) 157.

Streets.

A thin strip of ice formed from water discharged near a sidewalk by a pipe to take it from a sag in an eaves-trough is held not to make a city liable. (Mich.) 861.

An ordinance prohibiting the use of salt on street railways is sustained against the claim that it impairs the franchise of the street-railway company and is unreasonable. (N. J.) 170.

Water supply.

A by-law of a water company having a franchise to supply a city and its inhabitants with water, whereby it declines to make contracts with any persons except owners of property or their authorized agents, will not justify the company in refusing to supply a tenant in possession of property if he is ready to pay in advance. (Mont.) 697.

II. Contractual and Commercial Relations.

A promise to an infant by a near relative other than a parent, although occupying the relation of parent, to pay for services at the end of a certain period, if relied upon, although made in jest, will give the infant on discharge during that time a right to recover in assumpsit for the actual value of the services. (W. Va.) 400.

The use of electrotype plates is involved in a case for breach of a contract giving the right to use them but not to sell them or multiply them for the purpose of selling. (Mass.) 283.

Restricting publication.

A contract restricting a person who sells the goodwill of a newspaper from conducting another journal in the same county is sustained as reasonable and as unaffected by the constitutional guaranty of the freedom of the press. (N. C.) 829.

Death.

Dissolution of a contract of employment by a firm is held not to arise as matter of law by the death of one of the partners, especially where both parties seem to assume that the contract will continue. (Mass.) 620.

The death of a guarantor, and notice thereof to the guarantee, are held sufficient to revoke a continuing guaranty. (Conn.) 818.

Statute of frauds.

A contract for the manufacture of articles of special or peculiar design, especially when it includes the attachment of them to realty as part of a building, is held not to be within the statute of frauds. (Minn.) 593.

A contract to manufacture a monument is held not to be within the statute of frauds although it does not call for any personal skill and labor. (Vt.) 788.

The statute of frauds is held to defeat a parol agreement to convey real estate by will, even if valuable rights are surrendered. (Wash.) 796.

The omission of essential elements of a memorandum for the sale of real property is held to be supplied by a power of attorney authorizing the sale. (Ala.) 127.

Warranty.

The sale of a folding bed by one who did not make it is held not to imply any warranty of its safety, if there was no concealment, but full opportunity to inspect it. (Me.) 592.

Conditional sale.

Waiver of forfeiture on default of an instalment due on a conditional sale of goods by virtue of an extension of the time is held binding so as to prevent forfeiture before such time expires. (Md.) 455.

The enforcement of a judgment bond as collateral security taken on a conditional sale of a chattel is denied after the sale has been rescinded by retaking possession of the chattel. (Pa.) 467.

Railroad ticket.

A somewhat peculiar case of a mistake by the ticket agent in a union depot in giving a ticket to a passenger for a different road than that desired is held not to make the company whose ticket was furnished liable for the mistake. (Ind.) 154.

Sale of timber.

After logs are cut under a contract for the sale and removal of timber, the failure to remove them within the time agreed is held not to forfeit the purchaser's title to them. (Mich.) 102.

Expectancy.

The law on the subject of releasing the rights of an heir is involved in a California case, which upholds a covenant releasing such an interest and estopping the promisor from contesting any disposition of certain property, whether by deed or will. (Cal.) 595.

Banking.

A bank having an overdue note of a depositor amounting to more than his deposit is held entitled to deny payment of his check without any formal application of the deposit to the note. (Ky.) 568.

A peculiar stipulation on a check, that it will not be paid if presented through a specified agency, is sustained. (N. C.) 712.

The liability of a bank for theft of a special deposit by its cashier is sustained, where it had not acted with due diligence. (Ill.) 769; (Ga.) 775.

A special deposit which must be returned in case of the insolvency of the bank is shown by depositing gold coin in pledge to secure an obligation on a bail bond. (Cal.) 479.

Fraud of a bank receiving a note for collection when insolvent is held not to alter the rule that collections under direction to remit by draft will not be impressed with a trust which will give a preferential claim against the bank's assets. (Tenn.) 715.

Negotiable paper.

A statement on the face of an order upon a savings bank that the depositor's book must accompany the order is held to defeat its negotiability. (Me.) 590.

An indorser of a note who gives directions to erase his name before its transfer is held relieved thereby from liability to a transferee who knows the facts. (Utah) 266.

A peculiar case of a forged indorsement of the name of a fictitious person to whom the payee of a draft had by a fraudulent scheme been induced to indorse it holds that the drawee bank paying the draft on the faith of such indorsement is not thereby relieved from liability to the payee. (Tenn.) 778.

Reliance upon mortgage security to a note without any care or inquiry as to the financial standing of the maker of the note, or the purchase of it merely for the purpose of acquiring the mortgaged property by foreclosure, is held not to preclude a purchaser of the note in the ordinary course of business from being a bona fide holder. (N. D.) 730.

Insurance.

A new kind of insurance appears in the guaranty against loss by insolvency of customers. Such a policy is construed to be a contract of insurance. (Wis.) 383.

A policy to indemnify an employer against liability for claims for injuries to employees is construed to be one of indemnity against liability, and not against damages, and therefore

prior payment of such claims is not a condition of a right of action on the policy. (Wis.) 388.

A clause making insurance incontestible except for fraud, after two years from date, is held to preclude the defense of suicide in case of death after that time. (Iowa) 473.

Death from asphyxiation from illuminating gas while asleep is held not to be excepted from a policy of insurance which excluded liability for death from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled. (Ill.) 654.

The burning of soot in a chimney, accidentally caused by the burning of waste papers in a stove, is held to be within the fires covered by a fire insurance policy. (Mass.) 608.

Other insurance which will invalidate a policy is held to mean other valid insurance, and not a subsequent policy which is invalid because of the prior policy. (Md.) 570.

The right of a mortgagee to sue in his own name on an insurance policy payable to him as his interest may appear is sustained to the extent of recovering his interest in the proceeds, where the insurance was taken in compliance with a requirement of the mortgage. (Mass.) 615.

Members of a mutual insurance company are held liable for assessments after the cancelation of membership to pay losses previously accruing, and such assessments may include interest and expenses incident thereto, costs of litigation, and allowance for contingencies. (Mich.) 481.

The unreasonable action of the appraiser of an insurer in refusing to accept an umpire unless he is taken from a distance is held to constitute a waiver of arbitration. (Tenn.) 172.

III. CORPORATIONS AND ASSOCIATIONS.

The legal capacity of a corporation to take a devise of property in excess of the amount allowed by its charter is held in Maryland to be a question that cannot be raised collaterally by private persons who, as distributees of the testator's estate, are interested to defeat the gift. (Md.) 293.

Pooling arrangements to control the voting of stock are held to be contrary to public policy. (N. C.) 265.

Officers of a corporation are held subject to mandamus to compel them to call a special meeting of stockholders according to the by-laws. (Conn.) 575.

An officer of a corporation who is plaintiff or attorney in fact for the plaintiff in an action against the corporation cannot receive service of process against the company. (S. C.) 764.

The right to forfeit the franchises of a water company for overbonding and wrongful issue of stock is held to have been lost by delay during which the company had extended its business. (Wis.) 391.

Matured certificates in a benefit society are held to make the holders creditors, with the rights of creditors in case of subsequent insolvency of the organization. (Md.) 311.

The rights of the members of a mutual insurance company to relief from liabilities for unauthorized insurance by the company are discussed in an important Iowa case in which the company had issued some policies in excess of its powers, and misrepresentations had been made as to a guaranty fund. (Iowa) 490.

Foreign corporation.

Compliance by a foreign corporation with statutory requirements was held sufficient to prevent dismissal of an action brought by it, although this compliance was made after the action was brought and motion for dismissal made. (Mo.) 400.

Religious society.

The trustees and the majority of the members of a religious association belonging to a larger body are denied power to withdraw its property from connection with the denomination against the protest of a minority. (Mich.) 92.

The rights of a minority faction in a church which is divided on religious doctrines are sustained in respect to the church property, where the minority adheres to the original faith of the church. (Ind.) 838.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

An illegitimate child is held not to be a "child" within the meaning of a statute giving a father a right of action for the death of a child, even when he had acknowledged the child and there was no other next of kin and the mother was dead. (Ind.) 509.

A parent's liability for alienating the affections of his son from the latter's wife is held to depend upon malice as distinguished from a proper parental regard for his son's welfare. (Miss.) 623.

Under the Indiana statute giving an unmarried woman a right to an action against her seducer it is held that this is extinguished by the marriage of the parties, but that a decree of the nullity of the marriage for fraud will destroy the effect of the marriage as a bar to the action. (Ind.) 848.

A decree of land within the state as alimony in a divorce suit is sustained, although rendered on service by publication only against a husband who is absent from the state, on the ground that it is substantially a proceeding *in rem*. (Kan.) 289.

The liability of the equitable separate estate of a wife for her debts is sustained after her death, in a case which extensively discusses such liabilities. (Va.) 214.

Women as notaries.

The appointment of women as notaries public is held to be beyond the power of the legislature to authorize under the Massachusetts Constitution. (Mass.) 350.

V. FIDUCIARIES.

The act of an agent in loaning his principal's money, without the latter's knowledge to his own debtor, receiving his pay out of the proceeds, is held to constitute such a fraud that the principal may repudiate it. (Miss.) 631.

VI. TORTS; NEGLIGENCE; INJURIES.

Libel.

Caustic criticism of a book in respect to its theories or literary composition is held not to be libelous so long as it does not attack the character of the author or misstate the contents of the book. (Mich.) 104.

Condition of buildings.

A landlord is held not obliged at common law to provide fire escapes on a leased building. (Tenn.) 782.

A contractor whose work in repairing a building has been completed and accepted is held thereby relieved from liability for injuries subsequently sustained by a third person in consequence of negligence in doing the work. (Ind.) 837.

The lighting of common halls and stairways at night in a building occupied by tenants is held not to be a part of the duty of a landlord to provide safe passages. (N. J.) 645.

Attracting children.

The doctrine of dangerously alluring premises on which children are injured is denied application to a railroad yard properly fenced, except on the side where the railroad tracks are, and in which a child is injured while playing on a pile of ties. (Tex.) 825.

Explosions.

Statutory liability for failure to give notice of an explosion in blasting rock is held to include the frightening of a horse by the explosion, and the persons "approaching" who were entitled to notice are held to include those who have just passed the place. (Me.) 588.

The liability of a natural gas company for the destruction of a building by explosion of gas is sustained, where for several years the gas had been leaking and it passed under the frozen surface of the ground for 80 or 90 feet to the building. (Ind.) 146.

An explosion of the generator of a refrigerating machine while inexperienced men were attempting to stop a leak by tightening nuts while the machine was under pressure is held to show negligence on the part of the employer, producing an unequal strain on the parts by unskilful work in tightening the nuts. (Cal.) 524.

Electric shocks.

Liability of a telegraph company for injury to an employee caused by an electric shock is sustained in a case in which the jury found that the employer was negligent. (N. J.) 351.

The liability of an electric light company for injury to a tinsmith who touched a defectively insulated wire on the outside of a building is held to be a question for the jury. (Mass.) 400.

An electric wire charged with a dangerous current when wound on a reel near the ground upon an electric light pole in a street is held to show negligence on the part of the electric company. (N. J.) 700.

Other injury to employee.

An attempt by workmen whose work and wages are temporarily suspended during the unloading of materials not connected with their work but at the place thereof, to aid the person having the load, whereby they injure him, even if it is done by the direction of their foreman, is held not to create any liability on the part of their employer. (Mass.) 605.

A temporary room in a mine, formed by excavating ore and used as a working place in getting out ore, is held not to be within the rule requiring a safe place to be furnished for employees to work in. (Mich.) 435.

The doctrine of the assumption of obvious risks is held applicable notwithstanding a statute requiring the employer to properly guard cog-wheels near which an employee works, and the assumption of such risks is held not to contravene public policy. (N. Y.) 367.

Overflow.

The fact that a railroad embankment which has large trestles for the passage of water to some extent increases the overflows of water upon low lands is not enough to show that the railroad company is liable, if it does not appear that trestles would be as economical or as safe and suitable for the road. (Miss.) 262.

Standpipe.

The rule as to dangerous agencies is applied to a standpipe filled with water, and the proprietor held liable for injuries to a guest of his own tenant caused by the fall of the standpipe. (Ohio) 736.

Bicycle collision.

A collision between a bicycle attempting to pass on the right side and a truck which is turning toward the curb of a street is held not to show necessarily that the driver of the truck was in fault. (Conn.) 651.

Failure to carry passenger.

A somewhat novel action for failure to transport a passenger on a railroad because the company had only two engines, and one of them broke down while the other was in a shop for repairs, is sustained notwithstanding the poverty of the road, but punitive damages are denied in the absence of any personal insult or indignity. (N. C.) 543.

Injury to passenger.

Negligence of the servants of a railroad company, whereby a passenger on the train of another company using the road of the former under a contract is injured, is held to render the owner of the train liable to the passenger. (Conn.) 539.

A dangerous hole in the floor of a toilet room in a railroad depot, when the room, although unlighted, was left with an open door from a waiting room, is held to make the carrier liable for injury to a person sustained in consequence. (Mass.) 101.

An unusual case as to the liability of a carrier for the murder of a passenger when asleep in a sleeping car denies the carrier's liability, in the absence of anything to show knowledge of the danger. (Va.) 792.

Where a lady passenger with a light, gauzy dress was burned by a lighted match touching her dress as it was thrown by a passenger who had lighted a cigarette, the street railway company was held not to be liable. (Mo.) 167.

Due care on the part of a street railway company operating a double-track road, when it discharges a passenger at a street crossing, is discussed in a case which holds that the speed of cars must be so controlled and such warning of their approach given as will reasonably protect a passenger. (Ohio) 276.

Collision with street car.

The overloading of a street car and its excessive speed are held gross negligence rendering the street railway company liable for a resulting collision. (Va.) 220.

A boy riding uninvited and without the driver's knowledge upon a private vehicle is held unaffected by the driver's negligence, when suing a street railway company for injuries caused by a collision between a car and the vehicle. (Ohio) 340.

Injury by train.

Attempting to cross a railroad track when obscured by smoke, immediately after a train has passed, is held such contributory negligence as will defeat a recovery for injuries received. (Ind.) 149.

An unusual case of the use of a railroad track by licensees or by persons invited thereon is that of the employees of a corporation whose shops are on both sides of the road, between which the crossing is kept planked by the railroad company for their use, and it is held that in making a flying switch at such place the company owes them reasonable care. (Conn.) 530.

The use of salt to keep railroad switches free from ice, if necessary, is held not to make the railroad company liable for attracting live stock which were killed by trains. (W. Va.) 416.

Loss of baggage.

A peculiar case of trunks checked over the wrong railroad holds that the railroad company is not liable for their loss by the fall of a bridge, in the absence of any fault other than mere negligence. (Conn.) 535.

VII. PROPERTY RIGHTS.

Accession on wrongful taking.

The doctrine of accession of property wrongfully taken is applied to the cutting and removal of hay, when it was done in good faith but without right. (Neb.) 422.

Recipes.

Carpet manufacturers are held entitled to some record of recipes made by a color mixer in their employ, when, contrary to his duty, he entered them in his own books instead of the books of his employers. (Pa.) 761.

Trees.

Trees overhanging a highway are protected from cutting under orders of selectmen, without the consent of the owner, for the purpose of moving telephone or telegraph wires, under a statute prohibiting them to be cut without such consent by the telegraph or telephone companies. (Conn.) 280.

Oyster bed.

The rights of cotenants in an oyster bed are held to include the right to take natural oysters therefrom without the power of either to exclude the other, even by dredging the premises and placing oyster shells and seed oysters thereon which must be disturbed by taking natural oysters. (N. Y.) 270.

Market stall.

The occupant of a stall in a market under a license revocable at pleasure is held to be a mere trespasser after notice to leave, although he has held over after the time fixed for the annual renting. (N. C.) 706.

Gift.

A Christmas gift by check to an employee, made according to the habit of previous years but in forgetfulness of the fact that his salary had recently been increased, is sustained against an attempt to avoid it for mistake, where the check is collected and the donee not notified of any intent to repudiate it for several months. (N. Y.) 703.

Gift of a bond in trust to be delivered to the donee on the donor's death is held to be valid. (Pa.) 766.

Wills.

Legacies to daughters are held to be adeemed by conveyances to them by the testator by way of gift without any apparent or expressed intent to the contrary. (Mich.) 232.

The sufficiency of a signature of the name of a subscribing witness to a will is sustained, although it was written by another subscribing witness at the request of the former. (S. C.) 77.

Trust.

A deposit "in trust for" another in a savings bank is held to be a prima facie trust which may take effect as against the donor's estate, where all his acts and declarations are consistent therewith. (Me.) 377.

The doctrine that a deposit of money in trust for another will create a trust is limited by a New York case which holds that a mere deposit of one's own money in the form of a trust is not conclusive, and that the depositor may deny that he intended a trust, where he has never informed the beneficiary of it. (N. Y.) 373.

A letter by testator to his wife, to whom his will gives all his estate absolutely, in which he expresses a hope that she may have enough after paying debts to aid his children from time to time, and a desire after she has had the benefit of it during life that they may be given equal shares, is held insufficient to create a trust, and failure to perform the promise is held not to constitute a trust *ex maleficio*. (Ind.) 298.

An agreement between devisees for the selection of a trustee to whom they shall transfer

the lands devised is held to be both a voluntary and executory agreement which may be revoked. (Ill.) 555.

Charities.

A bequest without limitation as to use, made directly to an unincorporated but regularly organized and well established charitable association, is held valid. (N. J.) 625.

Chattel mortgage.

A strong exercise of comity toward mortgagees of chattels in Canada is made by sustaining the rights of such mortgagees of a half interest in horses of which possession had been taken under the mortgage in Canada, as against owners of the other half interest, who had taken a prior mortgage in Michigan on their co-owner's interest before the horses went to Canada, and recorded it after they were brought back, while it did not appear that they knew of the Canada mortgage when they took the horses from Canada. (Mich.) 442.

A landlord's mortgage on his interest in crops in possession of a tenant and yet undivided is held effective as against his creditors under subsequent garnishment. (Iowa) 811.

Fraudulent conveyance.

Overruling a prior decision, an Oklahoma case holds that a conveyance made with intent to defraud creditors is fraudulent as to a transferee, if he had sufficient notice to arouse the suspicion of an ordinarily prudent man and cause inquiry as to the purpose of the transfer. (Okla.) 33.

Pledge.

Oil in a tank is pledged effectively by a written order to the agent in charge of the tank, who accepts it, to hold the oil for the pledgees. (W. Va.) 408.

Quitclaim.

The holder of a quitclaim deed is allowed the rights of a bona fide purchaser under the New York recording laws. (N. Y.) 370.

Riparian rights.

A peculiar case as to the right to water for irrigation decides that water may be pumped for that purpose, and that the altitude of the land making irrigation by gravitation only impossible does not defeat the right. (Cal.) 190.

Water used for domestic purposes as well as that used for irrigation is held to be within the rule justifying an apportionment of a stream by giving to upper and lower proprietors in turn the exclusive use of the stream for designated periods when the absorption and evaporation would make a division of the quantity fatal to the rights of the lower proprietor. (Cal.) 667.

Surface water.

The limitation on the right to discharge surface waters upon another's land, that the latter must not be unnecessarily injured, is illustrated by a decision against the right to drain into a ditch in a highway contrary to the natural course of drainage, so that the water injures a neighbor, when the land owner might as easily have drained into a ravine on his own premises without injuring his neighbor. (Neb.) 229.

Property of husband and wife.

A deed to husband and wife as "tenants in common" is held to make them such, and not to make them tenants by the entirety. (N. J.) 701.

Community property which by state law is exempt from liability for the husband's debts is held to be beyond the reach of a judgment creditor of the husband, whose judgment was rendered in another state before such property was acquired. (Wash.) 73.

The power of a married woman to dedicate her statutory separate estate to public uses is denied, unless it is accomplished by a joint deed of herself and husband, or by some other statutory mode. The doctrine of equitable estoppel is held inoperative to devest her of such estate. (Ala.) 201.

Aliens.

By operation of the most favored nation clause in the treaty with Italy, subjects of that country are held to have the same rights that Frenchmen have under the treaty with France to acquire and dispose of property in this country in the same way and to the same extent that citizens of this country can do. (La.) 177.

Taxes and tax sale.

Forfeiture of a life estate for failure to pay taxes under the Ohio statutes is held to be limited to cases of valid sale. (Ohio) 805.

A devisee of a life estate in remainder is denied the power to cut off the remainders limited upon his life estate by purchasing the property at tax sales caused by the default of the first taker. (Mich.) 744.

A receiver to take charge of premises held by a life tenant is authorized, in case of the tenant's refusal, to pay taxes and make necessary repairs; and such receiver may be given power to sell the life estate for such purposes. (Minn.) 756.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Appeal.

An appeal from a judgment or order entered in exact accordance with the mandate of a previous appeal was held properly dismissed. (Utah) 828.

Process.

An assistant ticket agent in a union depot, although hired by the owner thereof and not by a railroad company for which he sells tickets, is held to be an acting ticket agent within the meaning of a statute as to service of process on a railroad company. (Minn.) 448.

Damages.

Loss of the society and prospective earnings of a child is held not to be included in the elements of damages for injuries resulting in a miscarriage. (Mich.) 142.

Injury to feelings and affections by default in delivering a telegram is held insufficient to sustain a recovery in Ohio. (Ohio) 735.

Nervous paroxysms caused by humiliation and indignity suffered by a passenger wrongfully expelled from a train are held to be a bodily injury for which damages may be recovered. (Cal.) 193.

The measure of damages to be recovered from an innocent purchaser of logs from an inadvertent trespasser is held to be their value immediately after their severance, excluding any enhancement of the value by transportation to another place. (Ala.) 199.

Damages for obstruction of water by a railroad embankment when the road was lawfully built are held recoverable for the entire injury in one action if the parties demand that they be assessed, and successive actions as in case of a continuing nuisance are inadmissible unless both parties fail to ask for the assessment of all in the first action. (N. C.) 708.

Demurrer to evidence.

The constitutionality of the practice of demurring to evidence is sustained on a very elaborate review of the practice and constitutional provisions of the different states. (Tenn.) 354.

Judgment.

An extensive discussion by prevailing and dissenting opinions, of the conclusiveness of an English judgment by default, appears in a Connecticut case which holds it conclusive on the merits, although the cause of action arose in this country. (Conn.) 236.

Levy.

Goods sold to a trader for resale, retaining title as security, are held to be used in the trader's business, within the meaning of a statute making property in his business liable for his debts. (Miss.) 260.

The interest of a person in property held by another as trustee having the absolute title under a trust merely for the division of the proceeds of sales is held not to be subject to levy. (Tex.) 785.

A fugitive from the state intending to return as soon as criminal proceedings against him are dropped is held to be still a resident for the protection of the family homestead from his creditors, when his wife and children continue to reside upon it. (N. C.) 394.

Ejectment.

Ejectment by the owner of the fee of a street is held to be the proper remedy to recover possession, subject to the public easement, from one who has wrongfully made a permanent obstruction thereon. (Mo.) 857.

Foreclosure.

Foreclosure of a mortgage securing a principal sum and interest coupons is allowed to raise the amount due on the coupons before the principal is due. (Ill.) 113.

Partition.

An attempt to partition the interest of parties having reciprocal easements in the use of stairs, halls, etc., when they are owners in severalty of the land, is held to be ineffectual. (Neb.) 451.

Specific performance.

Specific performance of a contract to sell waterworks to a town is sustained, where the owner has refused to agree on a price or appoint arbitrators as the contract requires, where the sale is only part of a larger contract and the parties cannot be placed *in statu quo*. (R. I.) 740.

Injunction.

An injunction is sustained against a judgment, to let in set-offs, where the judgment creditor is insolvent. (W. Va.) 321.

A peculiar case as to the right of action on an injunction bond denies liability thereon, where plaintiff dismissed his action by consent on an award against him by which he had agreed to abide, since this was not a judicial determination. (Ohio) 329.

A remarkable case of a play in a theater based on the facts of a criminal case then on trial decides that this cannot be restrained by injunction, even if it constitutes a criminal contempt which may be punished, and if it interferes with the administration of justice. (Cal.) 273.

Witness fees.

A person committed to secure his attendance as a witness is entitled to *per diem* fees during detention, only when he is unable to give security, and this inability arises from his misfortune and not his fault. (Md.) 449.

A contract to pay extra compensation to an expert witness is sustained although he subsequently testified without claiming the extra pay, and accepted statutory fees, and was not in fact asked any questions calling for his expert opinion. (Mass.) 619.

IX. CRIMINAL LAW AND PRACTICE.

An appeal given to the mother in a bastardy case from a finding in favor of the putative father is held unconstitutional, where the statute makes the proceeding a criminal one. (N. C.) 396.

The denial of a continuance on an admission that absent witnesses would testify as alleged in affidavits is held constitutional provided reasonable time and opportunity to obtain the witnesses by compulsory process has been given. (Ky.) 108.

Cross-examination of an accused person who offers himself as a witness in his own behalf is held to be unrestricted in respect to the subject as to which he has testified. (Fla.) 133.

Instigation.

Entering a building and taking money therefrom in the company of a detective who has by arrangement with the owner planned the affair to entrap his companion is held not to constitute a punishable crime because of the instigation. (Ill.) 139.

Arson.

Setting fire to one's own dwelling house is held not to be arson, either at common law or under a general provision of a statute against setting fire to any house. (S. C.) 647.

Possession as a crime.

Possession of opium contrary to provisions of a statute is held to be constitutionally made a criminal offense. (Or.) 738.

See also *supra*, I

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7. A vote by a city to accept a statute for the construction of a subway under its streets is virtually a vote to raise or to pay money, within the meaning of Mass. Pub. Stat. chap. 27, § 129, so as to give taxpayers a standing to contest the legality of the use of the public money for such purpose. *Id.*

8. One against whom no relief is sought except that he be ordered to convey a certain property which the bill shows that he has already conveyed is not a proper party to the bill. *Bristol* v. *Bristol & W. Waterworks* (R. I.) 740

9. The presiding elder of the district, entitled to the use of the church for holding quarterly conferences, the regular appointed pastor, entitled to the use of the parsonage and to hold religious services in the church, and the members of the congregation, entitled to use the church as a place of worship, may lawfully join in a suit to prevent the unlawful withholding of the church from them. *Fuchs* v. *Meisel* (Mich.) 92

10. Affidavits for a change of the place of trial because a fair trial cannot be had in the county cannot, by denying that such a trial can be had in certain other counties, prevent the judge from exercising his right under the statute to act on his own personal knowledge in sending the case to an adjacent county or some other county most convenient, in which the court is of opinion that a fair and impartial trial may be had. *Atkins* v. *Com.* (Ky.) 108

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2. An exception to a finding of fact as to negligence, when there is no uncertainty as to the rule by which it is to be governed, but only as to what the conduct was, constitutes no ground of appeal under Conn. act 1893. *Peltier* v. *Bradley, D. & C. Co.* (Conn.) 651

3. An appeal from an order refusing to set aside a judgment rendered without jurisdiction will not be denied on the ground that the judgment was appealable. *De La Montanya* v. *De La Montanya* (Cal.) 82

4. The time for taking a bill of exceptions based on an exception in respect to a charge to the jury, which is afterwards embodied in a motion for a new trial, which is overruled, is to be computed from the denial of that motion. *Cincinnati Street R. Co.* v. *Wright* (Ohio) 340

5. An appeal from a judgment or order which the district court entered in exact accordance with the mandate of the appellate court upon a previous appeal will be dismissed upon motion of the appellee. *Krantz* v. *Rio Grande W. R. Co.* (Utah) 828

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6. The duty of the supreme court to try the cause anew upon the judgment roll and render final judgment therein according to the justice of the case, which is imposed by N. D. Sess. Laws 1893, chap. 82, does not require the court to perform any functions that do not pertain to appellate jurisdiction as prescribed by the Constitution. *Christensen* v. *Farmers' Warehouse Asso.* (N. D.) 730

7. Objections not raised by the briefs in the Illinois appellate court cannot be renewed or made for the first time in the supreme court. *Fidelity & C. Co.* v. *Waterman* (Ill.) 654

8. Error in dismissing a petition setting up a compromise agreement, the genuineness of which is admitted by failure to file an affidavit denying it, without giving an opportunity to show lack of consideration, fraud, rescission, or waiver, cannot be set up for the first time on appeal, where no such ground of attack was made on the trial. *Re Garcelon's Estate* (Cal.) 595

9. The objection that there was a plain and adequate remedy at law cannot be taken in an equity suit for the first time on appeal. *Corey* v. *Sherman* (Iowa) 490

10. When the matter in dispute is one of law merely, the Michigan supreme court will review the action of a circuit judge in granting an injunction. *Ionia, E. & B. Farmers' Mut. F. Ins. Co.* v. *Ionia Circuit Judge* (Mich.) 481

11. An appeal on the judgment roll will present the question of the correctness of the granting of a motion to strike out an answer. *Gregg* v. *Groesbeck* (Utah) 266

12. In the absence of the evidence it will be assumed that findings of fact by the court below were sustained by the evidence and contain all the facts which the evidence established. *Wiggins* v. *Muscupiabe Land & W. Co.* (Cal.) 667

13. Amending a declaration under leave granted on sustaining a demurrer thereto prevents any objection to that ruling upon appeal. *Ball* v. *Chesapeake & O. R. Co.* (Va.) 792

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14. An erroneous instruction will not cause a reversal when it affirmatively appears that the defeated party was not injured by the error. *Gray* v. *Merriam* (Ill.) 769

15. An erroneous instruction will not require a reversal if the verdict was correct and should have been rendered if the instruction had been correct. *Richmond R. & E. Co.* v. *Garthright* (Va.) 220

16. Technical error in refusing to strike out mere probative matter from a complaint is not ground for reversal. *Sloane* v. *Southern California R. Co.* (Cal.) 193

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The failure to appoint an arbitrator under an agreement for arbitration cannot be objected to by another party who has expressly given notice of a refusal to comply with the contract for arbitration. *Bristol* v. *Bristol & W. Waterworks* (R. I.) 740

ARSON.

1. Setting fire to one's own dwelling house is not arson, either at common law or under a statute making it arson to set fire to "any house of whatever name or kind," although the property is insured so that the loss may fall on the insurer. *State* v. *Sarvis* (S. C.) 647

2. Procuring the burning of one's dwelling house with intent to defraud an insurance company is not arson in the absence of a statute making it such. *Id.*

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An attachment levied upon pledged property as that of the pledgeor is subject to the lien of the pledge. *First Nat. Bank* v. *Harkness* (W. Va.) 408

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The discretion of the circuit court to order into actual custody a defendant in a criminal trial which has commenced cannot be restricted by a previous allowance of bail by a county judge. *Atkins* v. *Com.* (Ky.) 108

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BANKS. See also CHECKS; EVIDENCE, 7, 17, 26, 27; GIFT, 4.

1. Damages are recoverable against a bank for refusal to pay the check of a customer who has sufficient funds in the bank applicable to the check. *Mt. Sterling Nat. Bank* v. *Greene* (Ky.) 568

2. A drawee bank which pays a draft relying on a forged indorsement thereon of the name of a fictitious person to whom the payee indorsed it innocently as the result of a fraud practiced upon him is not thereby relieved from liability to the payee. *Chism* v. *First Nat. Bank* (Tenn.) 778

3. A bank holding an overdue note of a depositor of greater amount than his deposit may properly refuse to pay his check, without any formal appropriation of the deposit upon the note. *Mt. Sterling Nat. Bank* v. *Greene* (Ky.) 568

Special deposit.

4. A bank which, according to its custom, receives securities as a special deposit, is liable for any loss thereof occurring through the want of that degree of care which good business men usually exercise in keeping property of such value. *Gray* v. *Merriam* (Ill.) 769

5. A bank is not relieved from liability to the owner of a special deposit stolen by the cashier, by the fact that up to a time three or more years previous to the discovery of the theft his reputation was good, and he stood in the community for honesty and integrity as high as any man; but it is incumbent upon the bank to show that it exercised at least a slight supervision of him, and that no indication of dishonesty or other reasons for distrusting him had appeared. *Merchants' Nat. Bank* v. *Carhart* (Ga.) 775

6. A bank holding United States bonds as collateral security is liable for their amount if they are stolen by its employee who has access to them, after the managing officer of the bank knows that he is speculating on the board of trade, and accepts his statement that he is using his own money, without knowledge that he has property other than his salary, which is $1,800 a year. *Gray* v. *Merriam* (Ill.) 769

7. A deposit of gold coin in a bank as a pledge to secure an obligation on a bail bond, and the receipt of an acknowledgment that it is payable on return of the certificate, with a clause stating that it is payable only on release of bonds and is not subject to check, constitute a special deposit, the return of which can be enforced in case of the bank's insolvency, the nature of which is not changed by the fact that without the knowledge or consent of the depositor the money afterwards gets into the bank vaults through the regular channels. *Anderson* v. *Pacific Bank* (Cal.) 479

Trusts.

8. A trust by a deposit in a savings bank of one's own money to his own credit, merely naming himself as trustee for another, is not established when the depositor states that he never intended to create a trust, and has always retained possession of the bank books, without making any disclosure or publication of the trust, or informing the proposed beneficiary of the transaction. *Cunningham* v. *Davenport* (N. Y.) 373

9. The fraud of a bank in receiving a note for collection when insolvent will not alter the rule that collections made under directions to remit "by draft" will not be impressed with a trust giving a preferential claim against the bank's assets. *Sayles* v. *Cox* (Tenn.) 715

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BICYCLES. See also NEGLIGENCE, 6.

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BILLS AND NOTES. See also LEVY AND SEIZURE, 1.

1. An order on a savings bank is not negotiable when upon its face, although below the signature, it says: "The bank book of the depositor must accompany this order," since this constitutes a contingency which may impair its circulation. *White* v. *Cushing* (Me.) 590

2. One who takes a negotiable note relying wholly upon the sufficiency of mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, and without inquiry or care as to the financial standing of the makers of the note, is not thereby precluded from being a bona fide holder of the note, when he takes it for full consideration, before maturity, in the ordinary course of business. *Christensen* v. *Farmers' Warehouse Asso.* (N. D.) 730

3. One whose name is indorsed on a note cannot be held liable thereon by a transferee if prior to the transfer he had given instructions for the erasure of his name, which was known to the transferee, although the instructions were not complied with. *Gregg* v. *Groesbeck* (Utah) 266

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1. The frightening of horses by the noise of an explosion in blasting rock is one of the dangers which it is intended to guard against by Me. Rev. Stat. chap. 17, § 23, requiring reasonable notice of the explosion, and § 24, declaring liability, in case the provision is violated, for all damages caused by the explosion. *Wadsworth* v. *Marshall* (Me.) 588

2. Persons "approaching" to whom notice is required by Me. Rev. Stat. chap. 17, § 23, by persons blasting rock, include those who have passed the point nearest the blasting and are receding from it, if they are in near proximity to, and not a safe distance from, the place of explosion. *Id.*

3. Driving a vicious horse not properly broken, and unsafe for the purpose, may contribute to the injury when the horse is frightened by blasting rock, so as to constitute a defense to the statutory liability for failure to give notice of the explosion. *Id.*

BOARD OF EDUCATION. See also SCHOOLS.

Members of a board of education acting individually and separately, and not as a board convened for the transaction of business, cannot accept a proposal to make any contract whatever that will bind them as a corporation. *Honaker* v. *Pocatalico Dist. Bd. of Edu.* (W. Va.) 413

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BONDS. See also GIFT, 2, 3; GUARANTY, 4; PAWNBROKERS, 3.

1. The theft of public money or its loss by bank failure without the fault or negligence of a county treasurer does not exonerate him or his bondsmen from liability on a bond conditioned for the faithful accounting for and paying over of the funds. *Bush* v. *Johnson County* (Neb.) 223

2. A certificate of deposit received by a county treasurer from his predecessor as representing public funds, and surrendered for a new certificate payable to himself as county treasurer, is the equivalent of the money for the purpose of charging his bondsmen therefor on a failure of the bank which had the money. *Id.*

3. Negligence or carelessness in the examination of accounts or reports of a county treasurer will not constitute any defense to his sureties for his failure to pay over funds received by him. *Id.*

4. Periodical settlements made with a county treasurer under a statutory requirement do not have the effect of a judicial determination, and an approval of his account or report is not conclusive in favor of his bondsmen. *Id.*

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A statutory dedication of land for a street by a plat filed under Mo. Rev. Stat. 1855, p. 1536, § 8, declaring that such plat "shall be a sufficient conveyance to vest the fee . . . for public use . . . and for no other use or purpose," gives the public only an easement, leaving the fee to vest in abutting owners respectively to the center of the street when they subsequently acquire title to lands abutting thereon. *Thomas* v. *Hunt* (Mo.) 857

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BRIBERY.

1. The giving to a school commissioner of money to pay him for his time and reimburse him for loss sustained by closing his place of business, in order to induce him to attend a meeting of the board of education to pass upon a proposed contract for the purchase of charts for the schools, will make void a contract therefor, when there was not a majority in favor of it without his vote. *Honaker* v. *Pocatalico Dist. Bd. of Edu.* (W. Va.) 413

2. Giving anything of value to a commissioner of a board of education to influence him in the discharge of a legal duty renders void any contract to the validity of which his vote or assent was necessary. *Id.*

BUILDINGS. See EASEMENTS; FIRE ESCAPE; NEGLIGENCE, 4.

BURGLARY.

Burglary is not committed by those assisting a detective in entering a building and taking money from a safe in pursuance of a previously arranged plan between him and the owner, with the sole intent of entrapping the others into the apparent commission of a crime. *Love* v. *People* (Ill.) 139

CARRIERS. See also ACTION OR SUIT, 2; DAMAGES, 8; PLEADING, 2, 3.

1. A railroad company owes to a passenger the highest degree of care consistent with the proper management of the business. *Jordan* v. *New York, N. H. & H. R. Co.* (Mass.) 101

2. A railroad company is liable to a passenger on its train for negligence of the servants of another railroad company over whose track such train is running under a contract between the companies, whereby the train is to be run subject to the orders and signals given by servants of the owner of the track, since they become thereby the servants of the owner of the train for the purpose of its management. *Murray* v. *Lehigh Valley R. Co.* (Conn.) 539

3. The bad, dilapidated, and ruinous condition of a railroad, and the old, worn, and bad condition of its two engines, render the company liable for compensatory damages to a passenger whom it was unable to carry in accordance with its contract on a return trip, because one of its engines had broken down while the other was in a shop for repairs, although the company was poor and struggling for existence and expending all its earnings and more on the road. *Hansley* v. *Jamesville & W. R. Co.* (N. C.) 543

4. The murder of a passenger when asleep in a sleeping car, by some intruder, stranger, or fellow passenger, does not render the carrier liable, if the carrier or its employees did not know of any impending danger and there were no circumstances to arouse their suspicions. *Ball* v. *Chesapeake & O. R. Co.* (Va.) 792

5. A street-railway company operating a double-track road, on discharging a passenger at a street crossing, with reason to know that he must cross its tracks, must so control the speed of cars and give such warning of their approach as will reasonably protect him from injury. *Cincinnati Street R. Co.* v. *Snell* (Ohio) 276

6. A lady passenger whose light gauzy summer dress is ignited on an open street car by a match carelessly thrown by another passenger after lighting a cigarette cannot hold the street-railway company liable for her injuries, where the servant in charge of the car was not chargeable with any negligence. *Sullivan* v. *Jefferson Ave. R. Co.* (Mo.) 167

Depots.

7. Opening a station for the sale of tickets upon a train which is about to pass is an invitation to persons to come there if they wish to take the train. *Jordan* v. *New York, N. H. & H. R. Co.* (Mass.) 101

8. The maintenance of a toilet room opening out of a waiting room in a railroad depot, for a long period of time, and leaving the door of it open when persons enter the depot for the purchase of tickets, although there is no light in either room except what comes from the ticket office, is an invitation to a passenger to enter the toilet room in case of a wish to use it. *Id.*

9. A dangerous hole in the floor of a toilet room in a railroad depot is evidence of negligence on the part of the carrier. *Id.*

10. Due care on the part of a lady who is injured by falling through a dangerous hole in the floor of an unlighted toilet room in a railroad depot, the door to which was open from the waiting room, may be found by the jury where she fell while feeling with her hand for the seat. *Id.*

Tickets.

11. A railroad company whose ticket was given by mistake to a passenger in lieu of a ticket of another company which was called for, where it was bought in a union depot of an agent who had authority to sell tickets for

both companies, is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket was desired. *Scott* v. *Cleveland, C. C. & St. L. R. Co.* (Ind.) 154

Expulsion of passenger.

12. The wrongful expulsion by a conductor of a passenger who had no ticket because it had been taken up by another conductor renders the carrier liable. *Sloane* v. *Southern California R. Co.* (Cal.) 193

13. A passenger is not called upon to question the right of a conductor in taking up a ticket in order to preserve the right to be carried to destination. *Id.*

Baggage.

14. A railroad company receiving from another carrier and transporting trunks under the mistaken supposition, induced by checks on the trunks, that they belong to passengers who have bought tickets over its road when in fact the owners of the trunks traveled by another route and supp sed their trunks were properly checked, is not liable, on the ground of mere negligence, for the loss of the trunks by the fall of a railroad bridge. *Beers* v. *Boston & A. R. Co.* (Conn.) 535

NOTES AND BRIEFS.

Carriers; duty as to extraordinary care. 194

Liability for safety of passenger in sleeping car. 792

Liability to passenger for default or delay in running railroad train:—In general; duty of railroads as to punctuality; effect of limitation of liability in timetable; passenger's rights; what damages are recoverable. 543

Expulsion of passenger. 193

Negligence in getting on wrong train. 154

Negligence as to depots. 102

Liability for baggage received from other road. 535

Liability for negligence of servant of another. 539

CARRYING WEAPONS. See also CONSTITUTIONAL LAW, 3.

1. The constitutional right to keep and bear arms for the common defense is not violated by Mass. Stat. 1893, chap. 367, § 124, prohibiting unauthorized bodies of men to associate together as a military organization or drill and parade with arms in cities and towns. *Com.* v. *Murphy* (Mass.) 606

2. Ordinary breech-loading Springfield rifles which have been altered so that they cannot discharge a missile by means of gunpowder or any other explosive, which fact is not obvious to the ordinary observer, are "firearms" within the meaning of Mass. Stat. 1893, chap. 367, § 124, prohibiting unauthorized bodies of men to parade with firearms. *Id.*

NOTES AND BRIEFS.

Carrying weapons; constitutional right of. 607

CASE. See also ACTION OR SUIT, 2.

A penalty prescribed by statute for the benefit of a party injured, no part of which goes to the state, may be recovered by him in an action of trespass on the case where no specific mode of recovery is provided. *Mapel* v. *John* (W. Va.) 800

CERTIFICATE OF DEPOSIT. See BONDS, 2.

CERTIORARI.

The quashing of the proceedings on appeal from a conviction may be reviewed by certiorari as well as by mandamus. *Grand Rapids* v. *Braudy* (Mich.) 116

CHARITIES. See also CORPORATIONS, 3.

1. A trust for the maintenance of a parish school is germane to the object for which a Protestant Episcopal church is incorporated. *Hanson* v. *Little Sisters of the Poor* (Md.) 293

2. A gift in trust for the maintenance of a parish school, to the vestry of a Protestant Episcopal church which is a corporation, is not void for indefiniteness and uncertainty. *Id.*

3. A bequest made without limitation as to its use, directly to an unincorporated but regularly organized and well-established charitable association, is valid. *Hadden* v. *Methodist Society* (N. J. Eq.) 625

NOTES AND BRIEFS.

Charities; validity of gift to unincorporated charity:—Early decisions; right to take real estate or permanent fund; personal property; association as trustee; statutes. 625

CHECK. See also BANKS, 1, 3; GIFT, 1.

A stipulation stamped on the face of a check, that it will not be paid if presented through a specified agency, may be upheld to prevent any right of action on the check by the prohibited agency. *Commercial Nat. Bank* v. *First Nat. Bank* (N. C.) 712

CIVIL RIGHTS.

1. A drug store in which soda water is sold is not a place of public accommodation and amusement within the Illinois civil rights act of June 10, 1885, but is to be classed with other mercantile stores. *Cecil* v. *Green* (Ill.) 566

2. The general expression in the Illinois civil rights act of June 10, 1885, "all other places of public accommodation and amusement," embraces only places of the same general character or kind as inns, restaurants, eating houses, barber shops, public conveyances, and theaters, specifically enumerated. *Id.*

NOTES AND BRIEFS.

Civil rights; in public places. 567

CIVIL SERVICE. See OFFICERS, 3.

COLOR BOOKS. See RECIPES.

COMMUNITY PROPERTY. See HUSBAND AND WIFE, 2, 3; PARTITION, 3.

CONDITIONAL SALE. See SALE, 1–3, NOTES AND BRIEFS.

CONFLICT OF LAWS. See also CORPORATIONS, 9.

1. A contract relating to what is to be done in Massachusetts, dated and signed there and sent to a foreign country for acceptance, which is to be signified by telegram sent to the signers there, is a Massachusetts contract governed by its laws. *Meyer* v. *Estes* (Mass.) 283

2. Executing in one state a reinstatement of a policy made in another state will not destroy the character of the policy as a contract of the state where it was originally executed. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

3. Property exempt from levy and sale on execution cannot be subjected to the payment of a judgment for a debt incurred in a sister state where the exemption laws are different. *La Selle* v. *Woolery* (Wash.) 73

4. A chattel mortgage on horses, given in Canada by the owner of a half interest in them and filed by the mortgagee, who takes possession of the horses and puts them in the care of a keeper of a hotel at a race track to hold possession for him, gives such mortgagee a better right to such interest in the horses after they have been taken without his consent from the custodian and shipped to Michigan by the owners of the other half interest in the horses, who did not know of his mortgage, than the latter can assert under another chattel mortgage from the same mortgagor, which they took in Michigan before the horses went to Canada and recorded after their return. *Vinning* v. *Millar* (Mich.) 442

NOTES AND BRIEFS.

Conflict of laws; place of contract. 285

CONSTITUTIONAL LAW. See also ACTION OR SUIT, 6; APPEAL AND ERROR, 1; CARRYING WEAPONS, 1; CONTINUANCE; LICENSE, 9; OFFICERS, 3; TRIAL, 1, 10.

1. A constitutional amendment repeals existing legislative enactments which are inconsistent with it. *Fesler* v. *Brayton* (Ind.) 578

2. A statute requiring a county board of revenue to act in private when passing on any claim or awarding a contract does not violate a constitutional provision that courts must be open, since in such matters it is not in the exercise of judicial power. *State, Bragg,* v. *Rogers* (Ala.) 520

Equality; discrimination.

3. A statute exempting certain independent military bodies or organizations from the operation of a provision against parading with firearms is not unconstitutional class legislation, as it grants a special privilege only, which does not interfere with any constitutional rights of others. *Com.* v. *Murphy* (Mass.) 606

4. A ferry lease granted under a statute which allows to all who choose the privilege of bidding therefor is not within the prohibition of the organic act of Dakota territory as to "granting private charters or especial privileges," or the constitutional provision against "private or special laws" authorizing ferries. *Nixon* v. *Reid* (S. D.) 315

5. A statute permitting certain uses of a dry emery wheel without a blower, while requiring a blower for other uses, is not class legislation as between operatives, when the rules apply to all persons equally. *People* v. *Smith* (Mich.) 853

6. A law is not general because it operates upon all within a class unless there is a substantial reason why it is made to operate upon that class only, and not generally upon all. *Ex parte Jentzsch* (Cal.) 664

7. A statute prohibiting barbers to carry on business after 12 o'clock on Sunday or on a legal holiday, and applying to no other class of labor, is unconstitutional as special, unjust, and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers. *Id.*

8. The police power does not justify a statute which makes it unlawful for barbers to do business on Sunday, without interfering with any other class of business. *Eden* v. *People* (Ill.) 659

9. The grant of the right of appeal in annexation proceedings to resident freeholders only does not deny to nonresident owners equal privileges or immunities. *Taggart* v. *Claypole* (Ind.) 586

10. A statute treating all owners of land in territory to be annexed to a city alike under like circumstances and conditions does not deprive anyone of the equal protection of the laws, although it permits an appeal only by residents of the territory to be annexed. *Id.*

11. A statute discriminating between different kinds of fish and between different localities and waters in regulating fisheries does not deny to any person the equal protection of the laws. *Bittenhaus* v. *Johnston* (Wis.) 380

12. A statute as to fisheries, making different regulations for certain localities or waters, is not void as class legislation, in the absence of a constitutional provision against it. *Id.*

13. The consideration of services rendered to the public, within the meaning of article 6 of the Massachusetts Declaration of Rights, denying any other title than such services to exclusive privileges, has reference to services to be rendered to the public thereafter, and not to past services. *Brown* v. *Russell* (Mass.) 253

Due process.

14. The annexation of territory to a city is not a taking of the property therein situated nor does it deprive any person of property within the constitutional provision as to due process. *Taggart* v. *Claypole* (Ind.) 586

15. Seizure and destruction of nets by officers in obedience to a statute, in abating a nuisance caused by their voluntary use by the owner in violation of the fishery laws, does not deprive the owner of his property without due process of law or of "a certain remedy in the laws for all injuries" to his property, or make an unconstitutional "distinction" as to the possession, enjoyment, or descent of property. *Bittenhaus* v. *Johnston* (Wis.) 380

16. A statute making it unlawful to consign any elk, moose, caribou, or deer, or any part thereof except the head or skin, by a common

carrier to any commission merchant or sale market at any time, is not an unconstitutional deprivation of property without due process of law, since wild game before it is reduced to possession belongs to the state in trust for the whole public, and any right of property acquired therein is from its inception subject to all limitations imposed by police laws. *State, Corcoran,* v. *Chapel* (Minn.) 131

17. A barber is deprived of property without due process of law by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business. *Eden* v. *People* (Ill.) 659

18. A statute requiring the weighing of coal hoisted from mines, which is made applicable to those mines only whose product shall be shipped by rail or water, violates a constitutional prohibition against depriving persons of liberty or property without due process of law. *Harding* v. *People* (Ill.) 445

Police power.

19. A statute requiring emery wheels to be provided with blowers to carry away the dust arising from their operation is,—at least so far as it applies to dry wheels and to the protection of persons continuously employed over them—a constitutional exercise of the police power. *People* v. *Smith* (Mich.) 853

20. Possession of opium without having a license therefor or without having obtained it on the prescription of a physician or pharmacist for medicinal purposes may be made a criminal offense in the discretion of the legislature, without violating any constitutional right. *Mon Luck* v. *Sears* (Or.) 738

21. A statute prohibiting the owner of coal land to open or work any mine or shaft within 5 feet of his division line without the consent of the adjoining owner, under a penalty of $500, is within the constitutional power of the legislature as imposing an impartial, just, and reasonable common burden for the benefit of all mine owners and the protection of the surface. *Mapel* v. *John* (W. Va.) 800

22. A law which deprives men engaged in the business of mining from the privilege of contracting with each other for the purpose of ascertaining the weight of the coal mined or the amount due them in any manner mutually satisfactory cannot be sustained. *Harding* v. *People* (Ill.) 445

NOTES AND BRIEFS.

See also FREEDOM OF SPEECH.

Deprivation of right of property. 131

Police power to protect health of employees. 853

As to right to use property; police regulations. 801

Class legislation; due process; police power. 380, 445

Class legislation; police power. 659, 664

As to special privileges. 254

CONTEMPT.

An act which is indifferent, meritorious, or only the assertion of an undoubted right of the party, does not become a criminal contempt merely because it is adjudged such by a court. *Ex parte Senior* (Fla.) 133

NOTES AND BRIEFS.

Contempt; power to punish. 273

CONTINUANCE.

A statute permitting the denial of a continuance in a criminal case for absent witnesses for the defendant, provided the prosecuting attorney will admit that the witnesses if present would testify as alleged in the affidavits, is not in violation of the constitutional right of the defendant to compulsory process for obtaining witnesses, or the right to meet witnesses face to face (which means witnesses against him), where he has had reasonable time and opportunity to obtain his witnesses by compulsory process of the law; but such reasonable time and opportunity must be given him. *Atkins* v. *Com.* (Ky.) 108

NOTES AND BRIEFS.

Continuance; error in refusal of. 109

CONTRACTOR. See NEGLIGENCE, 4.

CONTRACTS. See also BRIBERY, 1; CONSTITUTIONAL LAW, 22; CORPORATIONS, 4; COVENANT; INFANTS, 1; MASTER AND SERVANT, 3.

1. There is sufficient consideration for a promise to pay an expert witness a reasonable compensation in addition to the statutory fees, when he is engaged in advance of the trial to testify as an expert. *Barrus* v. *Phaneuf* (Mass.) 619

Statute of frauds.

2. A contract for the manufacture of articles of special and peculiar design, not suitable for general trade, is not for the sale of goods and chattels within the statute of frauds. *Brown & H. Co.* v. *Wunder* (Minn.) 593

3. A contract to furnish material and attach it to realty after performing labor thereon, making it a part of a building, is not a sale of goods or chattels within the statute of frauds. *Id.*

4. A contract to manufacture a monument is not within the statute of frauds, although there is no agreement to bestow personal skill and labor upon it, or anything to prevent the contractor from purchasing it elsewhere in whole or in part, instead of manufacturing it from his own quarry and in his own shop. *Forsyth* v. *Mann* (Vt.) 788

5. A parol promise to a testator by the sole beneficiary of his will, to dispose of a portion of the property in favor of another person, is invalid so far as it involves the disposition of real property, or of personal property of an amount which comes within the statute of frauds. *Orth* v. *Orth* (Ind.) 298

6. A parol agreement to convey real estate by will, made in settlement of a lawsuit, is not valid under the statute of frauds, although the intended devisee in consequence thereof gives up valuable rights. *Swash* v. *Sharpstein* (Wash.) 796

7. The omission of one or more of the essential elements of a memorandum of the sale of real property under the statute of frauds, from a writing containing some of the ele-

ments, signed by the appointee in a power of attorney to sell that particular land, may be supplied by reference to the power of attorney, which contains such elements. *White* v. *Breen* (Ala.) 127

8. Several different writings may be read together as constituent parts of a memorandum within the statute of frauds, where, when they are viewed together in the light of the situation and circumstances of the parties at the time they were written, they show unmistakably that they relate to the same matter and constitute several parts of the one connected transaction although there is no express reference from one to the other. *Id.*

9. A contract signed in the name of a firm is not such a memorandum under the statute of frauds as will make the oral acceptance thereof by a subsequent member of the firm binding upon him, where the contract comes within the statute. *Hughes* v. *Cross* (Mass.) 620

Validity and effect.

10. A covenant not to contest the will of a relative may be given effect as a release of the contingent right to make such contest and enforced, when fairly obtained and for an adequate compensation. *Re Garcelon's Estate* (Cal.) 595

11. An agreement to refrain from editing or being connected with a newspaper or magazine in the county in which is published a newspaper the goodwill of which is transferred as a part of such agreement is not void as in restraint of trade. *Cowan* v. *Fairbrother* (N. C.) 829

12. The area in which a vendor can be restricted from competition with his vendee is as broad as is necessary to afford ample protection to the latter, provided the agreement is not injurious to the public interest. *Id.*

13. The temporary suspension of a newspaper while reasonably diligent efforts are made to find a suitable editor and continue the business will not defeat the right of the owner to enforce an agreement restricting competition by a former owner of the paper. *Id.*

14. A contract of employment by a partner is not dissolved by the death of one of the partners, where the business goes on without a break and both parties seem to assume that the contract is not ended. *Hughes* v. *Gross* (Mass.) 620

15. An agreement in a contract of employment, that refusal to go on a second year can be justified only by "written notice . . . of any cause of dissatisfaction on or before January 1," plainly means "any existing cause" or "any cause relied on" and on such notice a cause not alleged therein if it existed before January 1, may be relied upon. *Id.*

16. Change of stock in the top die of a monument, which is procured elsewhere after breach of a contract to furnish it, does not affect the right to recover damages for such breach, if the substituted stock costs no more than that called for by the contract. *Forsyth* v. *Mann* (Vt.) 788

17. An agreement by the purchaser of electrotype plates, that he will not sell them to other parties or multiply them for the purpose of selling them, is valid and enforceable; and a sale by him to a third person, with no restriction as to the use to be made of them, may give his vendor a right to substantial damages for breach of the agreement. *Meyer* v. *Estes* (Mass.) 283

18. Under a contract by two firms for the purchase of electrotype plates to be used in a publication in which they are jointly interested, which contract is in form joint and provides that they will be "responsible for any and all wrong use of said electrotypes," a firm which sells all its interest to the other may be held for damages caused by a breach of the contract by the other after the sale. *Id.*

19. A third person who buys the plates, sheets, and copyright of a published work, cannot be considered as the successor in business of the publisher within the meaning of a contract by the publisher in procuring electrotype plates for it that they should be used only by the publisher "or his heirs or successors in business." *Id.*

20. For the purpose of determining the right of one who after contracting to furnish electrotype plates, took partners into his business and completed his contract without notifying the other party of the change of firm, to relief against one who has broken his contract as to the use to be made of the plates, the contract must be regarded as performed, not by a volunteer stranger, but by the contracting party acting through the partnership. *Id.*

NOTES AND BRIEFS.

Contracts; by parol, to convey real estate by will. 796

Statute of frauds as to article to be made; memorandum of. 788

Statute of frauds as to services. 404

Sufficiency of description of real property in. 128

Legality; ratification; bribery as affecting. 414

Effect of option. 730

Joint liability on; construction of; unilateral. 284

CORPORATIONS. See also ACTION OR SUIT, 4; ESTOPPEL, 4; INJUNCTION, 6; MANDAMUS, 1–3, RAILROADS; RELIGIOUS SOCIETIES, 1; TAXES, 4, 5; WRIT AND PROCESS, 1.

1. Railroad companies which might be incorporated under general laws by observing about the same forms and requirements which they do observe in attempting to become incorporated under special charters are *de facto* corporations, if the special charters are unconstitutional. *McTighe* v. *Macon Constr. Co.* (Ga.) 208

2. A corporation *de facto* can make any contracts, including mortgages of future-acquired property, which the law authorizes corporations to make. *Id.*

3. The legal capacity of a corporation to take a devise of property in excess of the amount prescribed by its charter cannot be raised collaterally by private persons,—such as the testator's heirs or next of kin,—or in any other

way except in a direct proceeding by the state. *Hanson* v. *Little Sisters of the Poor* (Md.) 293

4. A charter exempting a corporation from taxes so long as it has a specified amount of property in the state constitutes a contract which cannot be abrogated by the state, and which is not subject to a general provision of the statutes making all charters subject to alteration, suspension, and repeal. *State, Singer Mfg. Co.* v. *Heppenheimer* (N. J. Err. & App.) 643

5. A pooling arrangement by which stockholders transfer their shares to trustees to be voted as directed by holders of the majority thereof for the period of five years, unless the holders of two thirds of such stock vote to put an end to the trust sooner, is contrary to public policy and void as against the right of an assignee of some of the trustees' certificates to have the shares thereby represented issued to him in his own name and under his own control. *Harvey* v. *Linville Improv. Co.* (N. C.) 265

Forfeiture of franchises.

6. Leave will not be granted to institute proceedings to forfeit the franchises of a solvent active corporation carrying out the purposes of its creation in supplying the necessities of a large number of people, and whose securities are held by innocent persons, in the absence of a clear wilful misuse, abuse, or nonuse of its franchises. *State, Mylrea,* v. *Janesville Water Power Co.* (Wis.) 391

7. Waiver of the right to forfeit the franchises of a water company whose property a municipal corporation has the option to acquire for neglect to keep accurate accounts of the cost of construction, as required by the ordinance granting permission to erect and operate the works, is effected by long delay in moving for forfeiture, accompanied by active compulsion upon the company as to extension and operation of the works. *Id.*

Foreign companies.

8. An action by a foreign corporation which had not, at the time of commencing it, complied with the statutory requirements to enable it to do business in the state, will not be dismissed on motion, if at the time of the motion it has so complied, under a statute providing that foreign corporations which have not complied with the requirements cannot "maintain" any suit or action in the state. *Carson-Rand Co.* v. *Stern* (Mo.) 420

9. Debts established in a proceeding for the receivership of an insolvent foreign corporation will be paid out of the assets in the receiver's hands before sending the remainder of the assets to a receiver at the domicil of the corporation. *Fuiley* v. *Fee* (Md.) 311

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Right of private persons to contest the power of a corporation to take or hold property:—State alone can question the right of corporation in possession; inability of corporation to hold property does not give immunity to wrongdoer; right of persons contracting with corporation; defective organization and forfeiture; suits by the corporation; specific performance; property acquired by will. 293

Foreign; compliance with statutes. 420

COTENANCY. See also FISHERIES; HUSBAND AND WIFE, 1.

NOTES AND BRIEFS.

Relative rights of cotenants. 270

COUNTIES. See also CONSTITUTIONAL LAW, 2; LICENSE, 9; MANDAMUS, 4, 5; VOTERS AND ELECTIONS, 5, 6.

1. The determination of the board of county commissioners involved in their ordering an election upon a proposition to relocate a county seat, that the petition praying for such election was signed by the number of voters required by the North Dakota statutes, is not open to judicial investigation after the election has been held and a sufficient vote cast to work a relocation of the county-seat. *State, Little,* v. *Langlie* (N. D.) 723

2. The "votes polled," contemplated by Dak. Comp. Laws, § 565, requiring in order to effect a change of the county-seat that some place shall have "two thirds of the votes polled," mean the votes polled on the proposition to relocate the county-seat, and not the votes polled for the officer who received the highest number of votes cast at the same election as that at which the proposition was voted on. *Id.*

NOTES AND BRIEFS.

Counties; relocation of county-seat; vote for; petition for. 724

COUNTY TREASURER. See BONDS.

COUPONS. See MORTGAGE, 1, 2.

COURTS. See also LICENSE, 1; RELIGIOUS SOCIETIES, 3.

1. A court having jurisdiction over a railroad corporation, although it may be a company formed by the consolidation of a corporation in that state with one in another state, may make a decree foreclosing a mortgage on the corporate property situated in both states, and direct a sale of the whole property and the execution of a proper conveyance to the purchaser. *McTighe* v. *Macon Constr. Co.* (Ga.) 208

2. Land of the husband in another county within the state is within the jurisdiction of a court in a divorce suit to decree an alimony under Kan. Code Civ. Proc. § 72. *Wesner* v. *O'Brien* (Kan.) 289

3. A statute will not be declared void unless its nullity and invalidity are beyond reasonable doubt. *State* v. *Camp Sing* (Mont.) 635

4. It is a judicial question whether a trade or calling is of such a nature as to justify police regulation. *Eden* v. *People* (Ill.) 659

NOTES AND BRIEFS.

Courts; jurisdiction to order foreclosure sale of railroad in different states. 208

Power as to invalid statute. 254

COVENANT. See also EXPECTANCY.

The mutuality of covenants of adjoining lot owners may constitute a sufficient consideration for their respective grants of easements. *Barr* v. *Lamaster* (Neb.) 451

CRIMINAL LAW. See also APPEAL AND ERROR, 1; CERTIORARI; TRIAL, 4; 5; WITNESSES, 1–3.

1. No crime is committed where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act and to lead and encourage them in its commission, by one acting in concert with the owner. *Love* v. *People* (Ill.) 139

2. The owner of property and his agent may wait passively for a would-be criminal to perpetrate an offense and each and every part of it for himself, but must not aid, encourage, or solicit him that they may seek to punish. *Id.*

3. The refusal of a court to proceed to trial of the prosecution on appeal from a conviction is not an acquittal. *Grand Rapids* v. *Braudy* (Mich.) 116

NOTES AND BRIEFS.

As to self-crimination, see WITNESSES.

Instigation to crime. 139

Possession of property as an offense. 738

CRITICISM. See LIBEL AND SLANDER, 3, 4.

CROPS. See EMBLEMENTS, NOTES AND BRIEFS; MORTGAGE, 3.

CURATOR AD HOC.

NOTES AND BRIEFS.

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CURTESY. See also TAXES, NOTES AND BRIEFS.

NOTES AND BRIEFS.

Duty of tenant by, to pay taxes. 748

DAMAGES. See also ACTION OR SUIT, 3; CONTRACTS, 16; PLEADING, 6.

1. The right to bring an action *ex delicto* does not of itself authorize the allowance of smart money. *Hansley* v. *Jamesville & W. R. Co.* (N. C.) 543

2. Punitive damages cannot be recovered for failure to transport a passenger on a railroad because an engine was broken down, where there was no personal injury, insult, indignity, or intentional wrong to him. *Id.*

3. A railroad company is not liable for punitive damages on account of its failure from inability to run a train on the return trip at the stipulated time, merely because it sold a return ticket for that trip, when it had but two engines, one of which was in the shop for repairs and the other was not in good condition, and its roadbed and equipment had been used for a considerable time in a dilapidated condition, although the earnings of the road were all applied to its improvement. *Id.*

4. The negligent failure of a telegraph company to deliver a message does not authorize an action by him to whom it is addressed, to recover for resulting injury to his feelings and affections, when no other injury results. *Morton* v. *Western U. Teleg. Co.* (Ohio) 735

5. That an injured woman brings suit by her husband as next friend will not justify the inclusion, as an element of damages, of lost wages, which belong to him. *Tunnicliffe* v. *Bay Cities Consol. R. Co.* (Mich.) 142

6. The loss of the society and prospective earnings of the child is not a proper element of damages in an action by a married woman for injuries which resulted in a miscarriage. *Id.*

7. Paroxysms of the nervous system, caused by the indignity and humilation suffered by a passenger on being wrongfully ejected from a train, constitute a bodily injury for which damages are recoverable. *Sloane* v. *Southern California R. Co.* (Cal.) 193

8. A verdict for $1,400 for the ejection of a woman from a train, which obliged her to walk about a mile and caused a recurrence of insomnia and nevous paroxysms to which she had been subject, is excessive. *Id.*

9. A verdict for $1,000 damages cannot be held excessive in a case of personal injury by which a person's teeth were broken and his knee injured so that he was lame for a long time and unable to work efficiently at his trade for six or eight months. *Richmond R. & E. Co.* v. *Garthright* (Va.) 220

10. Damages for the conversion of logs, in an action against one who purchased them innocently from an inadvertent trespasser, are measured by the value of the logs immediately after severance, with interest thereon, excluding any enhancement of the value by transportation to another place. *White* v. *Yawkey* (Ala.) 199

11. The measure of damages for the obstruction of water by a railroad embankment lawfully built is the difference in the value of land as it is and as it would have been with the road properly built. *Ridley* v. *Seaboard & R. R. Co.* (N. C.) 708

12. Both present and prospective damages can be recovered in a single action for failure to make sufficient passageway for water through a railroad embankment, provided either party to the action demands that permanent damages be assessed. *Id.*

13. The difficulty and extra expense of procuring the stock for a monument in winter months and the limited time available, where a contractor who had agreed to furnish it in the spring repudiated the agreement late in December, may constitute elements of damages for breach of contract, when the other party was also bound to furnish it to a third party. *Forsyth* v. *Mann* (Vt.) 788

14. A contract that in case of the wrongful use of electrotype plates the purchaser shall be responsible for the damages caused the seller, and shall pay a fine to him "equal to the tenfold price of the wrongly used electrotypes," provides for a penalty, and not liquidated damages, which cannot be enforced under the Massachusetts law beyond the actual damages caused by the breach. *Meyer* v. *Estes* (Mass.) 283

15. The value of recipes in color books owned by a color mixer who entered them therein, instead of entering them in his employers' books as it was his duty to do, cannot be considered in estimating the damages, if any, which he can recover from them for detaining those books, on the supposition that they belonged to them, when he undertook to carry them away. *Dempsey* v. *Dobson* (Pa.) 761

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Damages; exemplary, when allowed. 762

For carrier's default or delay as to transportation of passenger. 545

For injury to feelings. 735

For shock to nervous system. 193

Recovery of, for miscarriage:—(I.) Right to damages; (II.) elements of damages. 142

DEATH. See also CONTRACTS, 14; GUARANTY, 2.

The father of an illegitimate child has no right of action for the child's death, under Ind. Rev. Stat. 1894, § 267, giving a father a right of action for the death of a "child," although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him. *McDonald* v. *Pittsburgh, C. C. & St. L. R. Co.* (Ind.) 309

NOTES AND BRIEFS.

Death; right of action for. 309

DEDICATION. See also BOUNDARIES; WATERS, 1.

A married woman cannot dedicate to public use her statutory real estate except by joint deed of herself and husband executed as the statute prescribes, or in some other way provided by statute. *Van Sandt* v. *Weir* (Ala.) 201

NOTES AND BRIEFS.

Dedication; how made. 201

DEEDS.

A quitclaim deed by the "heirs" of a living person, who have a remainder after his life estate, is good under a statute making future estates alienable in the same manner as estates in possession. *Defreese* v. *Lake* (Mich.) 744

DEFINITIONS. See also BLASTING, 2; CARRYING WEAPONS, 2; INSURANCE, 40; TRUSTS, 3, 4.

The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit. *Rosenbaum* v. *Newbern* (N. C.) 123

DEMAND. See INTEREST, 1.

DEMURRER TO EVIDENCE. See TRIAL, 1–3, NOTES AND BRIEFS.

DEPOT. See CARRIERS, 8–10; WRIT AND PROCESS, 2.

DESCENT AND DISTRIBUTION.

NOTES AND BRIEFS.

Effect of treaties upon an alien's right to inherit:—(I.) General doctrines respecting treaties; (II.) Great Britain; (III.) France; (IV.) Bremen; (V.) Germany; (VI.) Grand Duchy of Hesse; (VII.) Guadalupe Hidalgo; (VIII.) Hanover; (IX.) Hanseatic; (X.) The Netherlands; (XI.) Spain; (XII.) Sweden; (XIII.) Prussia; (XIV.) Switzerland; (XV.) Württemberg. 177

DETECTIVE. See BURGLARY.

DISCOVERY.

NOTES AND BRIEFS.

Injunction on bill of, to aid defense. 325

DIVORCE. See JUDGMENT, 5, 6.

DOMICIL.

NOTES AND BRIEFS.

Change of. 82

DOWER. See also TAXES, NOTES AND BRIEFS.

Dower; duty of tenant in, to pay taxes. 748

DRAINS AND SEWERS. See also WATERS, 7.

A municipal corporation which has constructed a system of sewers with a view to assessing a portion of the cost equally upon abutting property may, where a portion of the assessments are paid and a portion successfully resisted, require as a condition to the use of the sewer by those so resisting that they pay a sum equal to that paid by others toward its construction, under authority to prescribe rules and regulations for the tapping of sewers. *Herrmann* v. *State, Cooper* (Ohio) 734

DRUG STORE. See CIVIL RIGHTS, 1.

DUE PROCESS. See CONSTITUTIONAL LAW, 14–18.

EASEMENTS. See also COVENANT; MINES; PARTITION, 1.

Reciprocal easements created by mutual covenants of adjoining lot owners for the use of stairs, hallways, skylight, and heating apparatus in common in buildings which they erect, may be protected and enforced by a court of equity when the remedy at law is insufficient. *Barr* v. *Lamaster* (Neb.) 451

EJECTMENT.

Ejectment by the owner of the fee of a public street will lie to recover possession thereof, subject to the public easement, from one who has placed a permanent obstruction thereon. *Thomas* v. *Hunt* (Mo.) 857

NOTES AND BRIEFS.

Ejectment; for land in highway. 857

ELECTRICAL USES AND APPLIANCES. See also EVIDENCE, 10; TRIAL, 8.

1. Maintaining an uninsulated wire heavily charged with electricity upon a reel fastened to an electric-light pole in a street, so near the ground as to be within easy reach of a pedestrian, is a gross neglect of duty to the public. *Suburban Electric Co.* v. *Nugent* (N. J. Err. & App.) 700

2. Touching an electric light wire is not negligence as a matter of law, when touched by a tinsmith on the outside of a building, who does not know that an electric light wire would do any hurt, or that such wires run on the outside of buildings. *Griffin* v. *United Electric-Light Co.* (Mass.) 400

3. The duty of insulating electric-light wires running on the outside of a building is owed to every person who for purposes of business is rightfully upon the premises. *Id.*

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Negligence as to electric wires on or in buildings:—(I.) In general; (II.) wires on roofs; (III.) contributory negligence. 400

ELECTROTYPE PLATES. See CONTRACTS, 17–20; DAMAGES, 14.

EMBLEMENTS. See also MORTGAGE, 3.

One who in good faith makes grass into hay, with the knowledge of and without objection by the owner, under a belief that he has a right to do so, by which its value is greatly increased, acquires a title to the hay which will sustain his action of replevin therefor, but is liable for its value at the time of the conversion. *Carpenter* v. *Langenfelter* (Neb.) 422

NOTES AND BRIEFS.

Emblements; title to, when wrongfully served. 422

EMERY WHEEL. See CONSTITUTIONAL LAW, 19.

EMINENT DOMAIN. See ACTION OR SUIT, 6.

ENTIRETIES. See HUSBAND AND WIFE, 1.

EQUITY. See also INJUNCTION, NOTES AND BRIEFS.

1. Equity has jurisdiction to set aside an illegal contract of a board of education, which will create a debt in fraud of the rights of taxpayers, if there is no other adequate remedy. *Honaker* v. *Pocatalico Dist. Bd. of Edu.* (W. Va.) 413

2. A court of equity will not aid a mere volunteer to carry into effect an imperfect gift or an executory trust; but where a voluntary trust upon a meritorious consideration has been perfectly created, it is irrevocable and may be enforced in equity. *McCartney* v. *Ridgway* (Ill.) 555

ESTOPPEL. See also ARBITRATION.

1. A party cannot take two inconsistent positions. *Cole* v. *Hines* (Md.) 455

2. The doctrine of equitable estoppel cannot operate to deprive a married woman of her statutory separate estate. *Vansandt* v. *Weir* (Ala.) 201

3. The voluntary dismissal of an injunction suit by a plaintiff in accordance with an award by arbitrators does not estop him from insisting that such award does not constitute such a judicial determination of the suit as creates a liability on his injunction bond. *Columbus, H. V. & T. R. Co.* v. *Burke* (Ohio) 329

4. Eight years' delay will estop the state from proceeding to forfeit the franchises of a corporation for overbonding and issuing stock without payment in money or its equivalent. *State, Mylrea,* v. *Janesville Water Power Co.* (Wis.) 391

5. The objection that a town has not power to purchase water works cannot be made by the owner of the works in order to defeat its contract with the town for the sale thereof. *Bristol* v. *Bristol & W. Waterworks* (R. I.) 740

NOTES AND BRIEFS.

Estoppel; of married women. 202

EVIDENCE.

Judicial notice.

1. Historical facts showing an irreconcilable conflict between Calvinistic and Arminian doctrine are within judicial notice. *Smith* v. *Pedigo* (Ind.) 838

2. Judicial notice may be taken of a vote of a city at a special election accepting a statue. *Prince* v. *Crocker* (Mass.) 610

3. Judicial notice is taken of the situation of the streets and squares and public grounds of Boston, in determining the construction of a statue as to authorizing an entry upon the Public Garden in building a subway, under Mass. Stat. 1894, chap. 548. *Id.*

4. It is matter of universal knowledge that secondhand clothing is often the means of communicating contagious and dangerous diseases. *Rosenbaum* v. *Newbern* (N. C.) 123

5. It is common knowledge that thieves resort to pawnbrokers, junk-dealers, and dealers in second-hand goods to dispose of stolen goods, and that unscrupulous and oftentimes criminal persons are engaged in the business. *Grand Rapids* v. *Braudy* (Mich.) 116

6. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril may produce a complete change in the nervous system of an individual, and render weak and timid one who was physically strong and vigorous. *Sloane* v. *Southern California R. Co.* (Cal.) 193

7. It is common knowledge that all savings banks in the state have a by-law requiring the production of the depositor's book in order to obtain any money deposited. *White* v. *Cushing* (Me.) 590

Presumptions and burden of proof.

8. The laws of the state where a contract is made are, in the absence of proof to the con-

trary, presumed to be the same as those of the state where it is sought to be enforced. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

9. The presumption is that an ordinance within the powers granted to a municipality in its charter is reasonable, unless from its inherent character or from evidence it is demonstrated to be unreasonable. *State, Consolidated Traction Co.* v. *Elizabeth* (N. J. Sup.) 170

10. A person cannot be presumed negligent in touching an electric wire which kills him, if there is nothing to show the circumstances, or that he knew the wire was not properly insulated or that it was charged with electricity, when it is upon a reel fastened to an electric-light pole in a street, so near the ground as to be within easy reach. *Suburban Electric Co.* v. *Nugent* (N. J. Err. & App.) 700

11. Greater capacity than is common to other boys of the same age for discerning and avoiding danger is not presumed to be had by a boy fourteen years old, because he is accustomed to work for wages and go unattended to and from his work along city streets. *Cincinnati Street R. Co.* v. *Wright* (Ohio) 340

12. There is no presumption that the addressee of a letter received it, from the fact that it was not returned to the sender, if it was not directed to the place in which the addressee resided at the time. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

13. An insurer has the burden of proving the invalidity of the insurance because of additional insurance. *Sweeting* v. *Mutual F. Ins. Co.* (Md.) 570

14. The burden of showing that the amount of insurance premium demanded is correct is upon the insurer, where the policy requires payment of a certain sum "less the return premiums awarded." *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

15. The rule that one who, standing in a fiduciary relation to another, obtains an advantage from him, is presumed to have obtained it fraudulently, does not apply to the case of a testamentary provision by a husband in favor of his wife. *Orth* v. *Orth* (Ind.) 298

16. Acceptance of the devise by a life tenant will be presumed if he goes into possession, although he claims the fee under sales for taxes while the property was in possession of a prior taker; but such presumption may be overthrown by proof of acts inconsistent with acceptance. *Defreese* v. *Lake* (Mich.) 744

17. The burden is cast upon a bank under Ga. Code, § 2064, of showing that it had exercised at least slight diligence in the care and keeping of a special deposit, by proof of authority on the part of its cashier to receive and receipt for the same, and the introduction of a receipt by the latter, and proof of failure to deliver the property on demand. *Merchants' Nat. Bank* v. *Carhart* (Ga.) 775

Documentary.

18. Volumes of laws of a foreign state, which do not purport to have been published under authority of its legislature, and are not shown to be commonly admitted as evidence of such laws in that state, are not admissible to prove such laws in Iowa. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

19. A letter answering reasons for dissatisfaction given in a notice to terminate employment may be admitted against the employer to throw light on his reply and subsequent conduct, where it is not offered as evidence of admissions by him. *Hughes* v. *Gross* (Mass.) 620

20. A letter containing an argumentative presentation of the writer's view of his rights and of the grievance of which he complains, being a declaration in his own behalf, cannot be admitted in evidence in his own favor when unanswered. *Dempsey* v. *Dobson* (Pa.) 761

Parol, as to writings.

21. Extrinsic evidence is admissible to identify the plaintiffs in an action on a foreign judgment in favor of a partnership as those to whom the description of the judgment creditors in the record by partnership name properly applies. *Fisher* v. *Fielding* (Conn.) 236

22. Parol evidence is admissible to show that prior to the transfer of a note an indorser from whom payment is demanded had, with the knowledge of the transferee, given instructions for the destruction of the indorsement. *Gregg* v. *Groesbeck* (Utah) 266

23. Testimony of the one who drew a will unambiguous on its face is not admissible to prove an intent as to the disposition of the property different from that expressed by the language of the will. *Defreese* v. *Lake* (Mich.) 744

Materiality; weight.

24. Upon the question of collusion between two life tenants to cut off the remainder by permitting tax sales, evidence that the land was advertised and bid in by a third person is admissible. *Id.*

25. To show the motive of the defendant in an action for alienating the affections of his son from the latter's wife, conversations after the offense charged against him may be admitted. *Tucker* v. *Tucker* (Miss.) 623

26. Testimony that bonds stolen from the bank were in its possession as a special deposit, had been left there as collateral to a loan which was repaid, and that the bank officer had access to them for the purpose of cutting off coupons, is admissible upon the question of the liability of the bank for the loss, as tending to show the relation of the parties to each other and to the property. *Gray* v. *Merriam* (Ill.) 769

27. That a bank trusted its cashier with its own property under similar circumstances is not conclusive upon the question whether it observed the diligence due to a special depositor whose property was stolen by him. *Merchants' Nat. Bank* v. *Carhart* (Ga.) 775

28. That persons had not been previously married is not conclusively shown by their procuring the performance of a marriage ceremony between them. *Kromer* v. *Friday* (Wash.) 671

NOTES AND BRIEFS.

Evidence; burden of proof in insurance case. 473

Presumption of gift. 704

Presumption as to negligence of person found dead. 700
Of letters. 762
Parol as to written instrument. 266
As to recovery for services. 404

EXECUTORS.

NOTES AND BRIEFS.

Admissions and waivers by, in actions. 671

EXPECTANCY.

A covenant by an heir apparent to relinquish his expectancy in certain property of a relative is not invalid under Cal. Civ. Code, § 700, providing that "a mere possibility such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and § 1045, declaring that "a mere possibility not coupled with an interest cannot be transferred," which provisions are merely declaratory of the common law. *Re Garcelon's Estate* (Cal.) 595

NOTES AND BRIEFS.

Expectancy; validity of transactions between an heir and his ancestor relating to the former's expectancy:—(I.) General rule; (II.) the question of intention; (III.) inadequacy of price; (IV.) the statute of frauds; (V.) parol evidence to vary such contracts; (VI.) the doctrine of estoppel; (VII.) state statutes; (VIII.) such agreements enforced; (IX.) not enforced; (X.) English authorities: (*a*) general rule; (*b*) agreements enforced; (*c*) when not enforced. 595

EXPLOSION. See also BLASTING; GAS, 1; MASTER AND SERVANT, 8.

The explosion of the generator of a refrigerating machine a minute or two after tightening nuts to stop a leak, under an ammonia pressure much less than that which had been sustained the day before, is not necessarily the result of an unforeseen and unaccountable cause not chargeable to any negligence, when the nuts were tightened by inexperienced men, and the equality of the strain upon the parts may have been disturbed in tightening them. *Ryan* v. *Los Angeles Ice & C. S. Co.* (Cal.) 524

FERRIES. See also CONSTITUTIONAL LAW, 4.

1. The power to grant ferry leases or licenses belongs to the police power of the state, and may be exercised upon navigable rivers subject to the power of Congress to supersede the subordinate control. *Nixon* v. *Reid* (S. D.) 315

2. The right to establish a ferry at a certain place on a river within the jurisdiction of county commissioners may be granted by them so far as their jurisdiction goes, although the opposite side of the river is within an Indian reservation. *Id.*

3. A ferry lease for five years, with a privilege of five or ten more years at the option of the licensee, is not in excess of the power to grant a lease for a term not exceeding fifteen years. *Id.*

4. An assignment of a ferry lease is not invalid, at least when it is made with consent of the state by its agents. *Id.*

5. A ferry license is exclusive of the right to operate any other ferry within the limits prescribed where the law provides that no other license shall be granted within 2 miles on either side. *Id.*

NOTES AND BRIEFS.

Ferries; franchises for; bids for license; special privileges as to; exclusiveness of. 315

FIREARMS. See CARRYING WEAPONS, 2.

FIRE ESCAPE. See also MUNICIPAL CORPORATIONS, 10.

1. Fire escapes need not be provided by a landlord for the safety of a tenant, or for anyone on the premises by the latter's invitation or permission, unless this is required by statute or ordinance. *Schmalzried* v. *White* (Tenn.) 782

2. Failure of the owner of a building to comply with the ordinance as to fire escapes, even if not of itself the ground of an action by a person injured thereby, is at least a matter to be considered in connection with other facts and circumstances, on the question of negligence. *Id.*

FIRES. See ARSON.

FISHERIES. See also CONSTITUTIONAL LAW, 11, 12, 15.

A tenant in common of an oyster bed cannot deprive his cotenants of their right to take natural oysters therefrom, by dredging the land and placing oyster shells and seed oysters thereon, although these must be slightly disturbed by taking the natural oysters. *Mott* v. *Underwood* (N. Y.) 270

NOTES AND BRIEFS

Fisheries; police regulation of. 880

FLYING SWITCH. See RAILROADS, 1.

FOLDING BED. See SALE, 5.

FORECLOSURE. See COURTS, NOTES AND BRIEFS.

FOREIGN JUDGMENT. See JUDGMENT, NOTES AND BRIEFS.

FORFEITURE.

NOTES AND BRIEFS.

On conditional sale. 469

FORGERY. See BANKS, 2.

FRANCHISES.

NOTES AND BRIEFS.

Transfer of; to operate ferry. 315

FRAUD AND FRAUDULENT CONVEYANCES. See also EVIDENCE, 15.

1. Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take title in his own name and

does not disclose his agency. *Cowan* v. *Fairbrother* (N. C.) 829

2. The transferee of property from an insolvent debtor holds subject to creditors' rights, where at or before the transfer he has notice of such facts and circumstances as would arouse the suspicion of an ordinarily prudent man, and cause him to make such inquiry as to the purpose of the transfer as would disclose the fraudulent intent of the maker, although he has no actual notice of such intent. *Kansas Moline Plow Co.* v. *Sherman* (Okla.) 33

NOTES AND BRIEFS.

Fraud; participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against the vendor's creditor:—(I.) Necessity of participation; general doctrine; (II.) what constitutes participation; (III.) effect of payment of full consideration; (IV.) the intent necessary to constitute fraud; (V.) to what conveyances the rule applies: (*a*) generally; (*b*) marriage settlements; (*c*) assignment for creditors; (VI.) necessity of injury to creditors; (VII.) knowledge or notice sufficient to put purchaser upon inquiry: (*a*) generally; (*b*) notice or knowledge of indebtedness or insolvency; (*c*) knowledge of intended preference; (*d*) inadequacy of price; (*e*) retention of possession; (*f*) reservations and secret trusts; (*g*) transfers out of the ordinary course of business; (*h*) sales on credit; (*i*) purchase pending action; (*j*) purchase pending attachment or execution; (*k*) conveyance fraudulent on its face; (*l*) knowledge of, or notice to, agent; (*m*) other circumstances and conditions; (VIII.) payment after notice; (IX.) application of purchase price to debts; (X.) effect of assumption of vendor's debts; (XI.) effect of relationship or intimacy of the parties; (XII.) effect of fraud in other transactions; (XIII.) registration and failure to record; (XIV.) purchases from fraudulent grantees; (XV.) presumptions and burden of proof; (XVI.) effect of participation. 33

FREEDOM OF PRESS. See INJUNCTION, NOTES AND BRIEFS; NEWSPAPERS.

FREE SPEECH. See also INJUNCTION, 7.

NOTES AND BRIEFS.

Constitutional right of. 273

Constitutional freedom of speech and of the press:—(I.) In general; (II.) libels; (III.) prevention of speech or publication. 829

FRIGHT. See EVIDENCE, 6.

GAME LAWS. See CONSTITUTIONAL LAW, 16.

GARNISHMENT. See also MORTGAGE, 3.

Entry of judgment against the garnishee before proceedings to garnish the claim have commenced makes the indebtedness absolute, within the meaning of Wis. Rev. Stat. § 2769, providing that no judgment shall be rendered upon a liability owing from him to the defendant unless it is due absolutely before judgment against the defendant. *Hoven* v. *West Superior Iron & S. Co.* (Wis.) 388

GAS.

1. The destruction of a building by the explosion of natural gas which escaped from a leak in a high pressure main 80 or 90 feet distant across a street, and reached the building by penetrating the soil under its frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, although this had continued for several years and notice of the fact had been given to line walkers. *Consumers' Gas Trust Co.* v. *Perrego* (Ind.) 146

2. Ample notice of a leak in a high-pressure main of natural gas is given to the owner of the main by the continuance of the leak for several years and also direct information given to the walkers. *Id.*

NOTES AND BRIEFS.

Gas; negligence in respect to leak of. 146

GIFT. See also EQUITY, 2; TRUSTS, 2.

1. A Christmas gift by a check to an employee according to habit of previous years, although it is made in forgetfulness of the fact that his salary had been increased during the year, and is charged to his account a few days later, but without giving him notice of that fact for several months, cannot be avoided by the donor on the ground of mistake. *Pickslay* v. *Starr* (N. Y.) 703

2. In the absence of any reservation in a trust to deliver a bond to a donee upon the donor's death, the secret intention of the donor that it shall be redelivered to him if he survives the donee, and the fact that the trustee would have redelivered it in such case, will not make the gift subject to such a contingency as will defeat it. *Re Wagoner's Estate* (Pa.) 766

3. A gift made by a bond of the donor including a warrant of attorney for confession of judgment, when delivered to a third person to be held until the donor's death and then given to the donee, who is informed of the arrangement, constitutes a valid gift to the custodian as trustee, although he by mistake made the bond to bear interest during the donor's life; and this blunder was remedied by his indorsing the interest on the instrument without any payment thereof by the donor's direction. *Id.*

4. The words "in trust for," in the entry of a savings bank deposit, with the same form used on the depositor's book, are sufficient to create a prima facie trust which will be a completed trust or gift in favor of the donee as against the estate of the donor where all his declarations, acts, and conduct are consistent with the presumption arising from the entry itself. *Bath Sav. Inst.* v. *Hathorn* (Me.) 377

5. To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee or in a trust for the donee. Anything which remains to be done to complete the gift cannot be enforced; and the gift, while so incomplete, may be revoked. *McCartney* v. *Ridgway* (Ill.) 555

6. A gift of a legal estate capable of legal conveyance is revocable at any time before conveyance is made. *Id.*

NOTES AND BRIEFS.

Gift; of bond of donor. 766
Of check. 704

GOLD COIN. See BANKS, 7.

GUARANTY.

1. Power to revoke a continuing guaranty upon notice is implied unless the terms of the guaranty forbid. *Gay* v. *Ward* (Conn.) 818

2. Any notice of the death of a guarantor which brings that fact within the knowledge of the guarantee is sufficient to revoke a continuing guaranty. *Id.*

3. A renewal after notice of the death of a guarantor on paper discounted by a bank during his life is, so far as his estate is concerned, a payment, and terminates his liability. *Id.*

4. A bond guaranteeing the full, prompt, and ultimate payment of all paper discounted by a bank for a corporation does not include renewals of such discounts made after notice of the death of a guarantor. *Id.*

NOTES AND BRIEFS.

Guaranty; effect of guarantor's death. 819

GUARDIAN AND WARD. See INFANTS, 2.

HABEAS CORPUS.

NOTES AND BRIEFS.

Right to. 133

HABITUAL DRUNKARDS. See PAWNBROKERS, 2.

HEALTH.

A penal ordinance requiring secondhand clothing to be disinfected by fumigation, and requiring payment of a fixed price therefor according to the nature of the garment, must be deemed, in the absence of direct and unquestionable proof to the contrary, to be for the protection of the public health. *Rosenbaum* v. *Newbern* (N. C.) 123

NOTES AND BRIEFS.

Health; municipal regulation of dealing in secondhand clothes. 116

HIGHWAYS. See also BOUNDARIES; EJECTMENT; MUNICIPAL CORPORATIONS, 5; NEGLIGENCE, 5–7.

1. Power of selectmen to cut and trim trees overhanging a highway, without the consent of the owner, for the purpose of compelling a change in the location of telegraph or telephone wires, is denied by Conn. Gen. Stat. § 3944, prohibiting telegraph or telephone companies to injure any tree without the consent of the owner. *Bradley* v. *Southern New England Teleph. Co.* (Conn.) 280

2. A city is not liable for a thin strip of ice 3 feet wide and 1½ to 2 inches thick across a sidewalk, where it was formed by the discharge of water from a pipe which had been put up to take water from a sag in an eaves trough. *Gavett* v. *Jackson* (Mich.) 861

NOTES AND BRIEFS.

Liability for ice on sidewalk. 861
Power to cut trees in. 280

HOMESTEAD. See also PUBLIC LANDS.

A fugitive from the state intending to return as soon as a criminal proceeding against him is dropped, while his wife and children remain on the family homestead, does not cease to be a resident of the state within the protection of the homestead from attachment by his creditors. *Chitty* v. *Chitty* (N. C.) 394

HUNTING GROUND. See WATERS, 1.

HUSBAND AND WIFE. See also COURTS, 2; DAMAGES, 5; DEDICATION; ESTOPPEL, 2; EVIDENCE, 28; JUDGMENT, 5, 6; SEDUCTION.

1. A deed to husband and wife "as tenants in common" creates a tenancy in common, and not an estate by the entireties. *Fulper* v. *Fulper* (N. J. Err. & App.) 701

2. Land obtained under a homestead claim is in effect taken by purchase within the intent of the Washington community property laws, so that the wife has community rights therein. *Kromer* v. *Friday* (Wash.) 671

3. The exemption of community property from liability for a separate and individual debt of the husband extends to a judgment against him rendered in another state for his individual debt long before the community property was acquired. *La Selle* v. *Woolery* (Wash.) 73

4. The modes of alienation by a wife, prescribed in an instrument creating a separate estate in her, are not exclusive of other modes, unless such an intention can be clearly gathered from the face of the instrument. *Price* v. *Planters' Nat. Bank* (Va.) 214

5. The equitable separate estate of a wife may consist of any property and of any interest therein, and its nature and extent are to be determined according to the intention of the creator as ascertained from the construction of the instrument by which it is created; and it is not arbitrarily limited to such interest or property as would otherwise inure to the husband at common law. *Id.*

6. A wife is conclusively presumed to have intended that such separate estate as she owned free from restraint at the time of making a contract—even one made before the Virginia Code went into effect—liable therefor, unless a contrary intention is expressed in the contract. *Id.*

7. The liability of the equitable separate estate of a wife for her debts contracted on the faith thereof does not terminate upon discoverture by the death of the wife or of the husband, unless the estate is determined by the particular event that terminates the coverture. *Id.*

8. A wife's equitable separate real property which is without restraint of alienation by her may be sold under decree after her death to

discharge her general engagements contracted on the faith of her separate estate, where her separate personal estate is insufficient for that purpose, and the rents and profits of the real estate will not within a reasonable time amount to enough to discharge them. *Price* v. *Planters' Nat. Bank* (Va.) 214

9. A parent is not liable for advising a son to separate from his wife, if moved by proper parental motives for his son's welfare and happiness, instead of by malice. *Tucker* v. *Tucker* (Miss.) 623

10. A merely formal marriage entered into without intent to perform the marriage vows, but only to avoid imprisonment for bastardy and prosecution for seduction, and which is followed by a desertion of the wife, may be declared void by judicial decree at the instance of the wife. *Henneger* v. *Lomas* (Ind.) 848

11. A marriage procured by fraud is voidable at the suit of the injured party, independent of any provisions of the divorce law. *Id.*

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Husband and wife; charge on community property for debts. 73
Cotenancy of. 701
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Jurisdiction in divorce case. 82, 290

ICE. See HIGHWAYS, 2.

ILLEGITIMACY. See DEATH.

INCOMPETENT PERSONS.

NOTES AND BRIEFS.

Admissions and waivers by representatives of, in actions. 671

INFANTS. See also EVIDENCE, 11; JUDGMENT, 2; NEGLIGENCE, 8, 9.

1. A minor living in the family of a near relative other than a parent, who continues for years to render valuable services, relying on the relative's promise of compensation at the end of a certain period, can, when discharged during that time without compensation, recover the actual value of the services in assumpsit, even if the promises of the relative were made in jest. *Plate* v. *Durst* (W. Va.) 404

2. Guardians of minors, and their attorneys of record in a partition suit may rightfully admit that the property was community property, if that fact has been determined by a court having jurisdiction of the parties and subject-matter in a prior proceeding which remains unappealed from, even if the finding was erroneous. *Kromer* v. *Friday* (Wash.) 671

NOTES AND BRIEFS.

Infants; admissions and waivers by representatives of, in actions. 671

INJUNCTION. See also APPEAL AND ERROR, 10; ESTOPPEL, 3.

1. An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case. *Mott* v. *Underwood* (N. Y.) 270

2. A probability that more wrong will be done than prevented by an injunction prayed for will prevent granting it. *Fesler* v. *Brayton* (Ind.) 578

3. An injunction against proceeding to an election under an alleged unconstitutional statute will not be granted where that is the only law that has not been repealed or adjudged unconstitutional, under which an election of members of the legislature can be had. *Id.*

4. An injunction against the unlawful discharge of surface waters by an adjoining proprietor, constituting a continuing injury to land, may be granted. *Jacobson* v. *Van Boening* (Neb.) 229

5. Any person causing the unlawful discharge of water upon the premises of another may be restrained, although other persons contribute to the injury. *Id.*

6. Voting or controlling stock under a pooling arrangement which is against public policy may be restrained by injunction at the suit of the real owner of the stock. *Harvey* v. *Linville Improv. Co.* (N. C.) 265

7. The production in a theater of a play based upon the facts of a criminal case then on trial, although it may interfere with the administration of justice and deprive the accused of a fair trial and may constitute a punishable contempt, cannot be restrained by injunction, under Cal. Const. art. 1, § 9, declaring that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." *Dailey* v. *San Francisco Super. Ct.* (Cal.) 273

8. An injunction against the collection of a judgment will be granted to let in a set-off, where the judgment creditor is insolvent. *Jarrett* v. *Goodnow* (W. Va.) 321

9. The collection of a judgment may be enjoined for want of consideration for the note on which it was rendered, under W. Va. Code 1891, chap. 126, §§ 5, 6, giving the right to make such defense at law, or to go to equity without giving any excuse for not defending at law. *Id.*

10. A stipulation in an agreement of submission to arbitration, that it shall not impair the liability of the obligors on an injunction bond, does not impair the rights of such obligors to insist that an award binding on the parties, in pursuance of which they dismiss the suit without judicial action, does not constitute a judicial determination of the suit which will make the bond operative. *Columbus, H. V. & T. R. Co.* v. *Burke* (Ohio) 329

11. The dissolution of a temporary injunction and dismissal of the action by consent of the parties, when an award is made against the complainant by arbitrators selected by the parties, who agree to abide the award, and which is not made in any way subject to the approval of the court, will not support an action on the injunction undertaking, since the award is not a judicial determination that the injunction ought not to have been granted. *Id.*

12. No action can be maintained on an injunction undertaking, either against principal or surety, except in accordance with its terms. *Id.*

NOTES AND BRIEFS.

Injunction; against improper publication. 273

Against speech or publication. 831

Against trespass. 270

General equitable jurisdiction in regard to injunctions against judgments:—(I.) In matters of concurrent jurisdiction; (II.) where there is a failure to defend at law; (III.) where there is negligence in not asserting a legal defense; (IV.) where a legal defense was asserted at law; (V.) for offenses not available at law; (VI.) on a bill of discovery to aid defense; (VII.) where there is a remedy at law. 321

Right of action on bond for. 332

INSTIGATION. See BURGLARY; CRIMINAL LAW, 1.

INSURANCE. See also CONFLICT OF LAWS, 2; EVIDENCE, 13, 14.

1. Mere failure to reply to a letter containing a slip to be pasted to a policy of insurance, and which deals with a matter already embraced in the contract, will not make the slip binding on the insured, in the absence of anything to show that the insurer was injured by the silence. *Shakman* v. *United States Credit System Co.* (Wis.) 383

Employer's liability.

2. Payment of a claim for injuries to an employee is not a condition precedent to a right of action against the insurer on a policy to indemnify the employer for sums for which he "shall become liable" to employees. *Hoven* v. *West Superior Iron & S. Co.* (Wis.) 388

3. Injury to a workman in iron and steel works, caused by the fall of a girder which was being raised by an independent crew building an addition to the works, is within a policy of indemnity against claims for compensation for injuries in "all operations connected with the business of iron and steel works." *Id.*

Indemnity of merchants.

4. A contract to indemnify a merchant against loss by insolvency of customers is a contract of insurance. *Shakman* v. *United States Credit System Co.* (Wis.) 383

5. An agreement attached to a policy insuring against loss by insolvency customers which policy embraces a period of several months prior to the date of its issuance, which agreement accepts customers rated by a mercantile agency not recognized in the policy, will cover the same period as the policy. *Id.*

6. An exclusion of liability for losses for credit given "exceeding a credit of 30 per cent on the lowest capital rating," in a policy insuring against loss by insolvency of customers, excludes merely the excess above that amount, and not the entire loss in case credit is given above that amount. *Id.*

7. An agreement attached to a policy insuring a merchant against loss by insolvency of customers, that in case a customer is not rated "within the system" of the insurer by the mercantile agency designated by the policy, and he is rated by another specified agency within such system, losses suffered on his account shall be covered by the policy, will, in case the system requires a rating as to both capital and credit, include a customer rated by the agency designated by the policy only as to credit, but by the other agency as to both capital and credit. *Id.*

8. An agent of an insurer against loss by insolvency of customers, having power to solicit insurance, transmit applications, collect premiums, and receive pay therefor, may, under Wis. Rev. Stat. § 1977, bind his principal by an agreement to include customers rated by a mercantile agency not recognized in the regular policies of the company. *Id.*

Forfeiture; defenses.

9. Declarations of an insured person as to forfeiture of the policy are not binding on the beneficiary. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

10. A copy of an application for renewal or reinstatement of a policy must be annexed to it, to enable the insurer to rely on false statements therein, under McClain's (Iowa) Code, § 1733. *Id.*

11. False representations or warranties in an application for insurance cannot be relied on by the insurer, if a copy of the application is not attached to the policy as required by McClain's (Iowa) Code, § 1733. *Id.*

12. Insurance which is invalid by reason of the existence of valid prior insurance will not defeat the prior policy under a provision against additional insurance. *Sweeting* v. *Mutual F. Ins. Co.* (Md.) 570

Incontestability.

13. A clause in an insurance policy making it incontestable except for fraud in procuring it, after two years from its date, will control an agreement in the application that death by suicide is not covered by the policy, so that such death after the expiration of that period will not defeat liability on the policy. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

Notice to insured; address.

14. An insurance policy cannot be canceled for failure to comply with a notice which was misdirected and was returned to the insurer without reaching the insured. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

15. Notice of change of address of the insured, given to one authorized to collect premiums, is binding on the company. *Id.*

16. Oral notice to a general agent of an insurance company, of change of address of the insured, given upon the street, is sufficient to bind the company. *Id.*

Mutual insurance.

17. A mutual insurance company is not changed into a stock company by raising a guaranty fund to secure temporarily the payment of losses when assessments are insufficient, even if such guaranty fund should be held valid. *Corey* v. *Sherman* (Iowa) 490

18. The fact that the right to vote and control the management of an insurance company is vested in those members only who are guarantors does not prevent the company from being regarded as a mutual one, or impair the legal existence and the obligations of deposit notes given for premiums. *Id.*

19. That an insurance policy is renewable from quarter to quarter, instead of being for a period of years upon condition of payment of premiums, does not withdraw it from the operation of the ordinanry rules applicable to life insurance contracts. *Goodwin* v. *Provident Sav. L. Assur. Soc.* (Iowa) 473

20. Policies for specific amounts for an all-cash premium, issued to persons who are not bound to pay any assessments, are without authority of law when issued by a mutual insurance company which was organized under Iowa Code, § 1160, authorizing insurance of the property of members of the company only, and which was subject to § 1159, prohibiting a mutual company to take risks upon the stock plan. *Corey* v. *Sherman* (Iowa) 490

21. The validity of a policy or certificate constituting a contract between a benefit society and a member thereof is not destroyed by the adoption of some impracticable scheme for the execution of the contract. *Failey* v. *Fee* (Md.) 311

22. Holders of matured certificates of a benefit society become creditors thereof and remain so, notwithstanding the subsequent insolvency of the order. *Id.*

23. A provision in a certificate of membership in a benefit society as to the time of payment will control a different provision in a by-law, where the charter provides for payment as provided either by the by-laws or certificate. *Id.*

Premium notes.

24. The provision in Iowa Code, § 1146, that premium notes must on their face state that they were given for insurance, is by § 1160 made inapplicable to notes given for mutual obligations by persons organized for mutual insurance under the provisions of § 1058, for organizing corporations in general. *Corey* v. *Sherman* (Iowa) 490

25. Premium notes given by members of a mutual insurance company cannot be canceled because the company without authority issued policies in fixed amounts for cash premiums, so long as there is a liability for losses to persons insured on the mutual plan. *Id.*

26. Makers of deposit notes given to a mutual insurance company to cover future assessments, although they may have been deceived by misrepresentations as to a guaranty fund for partial protection against assessments, are not entitled to have their notes canceled without paying assessments for losses which occurred during the time for which they had the benefit of their insurance,—at least when they have asked no relief until after the company has ceased to do business and assigned its property for the benefit of creditors. *Id.*

Assessments.

27. The obligation to contribute to the payment of prior losses, on assessments, is not terminated by the insolvency of a mutual insurance company and its assignment for the benefit of creditors. *Corey* v. *Sherman* (Iowa) 490

28. The liability of a member of a mutual insurance company for losses occurring during his membership continues until an assessment has been made covering them. *Ionia, E. & B. Farmers' Mut. F. Ins. Co.* v. *Ionia Circuit Judge* (Mich.) 481

29. Failure to adjust a loss until a member of a mutual insurance company cancels his membership will not relieve him from his share of the liability thereon. *Id.*

30. Members of a mutual insurance company who did not pay their shares of a void assessment to cover a valid claim will not be permitted to object to the crediting of the amounts paid thereon by other members, upon the sums assessed against them under a new levy to meet the liabilities for which the void assessment was levied. *Id.*

31. Assessments upon the members of a mutual insurance company to pay a loss may include interest and expenses incident thereto resulting from not paying it when due, and also the costs of litigation incurred in defending actions. *Id.*

32. Thirty per cent is not an unreasonable amount to levy for contingencies, in levying an assessment upon the members of a mutual insurance company to meet liabilities, where a new assessment for deficiencies arising from failure to collect cannot be made under the law of the state, and litigation in connection with the collection of the assessment is probable. *Id.*

33. For losses on cash policies unlawfully issued by a mutual company, members who took lawful policies on the assessment plan cannot be compelled to contribute by assessment on their premium notes merely because they knew of the issue of the cash policies, but did nothing to estop themselves from denying liability on account of them. *Corey* v. *Sherman* (Iowa) 490

34. Notice of assessments by mutual insurance companies need not be given before they are made, unless expressly provided for by the articles of incorporation and by-laws. *Id.*

Insolvent company.

35. A guaranty fund is not, strictly speaking, assets of a mutual insurance company for the purpose of determining its solvency, when the company is required to refund all moneys obtained from it. *Corey* v. *Sherman* (Iowa) 490

36. One or more stockholders of a mutual insurance company may on behalf of all bring a suit to set aside the appointment of an assignee and to cancel assessments and for other relief, under Iowa Code, § 2549, authorizing one or more persons to sue for the benefit of the whole, when the question is one of common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court. *Id.*

Loss by fire.

37. Damage to insured property by the burning of soot in a chimney, accidentally ignited by the burning of waste paper in a stove, is within the terms of a policy against all loss or damage by fire, especially where there was an accidental obstruction of the flue contributing to the damage. *Way* v. *Abington Mut. F. Ins. Co.* (Mass.) 608

Cause of death.

38. Death from asphyxiation by illuminat-

ing gas while the insured was asleep is not within a clause of an accident insurance policy providing that the insurance does not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." *Fidelity & C. Co.* v. *Waterman* (Ill.) 654

39. The words "absorbed or inhaled," in the provision of an accident insurance policy that it does not cover injuries from anything accidentally or otherwise absorbed or inhaled, implies a voluntary and intelligent act as distinguished from an involuntary and unconscious act. *Id.*

40. The word "absorbed," in a provision of an accident insurance policy that it does not cover injuries from poison or anything accidentally or otherwise absorbed or inhaled, refers only to the process of absorption by sucking up or imbibing through the pores of the body. *Id.*

Recovery; mortgagee's interest.

41. The market value of property destroyed so far as it is covered by insurance policies is the amount to be recovered. *Hickerson* v. *German-American Ins. Co.* (Tenn.) 172

42. A mortgagee is entitled to recover in his own name to the extent of his interest, on a policy of insurance payable to him as his interest may appear, where the mortgagor is by the mortgage required to insure the property for the mortgagee's benefit. *Palmer Savings Bank* v. *Insurance Co. of N. A.* (Mass.) 615

43. The interest of a mortgagee in a policy payable to him as his interest may appear does not extend to a subsequent mortgage executed by the wife of the insured, who had in the meantime obtained a conveyance of the property, and in which the husband is not named in the granting clause, although he joins in the instrument to release any marital rights he may have. *Id.*

Arbitration.

44. The existence of a real difference arising out of an honest effort between insurer and insured is necessary to make operative a provision in a policy for arbitration of differences. *Hickerson* v. *German-American Ins. Co.* (Tenn.) 172

45. An insured cannot demand an appraisal and arbitration of the amount of loss while denying all liability under the policy. *Id.*

46. Appraisers in an insurance case act in a quasi-judicial capacity, and must be free from bias in favor of either party. *Id.*

47. An appraiser chosen by an insurer cannot demand that an umpire be selected who does not live in the vicinity of the property. *Id.*

48. An unreasonable demand of an appraiser for the insurer that an umpire be chosen who does not live in the vicinity amounts to a waiver of arbitration. *Id.*

49. A more general objection to a statement of loss, without pointing out in detail the items excepted to, will not constitute such a failure to agree as makes a case for arbitration under an insurance policy. *Id.*

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Liability of members of mutual fire insurance companies:—(I.) In general; (II.) who are members: (*a*) in general; (*b*) transfers of policy or property; (III.) notes of members: (*a*) kinds and effect; (*b*) consideration; (*c*) maturity; (*d*) negotiation; (*e*) collection by receiver or assignee for creditors; (*f*) defenses; (IV.) altered charter, by-law, or contract of membership; (VI.) for what losses or obligations liable: (*a*) in general; (*b*) during what time or period; (*c*) return premium; (*d*) division into classes generally; (*e*) losses on cash or stock policies; (VI.) defenses against contract: (*a*) in general; (*b*) contract invalid or unauthorized; (*c*) fraud or mistake; (*d*) failure of consideration; (VII.) termination of liability: (*a*) rescission or cancelation of contract; (*b*) by loss and payment of insurance; (*c*) by transfer of property insured; (*d*) by member's default; (*e*) by termination of company; (VIII.) liability of guaranty members; (IX.) assessments: (*a*) necessity; (*b*) who can make; (*c*) who to be assessed; (*d*) marshaling funds; (*e*) how and when made; (*f*) amount; items included; (*g*) notice or demand; (*h*) conclusiveness; (*i*) liens; (*j*) set-off; (*k*) procedure to enforce; (1) in general; (2) statement and pleadings; (3) proof; (4) statute of limitations. 481

INTEREST. See also INSURANCE, 31; USURY.

1. A demand is necessary to start the running of interest on a special deposit as a pledge to secure a bail bond, even after the sureties have surrendered the persons bailed. *Anderson* v. *Pacific Bank* (Cal.) 479

2. A sewer assessment carries no interest as such nor by way of penalty for nonpayment, unless the law so provides. *Sargent* v. *Tuttle* (Conn.) 822

3. A municipal by-law cannot require interest on sewer assessments, unless the power is conferred upon the city to make such by-law. *Id.*

NOTES AND BRIEFS.

Interest; on assessments for local improvements. 822

INTOXICATING LIQUORS.

1. A vote on the question of local option may be held by a town alone, under Ky. Stat. § 3704, although a special prohibitory law had been in force in a magisterial precinct that included the town. *Lafferty* v. *Huffman* (Ky.) 203

2. A statute exacting the payment of a sum called a tax, and also the giving of a bond, as conditions precedent to the right to engage in the sale of intoxicating liquors, is an exercise

of the police power, rather than a tax law in the proper sense. *People, Einsfeld*, v. *Murray* (N. Y.) 344

3. A general state excise law, although it graduates excise taxes in cities according to their population, but does not follow the classification of cities in the Constitution, is not a general or special city law, and does not relate to the "property, affairs, or government" of cities so as to bring it within the provisions of N. Y. Const. art. 12, § 2, respecting the classification of cities and the reference of special city laws to the mayors of the cities affected thereby. *Id.*

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JUDGMENT. See also ACTION OR SUIT, 3; COURTS, 2; INJUNCTION, 8, 9; PLEADING, 7, 8.

1. A finding of community rights in real estate, unappealed from, whether of fact or of law, by a court having jurisdiction and all the parties before it, although erroneous, is the law of the case and conclusive upon the parties. *Kromer* v. *Friday* (Wash.) 671

2. Minor part owners of common property, properly represented in a partition suit, may be effectually bound by a decree of sale for partition under the Washington Code. *Id.*

3. Service on a foreigner temporarily in the country, made on the eve of his departure, is sufficient to give jurisdiction to render judgment against him, although the cause of action did not arise within the jurisdiction. *Fisher* v. *Fielding* (Conn.) 236

4. An English judgment rendered by default against a citizen of Connecticut after personal service made on him while temporarily in England and upon the eve of his departure is conclusive as to the merits in the absence of fraud, although the cause of action did not arise in England. *Id.*

5. A judgment for divorce giving a wife the custody of children, and decreeing to her as alimony a tract of land within the state, which she specifically describes and asks for in her petition, may be valid under Kan. Code Civ. Proc. § 72, although rendered on service by publication only against the husband, who is not in the state. *Wesner* v. *O'Brien* (Kan.) 289

6. Constructive service of summons cannot give jurisdiction in a divorce suit to award alimony and the exclusive custody of the children, where the defendant and the children are outside of the state and do not appear, even if their domicil is within the state. *De La Montanya* v. *De La Montanya* (Cal.) 82

7. A motion to vacate a judgment rendered without jurisdiction may be made without the defendant's submitting himself to the jurisdiction of the court or showing a meritorious defense, as is required in cases under Cal. Code Civ. Proc. § 473. *Id.*

NOTES AND BRIEFS.

See also INJUNCTION.

Judgment; confession of, by fiduciaries. 671
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JUNK DEALERS. See also EVIDENCE, 5; LICENSE, 1–3; PAWNBROKERS, 1–3.

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JURISDICTION. See COURTS; HUSBAND AND WIFE, NOTES AND BRIEFS.

LANDLORD AND TENANT. See also FIRE ESCAPES, 1; MARKETS, 1, 2.

1. The duty of disclosing to a tenant hidden defects and secret conditions that contribute to make the property unsafe is not imposed upon a landlord who is ignorant thereof without fault or negligence on his part. *Schmalzried* v. *White* (Tenn.) 782

2. The duty to furnish light at night in common halls and stairways of a rented building is not included in the duty of the landlord to make such halls and stairways reasonably fit for passage in the absence of any contract to furnish it. *Gleason* v. *Boehm* (N. J. Sup.) 645

3. A visitor passing down an unfamiliar stairway in the dark without waiting for a companion who is familiar with it, or seeking a light, and using no precaution except to feel with hands and feet, is chargeable with negligence which will preclude recovery for injuries in falling down a stairway because of the want of a light. *Id.*

4. A water company is liable for injuries to a guest of its employee occupying as tenant at will without a fixed rental, but as a part of his compensation, a dwelling house upon the property of the company, from the escape of water from its standpipe, due to the negligent construction of and care for such pipe. *Defiance Water Co.* v. *Olinger* (Ohio) 736

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Liability for injury to tenant's visitor. 645
Liability of landlord for dangerous premises. 782

LAW OF THE ROAD. See NEGLIGENCE, 5–7.

LEGACIES. See WILLS, 3.

LEVY AND SEIZURE. See also CONFLICT OF LAWS, 3.

1. Indorsers for one doing business in his own name, who are compelled to pay the note, are creditors within the protection of Miss. Code 1892, § 4234, making property used or acquired by such person in his business liable for his debts; and they may secure themselves by taking a bill of sale of such property. *Columbus Buggy Co.* v. *Turley* (Miss.) 260

2. Goods sold to a trader for resale under a contract retaining title in the vendor until they

are paid for, and making the purchaser agent for their sale, are acquired and used in his business within the meaning of Miss. Code 1892, § 4234, making such property of one doing business under his own name without disclosing his principal or partner liable for his debts. *Id.*

3. The interest of persons who contribute money to purchase lands conveyed to a trustee who has the absolute title, and is a trustee for the purpose only of accounting for the proceeds of sales, is not subject to levy under a writ of attachment. *Chase* v. *York County Sav. Bank* (Tex.) 785

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Levy; on community property. 73

LIBEL AND SLANDER.

1. To call a remedy proposed by a book for poverty a "quack remedy" is not libelous. *Dowling* v. *Livingstone* (Mich.) 104

2. To say that a writer quotes from another without giving him credit, when he incloses in quotation marks the passage quoted, does not charge him with plagiarism. *Id.*

3. Criticism, although severe and caustic, so long as it is directed to literary composition and theories, and not to the personal character of the author, is not libelous. *Id.*

4. Criticism of a book which is placed before the public is not libelous provided it does not include any misstatements of any material facts contained in the book, or attack the character of the author. *Id.*

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Libel; what constitutes; by criticism. 106

LICENSE.

See also MARKETS, 1, 2; NEGLIGENCE, 3; RAILROADS, 1.

1. Power to revoke the license arbitrarily, reserved in an ordinance regulating licenses for pawnbrokers and junk dealers, is not so unreasonable that the courts can declare it void. *Grand Rapids* v. *Braudy* (Mich.) 116

2. Requiring an indorsement by twelve freeholders on an application for a license by a pawnbroker or junk-dealer is not unreasonable. *Id.*

3. It is not unreasonable to require a license fee of $25 per annum from junk dealers and secondhand dealers, or $50 from pawnbrokers. *Id.*

4. A merchant may be compelled to pay a license tax for the sale of secondhand goods, although he pays another for the business of selling general merchandise. *Rosenbaum* v. *Newbern* (N. C.) 123

5. A tax of $4 per month levied upon a person as a dealer in secondhand clothing, and a tax of $1 per month on the occupation of selling general merchandise, do not violate a constitutional requirement of uniformity, since this requires uniformity only between those belonging to the same class. *Id.*

6. A license of $50 per quarter for retailing goods outside of regular places of business is not unreasonable and oppressive as an attempt to prohibit business, although it is heavier than that imposed upon mercantile business at fixed places. *Re Haskell* (Cal.) 527

7. Discrimination between merchants having fixed places of business in the municipality and also persons "selling to the trade" on the one hand, and retail dealers who have no regular places of business on the other hand, is not unlawful for the purpose of license taxes. *Id.*

8. An unlawful discrimination as to hawkers and peddlers will not invalidate a wholly independent provision in the same ordinance as to persons selling goods at retail outside those conducting regular places of business. *Id.*

9. A license tax upon persons and corporations, imposed by the legislature, of which a portion of the proceeds is given to the county, does not violate Mont. Const. art. 12, § 4, prohibiting the legislature from levying taxes in any county, city, or town, for county, town, or municipal purposes, since it is not clear that a license tax is within the intent of this constitutional provision. *State* v. *Camp Sing* (Mont.) 635

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License; distinguished from tax. 636

Of business; power of municipal authorities; reasonableness. 528

LIFE TENANT.

See also DEED; EVIDENCE, 16; REAL PROPERTY.

1. A devisee of a life estate in remainder cannot cut off the remainders limited upon his life estate by purchasing the property at tax sales caused by default of the first taker. *Defreese* v. *Lake* (Mich.) 744

2. Forfeiture of a life estate under Ohio Rev. Stat. § 2852, for neglect to pay taxes so long that the land is sold therefor, and neglect to redeem within one year thereafter, does not occur when such tax sale is so defective that a valid deed cannot be made thereon. *Estabrook* v. *Royon* (Ohio) 805

3. An administrator with the will annexed, who under a provision of the will has paid the taxes on a homestead estate, which the life tenant has neglected and refused to pay, in order to save it from entire loss to the reversioner, may have a receiver appointed to take charge of the premises, collect the rentals, and apply the proceeds to pay the taxes and necessary repairs and reimburse the administrator for the taxes paid by him; and such receiver may, if the rental is insufficient, sell the life estate under direction of the court, or so much thereof as may be sufficient for the purpose. *St. Paul Trust Co.* v. *Mintzer* (Minn.) 756

NOTES AND BRIEFS.

See also TAXES.

Life tenants; duty to pay taxes:—(I.) Tenants for life strictly: (*a*) general rule as to taxes; (*b*) general rule as to assessments; (II.) tenant by the curtesy; (III.) tenant in dower; (IV.) property taken in lieu of dower; (V.) as between husband and wife; (VI.) assignee of life tenant; (VII.) duty in case of dispute; (VIII.) decisions under state statutes; (IX.) devisee for life; (X.) devise of income; (XI.) devise to widow. 744

LIGHT. See LANDLORD AND TENANT, 2.

LIMITATION OF ACTIONS. See also TAXES, NOTES AND BRIEFS.

The statute of limitations against an action for obstruction of water by a railroad embankment runs from the time when the first injury was sustained, and not necessarily from the construction of the road. *Ridley* v. *Seaboard & R. R. Co.* (N. C.) 708

LOCAL OPTION. See INTOXICATING LIQUORS, 1.

LOGS. See DAMAGES, 10.

LUNATICS. See INCOMPETENT PERSONS, NOTES AND BRIEFS.

MAJORITY. See COUNTIES, 2.

MALICE. See ACTION OR SUIT, 1.

MANDAMUS.

1. Mandamus lies to compel the president and secretary of a joint-stock corporation to call a meeting of the stockholders, upon the written request of the stockholders holding a specified amount of stock, in accordance with a by-law of such corporation, as Conn. Gen. Stat. § 1945, expressly requires the meetings to be called by such officers. *Bassett* v. *Atwater* (Conn.) 575

2. That refusal to call a meeting of the stockholders of a corporation does not work a public wrong is not sufficient to defeat the issuance of a mandamus to compel the officers to do so. *Id.*

3. The obligations imposed by the by-laws of a corporation upon its officers are not such as rest wholly upon contract, for breach of which there is an adequate legal remedy which will prevent the issuance of a writ of mandamus to compel compliance with them. *Id.*

4. Mandamus to compel the several officers of a county to hold their offices at the legal county-seat is the proper remedy to determine whether the county-seat has been legally changed, in the absence of any other adequate and speedy remedy to test the validity of the election held to relocate the county-seat. *State, Little,* v. *Langlie* (N. D.) 723

5. The remedy of contest in the courts to test the validity of a county-seat election, furnished by Dak. Comp. Laws, §§ 1494–1498, although adequate and speedy, does not preclude the remedy by mandamus to compel the officers to remove their offices to the legal county-seat, as such remedy could be employed before the passage of Dak. Laws 1885, chap. 54, by which such sections were enacted, and § 11 expressly provides that the act shall not affect any of the remedies provided for in the Code of Civil Procedure. *Id.*

NOTES AND BRIEFS.

Mandamus; to enforce provision of by-laws of corporation. 575

To test county-seat election. 724

MARKETS.

1. The occupant of a stall in a market under a provision in the town laws that his license may be revoked for any cause which the board may deem sufficient is a mere licensee, and not a lessee. *Hutchins* v. *Durham* (N. C.) 706

2. A tenancy from year to year is not created by holding over as occupant of a stall in a market under a license revocable at the pleasure and discretion of the licensor, after the time fixed for the annual renting of the stalls. *Id.*

3. A person may be expelled as a trespasser from a stall in a market which he has held under a revocable license, when he refuses to vacate it after revocation of his license and notice to leave. *Id.*

NOTES AND BRIEFS.

Markets; rights as to stall in. 706

MASTER AND SERVANT.

1. An employer is bound to use reasonable care to protect his servant against unnecessary risk, and is liable for damages occasioned through latent danger of which he ought to have warned him. *Western U. Teleg. Co.* v. *McMullen* (N. J. Err. & App.) 351

2. A servant assumes the ordinary risks of his employment, and also special risks known to him or which he could have known by reasonable care and skill. *Id.*

3. The assumption of the obvious risks of unguarded cogwheels by an employee, who thus waives the protection of a statute requiring them to be guarded, is not in contravention of public policy. *Knisley* v. *Pratt* (N. Y.) 367

4. Disregard of the statutory duty properly to guard the cogwheels of a machine, which is imposed by N. Y. Laws 1890, chap. 396, p. 756, § 12, does not render an employer liable to an employee whose hand was caught in such wheels where the risk was obvious and was assumed by engaging in the work. *Id.*

5. A temporary room in a mine, formed by excavating ore and used as a working place to get out ore lying around its sides, is not within the rule requiring the master to furnish a safe place for his servants to work in. *Petaja* v. *Aurora Iron Min. Co.* (Mich.) 435

6. Failure of miners or a shift boss to notify the timbermen that a newly opened space in the mine is ready to be timbered is the negligence of fellow servants of a trammer who is injured by the fall of ore from the roof because of absence of the timber. *Id.*

7. An engineer in charge of a refrigerating machine under the direction of the superintendent and general manager of a corporation when he is present, and in sole charge during his absence, with the same power to control workmen that the superintendent had when present, is not at such a time a fellow servant of a workman under his control who is injured while obeying his orders in a dangerous service. *Ryan* v. *Los Angeles Ice & C. S. Co.* (Cal.) 524

8. Tightening up the nuts on the generator of a refrigerating machine without reducing the pressure, when there is an ammonia pressure

of about 120 pounds which is increasing, is a dangerous work at which a carpenter employed as a general laborer or handyman, but unfamiliar with and uninstructed as to the danger or the mode of operation necessary to preserve an equal strain on all parts of the generator, cannot be set without rendering the employer liable to him for injury resulting from an explosion caused by his lack of skill. *Id.*

9. A contractor building a brick and mortar foundation for a printing press is not liable to a driver of a van containing rolls of paper, for an injury to him caused by negligence of employees attempting to aid in unloading the van, for which their own work was necessarily suspended, with a suspension of their wages for the time lost, when they attempted to assist without any request of the driver, even if they may have been directed to do so by their foreman. *Brown* v. *Jarvis Engineering Co.* (Mass.) 605

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Master and servant; care as to employment in mines; assumption of risk; negligence of fellow servant. 435

Liability for unforeseen accidents; duty as to dangers. 524

Liability of electric company to employee for injury caused by electric shock:—Negligence of employer; duty to warn; assumption of risks; contributory negligence. 351

Assumption of risk; duty of master to guard machinery. 367

MAXIMS.

1. Actor sequitur forum rei. *Fisher* v. *Fielding* (Conn.) 236

2. Damnum absque injuria. *Daugherty* v. *Herzog* (Ind.) 837; *Jacobson* v. *Van Boening* (Neb.) 229

3. Equity aids the vigilant. *Fesler* v. *Brayton* (Ind.) 578

4. Ex mala causa non oritur actio. *Commercial Nat. Bank* v. *First Nat. Bank* (N. C.) 712

5. Interest reipublicæ ut sit finis litium. *Fisher* v. *Fielding* (Conn.) 236

6. Nemo tenetur prodere seipsum. *Ex parte Senior* (Fla.) 133

7. Nullus videtur dolo facere qui suo jure utitur. *Fisher* v. *Fielding* (Conn.) 236

8. Qui facit per alium facit per se. *First Nat. Bank* v. *Harkness* (W. Va.) 408

9. Volenti non fit injuria. *Knisley* v. *Pratt* (N. Y.) 367

MERCHANT. See DEFINITIONS; LICENSE, 7.

MILITIA. See CARRYING WEAPONS, 1.

MINES. See also CONSTITUTIONAL LAW, 18, 21, 22; MASTER AND SERVANT, 5, 6.

An easement to take coal at a bank then in use for an adjoining tract of land does not constitute any consent, within W. Va. Code 1891, p. 668, chap. 79, § 7, by the owner of the servient estate to digging within 5 feet of his lot, at a different place, by the owner of the easement. *Mapel* v. *John* (W. Va.) 800

MISCARRIAGE. See also DAMAGES, 6.

NOTES AND BRIEFS.

Miscarriage; recovery of damages for. 142

MONUMENT. See CONTRACTS, 4, 16; DAMAGES, 13.

MORTGAGE. See also CONFLICT OF LAWS, 4; COURTS, 1; INSURANCE, 42, 43; NOTICE; SUBROGATION.

1. Holders of a principal note and interest coupons not due are not necessary parties to a suit to foreclose a mortgage to raise the amount due on matured interest coupons, if the lien of the mortgage in favor of the other notes is to be left unimpaired. *Boyer* v. *Chandler* (Ill.) 113

2. A mortgage securing a principal sum and interest coupons may be foreclosed to raise the amount due on coupons as they fall due, without affecting its security for the principal and other coupons. *Id.*

3. A lessor's mortgage of his interest in crops raised by a tenant on leased land and still in the possession of the tenant and undivided gives the mortgagee a right paramount to that of the creditors of the mortgagor under garnishment proceedings subsequent to the mortgage. *Riddle* v. *Dow* (Iowa) 811

NOTES AND BRIEFS.

See also COURTS.

Foreclosure for default on interest coupons. 114

MOTION. See JUDGMENT, 7.

MOTIVE. See ACTION OR SUIT, 1.

MULTIFARIOUSNESS. See ACTION OR SUIT, 5.

MUNICIPAL CORPORATIONS. See also ACTION OR SUIT, 7; CONSTITUTIONAL LAW, 14, 18, 22; DRAINS AND SEWERS; EVIDENCE, 2, 9; HEALTH; INTEREST, 3; INTOXICATING LIQUORS, 3; LICENSE, 8; PAWNBROKERS, 1; STREET RAILWAYS, 2.

1. A statutory limitation on municipal indebtedness may be changed by the legislature by providing for additional indebtedness for a specified purpose. *Prince* v. *Crocker* (Mass.) 610

2. "The income and revenue provided for each year," which municipal indebtedness is forbidden by constitution to exceed, includes income for license fees and all other sources. *Lamar Water & E. L. Co.* v. *Lamar* (Mo.) 157

3. The aggregate amount involved in a municipal contract the performance of which will extend over a series of years, but payments upon which are to be made annually, is immaterial in determining whether or not the

constitutional prohibition of indebtedness exceeding revenues is infringed. It is sufficient if the revenues equal the sums falling due each year. *Lamar Water & E. L. Co.* v. *Lamar* (Mo.) 157

4. A provision of a constitution limiting the rate of taxation for municipal purposes to a certain rate, "which shall apply to taxes of every kind and description, whether general or special," is not a limitation upon a subsequent provision prohibiting indebtedness to an amount exceeding the annual income "without the assent of two thirds of the voters," and requiring provisions for the collection of an annual tax to pay interest on any debt created when it falls due, and to provide a sinking fund to pay the principal. *Id.*

5. The consent of the city council is not necessary to authorize the legislature to impose a debt upon a city and to take away the control of its streets to some extent from the city officers by constructing a subway under the streets,—especially when the statute is accepted by a majority of the voters of the city. *Prince* v. *Crocker* (Mass.) 610

6. The combined action of the legislature in passing a statute and of the inhabitants of a city in accepting it is a sufficient answer to an objection that the statute authorizes the use of public grounds without compensation in the construction of a subway for transportation of passengers. *Id.*

7. Consent by the inhabitants of a city to a particular use of public grounds may constitute a waiver of the provisions of a statute prohibiting such use, even if that constitutes a contract between the state and the city. *Id.*

8. An ordinance making it unlawful to import into a town any second-hand clothing, garment, cloth, or bed furniture, for the purpose of selling or offering it for sale, is void as an attempt absolutely to prohibit a lawful business not in itself necessarily a nuisance, but which may be conducted without danger to the community when properly regulated. *State* v. *Taft* (N. C.) 122

9. Municipal ordinances are not within a constitutional provision as to the entitling of statutes. *Re Haskell* (Cal.) 527

10. An ordinance requiring fire escapes on buildings of specified kinds, when it is a subsection of a general ordinance covering the whole subject of erection of buildings within the city, repeals by necessary implication an earlier ordinance which made a different list of the buildings to be provided with fire escapes, and placed the control of the matter in the hands of a different officer. *Schmalzried* v. *White* (Tenn.) 782

NOTES AND BRIEFS.

Municipal corporations; limitation of powers of; ordinance as to use of street. 170

Police power as exercised by municipalities over the business of pawnbrokers, junk dealers, and dealers in secondhand clothes:—(I.) Power to regulate trade; (II.) pawnbrokers; (III.) junk dealers; (IV.) dealers in secondhand clothes. 116

Power to tax; to establish waterworks. 740

Limitation of indebtedness. 161

NEGLIGENCE. See also BLASTING, 3; ELECTRICAL USES AND APPLIANCES, 1, 2; EVIDENCE, 10, 11, 27; LANDLORD AND TENANT; RAILROADS, 2, 3; STREET RAILWAYS, 4–6; TRIAL, 7–9.

1. One who collects upon his own premises a substance liable to escape and cause mischief must use reasonable care to restrain it, and is answerable for the damages sustained by persons or property rightfully on adjoining premises, from its escape for want of such care. *Defiance Water Co.* v. *Olinger* (Ohio) 736

2. A dwelling house situated on the same parcel of land and subject to the same general ownership as that upon which a substance liable to escape and cause mischief is accumulated is to be regarded as on adjoining premises, if in the possession of and occupied as a family residence by a tenant of the owner, although such tenancy is at will by an employee of the owner as part of his compensation. *Id.*

3. The duty of using due care not to injure those rightfully on one's premises is the same whether they are there as licensees or upon invitation. *Pomponio* v. *New York, N. H. & H. R. Co.* (Conn.) 530

4. Negligence of a contractor in reconstructing a building will not render him liable to a third person who is injured in consequence thereof after the work has been completed and accepted by the owner of the building. *Daugherty* v. *Herzog* (Ind.) 837

5. One who drives a team to the left of the road in order to stop there does not thereby assume the responsibility of an unusual and the highest degree of care to avoid a collision with another vehicle which attempts to keep to the right in passing. *Peltier* v. *Bradley, D. & C. Co.* (Conn.) 651

6. The rider of a bicycle has not an absolute right to pass on the right-hand side in meeting a truck which is turning toward that side to the curb of the street, nor can he assume that the driver must turn out for him, but is bound to exercise the same degree of care which the law requires of the driver of the truck to avoid a collision. *Id.*

7. The driver of a truck for the conveyance of goods is not obliged to turn to the right on meeting a vehicle for the conveyance of persons, under Conn. Gen. Stat. §§ 2689, 2690, as the statute applies only to vehicles for the conveyance of persons. *Id.*

8. A boy riding uninvited and without the knowledge of the driver on a private vehicle is not chargeable with the negligence of the driver so as to affect his right of recovery from a street railway company in case of a collision between the vehicle and a car. *Cincinnati Street R. Co.* v. *Wright* (Ohio) 340

9. Injury to a child while playing on a pile of railroad bridge ties in the railroad yard, which is fenced except on the side along the railroad track, and out of which the servants of the company always ordered any children found there, does not render the railroad company liable, as it was not under obligation to so pile the ties as to prevent injury by a child climbing upon them. *Missouri, K. & T. R. Co.* v. *Edwards* (Tex.) 825

NOTES AND BRIEFS.

Negligence; as to safety of structures on one's own premises. 736
Duty as to licensees. 531
Injury to trespasser or licensee. 700
In collision on highway. 651
Injury to children while trespassing. 825
Imputed. 341

NEGROES. See CIVIL RIGHTS.

NEWSPAPERS. See also CONTRACTS, 11, 13.

The constitutional guaranty of the freedom of the press does not restrict the right of the owner of a newspaper on a sale of it to bind himself against editing or being connected with another journal in the same locality. *Cowan* v. *Fairbrother* (N. C.) 829

NOTARIES.

The appointment of women to be notaries public cannot be authorized by the legislature under article 4 of the amendments to the Massachusetts Constitution, providing that they shall be appointed by the governor "in the same manner as judicial officers are appointed." *Re Opinion of the Justices* (Minn.) 350

NOTICE. See also GAS, 2.

Possession by the holder of an unrecorded contract for the purchase of a block of flats, of one of the flats in the building, is sufficient notice to preserve his rights as to a person subsequently taking a mortgage from the vendor. *Boyer* v. *Chandler* (Ill.) 113

NOTES AND BRIEFS.

Notice; by possession of real property. 114

NUISANCES.

A railroad embankment without sufficient provision for the passage of the water of running streams, if built under lawful authority, is neither an abatable or public nuisance nor a continuing private nuisance. *Ridley* v. *Seaboard & R. R. Co.* (N. C.) 708

OFFICERS.

1. A constitutional provision that officers shall hold until their successors are elected and qualified applies in case of failure to hold an election to choose their successors. *Lafferty* v. *Huffman* (Ky.) 203

2. Members of the detective department of the district police force, under Mass. Pub. Stat. chap. 103, and amendments, who have the powers of police officers and constables, except the service of civil process, are public officers, are not merely employees of the commonwealth. *Brown* v. *Russell* (Mass.) 253

3. The compulsory appointment of veterans, if they desire to be appointed, whenever they make a sworn statement of qualifications with the certificate of three citizens of good repute in the community, which Mass. Stat. 1895, chap. 501, §§ 2, 6, attempt to provide for, is inconsistent with the Constitution, especially article 7, declaring that government is for the common good, "and not for the profit, honor, or private interest of any one man, family, or class of men," and article 6, declaring that no man, corporation, or association shall have any other title to exclusive privileges than what arises from the consideration of services rendered to the public. *Id.*

NOTES AND BRIEFS.

Officers; special privileges as to office. 254

OIL. See PLEDGE, 3.

OPIUM. See CONSTITUTIONAL LAW, 20.

ORDINANCE. See MUNICIPAL CORPORATIONS, 9.

OYSTERS. See FISHERIES

PARADE. See CARRYING WEAPONS, 1; CONSTITUTIONAL LAW, 3.

PARENT AND CHILD. See DEATH.

PARKS. See SUBWAYS.

PARTIES. See ACTION OR SUIT, 8, 9.

PARTITION. See also JUDGMENT, 2; PLEADING, 4; WATERS, 6.

1. A partition cannot be compelled by one of the parties who by agreement have created reciprocal easements in the use of stairs, hall ways, skylights, and heating apparatus used by them in common, when they are owners in severalty of the adjoining lots. *Barr* v. *Lamaster* (Neb.) 451

2. The question of title to real estate may be tried in a partition proceeding under the Washington Code. *Kromer* v. *Friday* (Wash.) 671

3. Jurisdiction to order a partition sale of community property is not defeated by the fact that the husband by will directs the property to be retained until his children reach majority, since his will cannot affect his wife's right to her half of the property. *Id.*

A partition sale cannot be attacked otherwise than by appeal, because the notice of sale was published before the decree was actually signed, if the order was made prior to the publication. *Id.*

NOTES AND BRIEFS.

Partition; of what property. 452

PARTNERSHIP. See CONTRACTS, 9, 14, 18.

PATENTS.

NOTES AND BRIEFS.

Ownership of employee's inventions. 762

PAWNBROKERS. See also EVIDENCE, 5; LICENSE, 1–3.

1. A very clear abuse of the police power must be shown in order to justify the court in declaring ordinances regulating pawnbrokers,

junk dealers, and dealers in secondhand goods, to be unreasonable and void. *Grand Rapids* v. *Braudy* (Mich.) 116

2. Prohibiting purchases from boys, intoxicated persons, or habitual drunkards, by licensed pawnbrokers or junk dealers, is not unreasonable. *Id.*

3. Requiring a bond of $2,000 from a junk dealer or secondhand dealer, and one of $5,000 from a pawnbroker, conditioned for the observance of the city charter and ordinances, is not unreasonable. *Id.*

NOTES AND BRIEFS.

Pawnbrokers; municipal power to regulate business of. 116

PEDDLERS. See LICENSE, 8.

PENALTY. See CASE.

PERPETUITIES.

A limitation of life estates to two living persons in succession, with remainder over, is not void for remoteness. *Defreese* v. *Lake* (Mich.) 744

PLAT. See BOUNDARIES.

PLEADING.

1. The want of a theory does not make a complaint demurrable, if it states sufficient facts to constitute a cause of action. *Scott* v. *Cleveland, C. C. & St. L. R. Co.* (Ind.) 154

2. Averments that a conductor negligently and carelessly mistreated a passenger in carrying her beyond her destination, and in stopping at a distance from the depot and roughly ordering and forcing her to get off, are not sufficient to constitute a cause of action, where it is not alleged that she had conformed to the rules of the company and had paid her fare or offered to do so. *Id.*

3. Averments that a carrier's servants carelessly and negligently caused a passenger to enter a train for which she had a ticket given her by mistake, without averment of their knowledge that she did not desire to take passage on the train indicated by the ticket she held, do not constitute a cause of action against the carrier. *Id.*

4. Facts sufficient to give jurisdiction of a partition proceeding and suit to try title are shown by allegations of the extent of plaintiff's title, of defendant's title as plaintiff understands it, and that plaintiff and defendant are tenants in common. *Kromer* v. *Friday* (Wash.) 671

5. Averment in a bill that plaintiff is ready and willing or able to pay the price to be fixed by arbitrators is not necessary in a bill framed upon the theory that the time for arbitration has passed because the respondent has refused arbitration. *Bristol* v. *Bristol & W. Waterworks* (R. I.) 740

6. A complaint for personal injuries, specifying humiliation, injuries to health, etc., as elements of damage, need not designate the particular amount of damage sustained in each particular. *Sloane* v. *Southern California R. Co.* (Cal.) 193

7. An allegation that a foreign judgment was "duly adjudged" is sufficient to show jurisdiction and notice to the defendant and the fact that a hearing or trial was had. *Fisher* v *Fielding* (Conn.) 236

8. An averment that the plaintiffs well knew that defendant was not indebted to them, and that the only claim they could have was one against a corporation of which he was an officer, is not sufficient to show such fraud as will make a foreign judgment against him reviewable on its merits. *Id.*

9. An answer to a complaint by trustees of a church, denying that they are trustees and averring that defendants instead are trustees, wherefore judgment is demanded for costs and all proper relief, does not raise an issue as to the legal election of the trustees. *Smith* v. *Pedigo* (Ind.) 838

10. An answer that defendant has no knowledge or information upon which to form a belief as to a certain allegation, and therefore denies the same, is not such a specific denial as is required by Mont. Comp. Stat. 1887 (Mont. Code Civ. Proc. § 89). *State, Milsted,* v. *Butte City Water Co.* (Mont.) 697

11. An answer should not be stricken from the files if its meaning can be discovered and the facts alleged present a defense. *Gregg* v. *Groesbeck* (Utah) 266

12. An answer which is demurrable may be invulnerable when assailed by a motion to strike out. *Id.*

13. A denial by a corporation for want of sufficient information and belief is insufficient if the matters alleged were presumptively within the knowledge of any of its officers even if the one verifying the answer was without information or belief upon the subject. *Sloane* v. *Southern California R. Co* (Cal.) 193

PLEDGE. See also ATTACHMENT; INTEREST, 1.

1. A pledge is a bailment of goods by a debtor to his creditor to be kept by him until the debt is discharged. *First Nat. Bank* v. *Harkness* (W. Va.) 408

2. The fact that a pledge is evidenced by writing does not make it necessary to record it. *Id.*

3. Oil in a tank is effectively pledged by written order to the owner's agent in charge of the oil to hold it to the order of the pledgees as collateral security for a certain sum of money, when such order is accepted by the agent, as this transfers the possession of the oil to the pledgees. *Id.*

NOTES AND BRIEFS.

Pledge; possession to sustain. 408

POLICE. See OFFICERS, 2.

POLICE POWER. See INTOXICATING LIQUORS, 2.

POSSESSION. See CONSTITUTIONAL LAW, 20; NOTICE.

POSTOFFICE. See EVIDENCE, 12.

POWER OF ATTORNEY. See PRINCIPAL AND AGENT, 1.

PRESS. See FREEDOM OF SPEECH, NOTES AND BRIEFS.

PRINCIPAL AND AGENT.

1. Corrupt or fraudulent practices of an agent in obtaining a contract, although not known to the principal, taint the contract and prevent its enforcement by the principal. *Honaker* v. *Pocatalico Dist. Bd. of Edu.* (W. Va.) 413

2. An agent is guilty of a fraud which may be repudiated by his principal when without the latter's knowledge he loans his money to his own debtor, receiving a large part of the proceeds in payment of a deed of trust held by him. *Dorrah* v. *Hill* (Miss.) 631

3. A description of lots by reference to the streets and the city in which they are located and the name of the owner sufficiently identifies them for the purposes of the statute of frauds requiring a power of attorney to sell lands to be evidenced by a memorandum in writing identifying the property, in connection with evidence that the principal owned no other property in the city. *White* v. *Breen* (Ala.) 127

NOTES AND BRIEFS.

Principal and agent; disposal of principal's property by agent. 260

Liability for act of common agent. 154

PRINCIPAL AND SURETY.

1. It is a general rule that any agreement between the principal and the party secured, essentially varying the terms of a contract by which a surety is bound, without the latter's consent, will release him from responsibility. *McCartney* v. *Ridgway* (Ill.) 555

2. The sureties upon the bond of a trustee under an agreement that he shall sell and convert lands to be conveyed to him, as soon as can be conveniently, without sacrifice, invest the money, and pay over the interest, with authority to make public or private sale for cash or on credit, as he may deem best, except that the consent of four persons is required to a private sale,—are released by a subsequent agreement by which the trustee can make no public sale for a year, and no private sale at any time without the consent of seven persons, is deprived of all discretion as to the sales, and by which his duties are changed and his responsibilities increased. *Id.*

PUBLIC GROUNDS. See MUNICIPAL CORPORATIONS, 6, 7; SUBWAYS.

PUBLIC IMPROVEMENTS. See also INTEREST, 2, 3.

An assessment for benefits for a local public improvement is in its nature a tax. *Sargent* v. *Tuttle* (Conn.) 822

NOTES AND BRIEFS.

Public improvements; assessments for interest on. 822

PUBLIC LANDS. See also HUSBAND AND WIFE, 2.

A patent for homestead land will not relate back to the time of making final proof, so as cut out the rights of a woman under a marriage ceremony performed between the two dates, where long prior to final proof she had been living with the claimant as his wife. *Kromer* v. *Friday* (Wash.) 671

PUBLIC MONEYS. See also APPROPRIATIONS, NOTES AND BRIEFS; BONDS, 1.

The building of a subway under the streets of a city for the carriage of such passengers as pay the regular fare on a street railway to which it will be leased is for public use and within the constitutional power of the legislature to order or sanction taxation for it. *Prince* v. *Crocker* (Mass.) 610

QUITCLAIM. See VENDOR AND PURCHASER, NOTES AND BRIEFS.

RAILROADS. See also ACTION OR SUIT, 3; COURTS, 1; DAMAGES, 11, 12; LIMITATION OF ACTIONS; NEGLIGENCE, 9; NUISANCES; WRIT AND PROCESS, 2.

1. A railroad company making a flying switch at a crossing which it has kept planked many years between shops of a corporation located on both sides of its road for the use of workmen therein, when it knows that this constitutes practically the only entry to the shops on one side of the track and is used by the workmen in crowds at stated hours of the day, must exercise reasonable care towards them, whether they are to be regarded as licensees or as using the track by invitation. *Pomponio* v. *New York N. H. & H. R. Co.* (Conn.) 530

2. One who, in approaching a railroad track, has an unobstructed view of an approaching train, is not relieved from contributory negligence in attempting to cross the track, by the fact that his view becomes obstructed by the smoke from a train going in an opposite direction. *Oleson* v. *Lake Shore & M. S. R. Co.* (Ind.) 149

3. One who attempts to cross a railroad track immediately after the passage of a train whose smoke obscures the view in the opposite direction, but is rapidly being carried away by the wind, is guilty of contributory negligence in not waiting until the view becomes clear. *Id.*

4. The duty of trainmen to avoid injury to animals on the track must be exercised consistently with the paramount duty to passengers on the train. *Kirk* v. *Norfolk & W. R. Co.* (W. Va.) 416

5. At least ordinary care must be used to avoid unnecessary injury to animals found in the way of a train on a railroad track which is unenclosed, where animals are allowed to run at large. *Id.*

6. The use of salt on railroad switches, when it is the only effective means of freeing them from ice and thus protecting passengers and employees from the danger of a wreck, although it may have a tendency to lure livestock to the track, will not render the rail-

road company liable for such stock killed by a train, in the absence of negligence in running the train. *Kirk* v. *Norfolk & W. R. Co.* (W. Va.) 416

7. The fact that overflows of surface water and water from a river and streams upon low land are somewhat deepened and somewhat more prolonged when they occur, on account of the construction of a railroad embankment, with large and numerous trestles to provide for the passage of the water, does not make the railroad company liable where there is nothing to show that trestles in lieu of the embankment would be as economical or make as safe and proper a roadway. *Yazoo & M. V. R. Co.* v. *Davis* (Miss.) 262

NOTES AND BRIEFS.

See also COURTS.

Negligence in killing stock; attracting stock to. 416

Contributory negligence of person at crossing. 149

Injury to licensees on track. 531

REAL PROPERTY.

1. A life estate only is given to the first taker by a devise to one, "and after his decease said real estate to belong to his heirs." *Defreese* v. *Lake* (Mich.) 744

2. In case of a devise to a person for life, with remainder to his heirs, the heirs under the Michigan statute take as purchasers. *Id.*

NOTES AND BRIEFS.

Real property; necessity of recording. 114

Remainder; when contingent. 562

RECEIVERS. See also CORPORATIONS, 9; LIFE TENANTS, 3.

NOTES AND BRIEFS.

Receivers; foreign; of corporations. 311

RECIPES. See also DAMAGES, 15.

1. The recipes prepared by a color mixer for the use of his employers in the manufacture of their carpets belong to them, so far at least as to give them the right to the use of the various colors and shades produced by them. *Dempsey* v. *Dobson* (Pa.) 761

2. Carpet manufacturers have a right to some record or register of recipes prepared by a color mixer in their employ, where, instead of entering them in their color book as it was his duty to do, he has without their knowledge entered them in a book of his own. *Id.*

RELIGIOUS SOCIETIES. See also ACTION OR SUIT, 5, 9.

1. The presumption of the incorporation of a religious society made by How. (Mich.) Stat. § 4649, when it has exercised the franchises and privileges of a corporation for ten successive years is not conclusive and does not apply when the powers conferred by statute upon the corporators are by the laws of the church lodged in another body. *Fuchs* v. *Meisel* (Mich.) 92

2. That no trust or title in or to property ever vested in the general denomination is not a sufficient answer to a bill by individuals to establish a right to the use of the property under the discipline and usages of the church to which it was conveyed. *Id.*

3. Courts are not deprived of jurisdiction to enforce rights in the property of a voluntary religious association, which have been established by a conclusive ecclesiastical decree, where there is no other remedy, by a statute providing that no order of any ecclesiastical body, or any custom or usuage of any religious order, shall hereafter be recognized or enforced in this state so far as it shall relate to the acquisition, tenure, control, or disposition of any real estate or interest therein. *Id.*

4. The trustees and a majority of the members of a religious association which voluntarily connected itself with a particular denomination and acquired property in such connection cannot withdraw such property from its connection with the denomination against the protest of the minority, or prevent its use by persons remaining in the denomination and representing its regular organization. *Id.*

5. The majority of a church which has abandoned the religious faith on which the church was founded cannot hold the church property against the minority which adheres to the original doctrines. *Smith* v. *Pedigo* (Ind.) 838

6. The excommunication by a majority faction of a church, of the minority members, who still adhere to the original faith and claim to be the church, cannot affect the rights of the minority to the church property. *Id.*

7. The minority members of a church acting in harmony with its ecclesiastical laws and adhering to the faith constitute the church as against a majority which has departed from the faith. *Id.*

8. The "means" doctrine, to the effect that conversions and salvation may be aided by the use of human means, is a departure from the faith of a "regular Baptist church," which is strongly Calvinistic. *Id.*

NOTES AND BRIEFS.

Religious societies; power of local church society to withdraw from the general body of a church:—Independent congregations; rights of majority and minority; rule under particular statutes; property acquired under express trust or for particular purpose; synodical relations; rule where governing body of denomination changes its laws; immaterial change; withdrawal under laws of church; division of property; effect of statutory permission; effect of unanimous action; rights of third persons. 92

REMITTITUR. See APPEAL AND ERROR, 18.

REPLEVIN. See EMBLEMENTS.

RESIDENCE. See HOMESTEAD.

RESUME. For résumé of contents of book, see 865

RIPARIAN RIGHTS. See WATERS.

SALE. See also LEVY AND SEIZURE, 2; TIMBER.

1. A promise to extend the time for payment of an instalment due on a conditional sale or lease of goods is a waiver of forfeiture for default thereon, which will preclude the assertion of such forfeiture before the expiration of the extended time. *Cole* v. *Hines* (Md.) 455

2. A seller of a chattel by conditional sale reserving the power to take possession upon default, who also receives a judgment bond as collateral security, cannot enforce such bond after he has rescinded the sale by taking possession of the chattel. *Seanor* v. *McLaughlin* (Pa.) 467

3. An article sold on instalments by a so-called lease retaining title until full payment is made can be retaken on default without returning the partial payments that have been received. *White* v. *Oakes* (Me.) 592

4. There is an implied warranty of good title upon a sale of personal property by one in possession. *Jarrett* v. *Goodnow* (W. Va.) 321

5. There is no implied warranty of the safety of a folding bed by a dealer who did not manufacture it and did not know that it was dangerous, when the sale is made in writing with full opportunity of inspection of its mechanism by the purchaser as well as by the vendor. *White* v. *Oakes* (Me.) 592

6. A gratuitous warranty of an article, made by the vendor on repairing it after it had broken, when he was not obliged to repair it or take it back, is not binding. *Id.*

NOTES AND BRIEFS.

Sale; on condition, effect of. 260

Rights and liabilities of vendor and purchaser by conditional sale on default of payment:—(I.) Rights of vendor: (*a*) to collect the balance after the vendor retakes possession; (*b*) to recover purchase price where the property is destroyed after delivery; (*c*) to recover on unpaid notes or contract where the vendor does not resume possession or accept a return of the property; (*d*) to recover from the purchaser the possession or the value of the property on default; (*e*) to assert vendor's lien; (II.) right of purchaser: (*a*) to recover payments where the vendor took the property from his possession; (*b*) to recover the property, or its value, or in trespass: (III.) forfeiture: (*a*) by vendor, of money received; (*b*) by purchaser, of money paid; (IV.) rescission; (V.) statutory provisions as to rights and remedies; (VI.) waiver; (VII.) election of remedy under contract. 455

SAVINGS BANKS. See BILLS AND NOTES, 1; EVIDENCE, 7.

SCHOOLS. See also BOARDS; BRIBERY; CHARITIES, 1, 2; EQUITY, 1; VOTERS AND ELECTIONS, 2–4.

1. A board of education in West Virginia cannot incur any debt to be paid out of the school money of any subsequent year. *Honnker* v. *Pocatalico Dist. Bd. of Edu.* (W. Va.) 413

2. The board of education of a school district created by W. Va. Code, chap. 45, § 7, is a public corporation, having no powers not expressly conferred or fairly arising by necessary implication, and can act only in the mode prescribed by statute. *Id.*

3. The appliances which a board of education may provide for a school include maps and charts, if they are not mere school books in some other form or under some other name, but something suitable to the school and reasonably necessary for instruction, of which a few will answer the needs of all the pupils. *Id.*

SECONDHAND GOODS. See also EVIDENCE, 4, 5; HEALTH; LICENSE, 3–5; MUNICIPAL CORPORATIONS, 8; PAWNBROKERS, 1, 3.

NOTES AND BRIEFS.

Secondhand goods; municipal regulation of dealings in. 116

SECRETS. See RECIPES, 2.

SEDUCTION.

1. Marriage with her seducer extinguishes the right of action for damages for seduction which is given by Ind. Rev. Stat. 1881, § 263 (Ind. Rev. Stat. 1894, § 264), to any unmarried woman; and she cannot maintain an action against him therefor after a divorce. *Henneger* v. *Lomas* (Ind.) 848

2. A decree of the nullity of a marriage between a woman and her seducer establishes her right to sue him for her seduction under the Indiana statute, notwithstanding the form of marriage between them, which if it were valid would have defeated the action. *Id.*

SELECTMEN. See HIGHWAYS, 1.

SET-OFF. See BANKS, 3.

SEWERS. See DRAINS AND SEWERS; INTEREST, 2, 3.

SIGNATURE. See WILLS, 1.

SLEEPING CARS. See CARRIERS, 4.

SPECIFIC PERFORMANCE.

A contract between a town and a waterworks company for the purchase by the town of the waterworks at a price to be mutually agreed upon, or, on failure to agree, to be fixed by arbitrators, will be enforced by the court if the waterworks company refuses to agree or to appoint arbitrators, where the agreement to purchase is merely a part of another more extensive contract under which the parties have incurred obligation so that they cannot be placed *in statu quo*. *Bristol* v. *Bristol & W. Waterworks* (R. I.) 740

STAIRWAYS. See EASEMENTS.

STANDPIPE. See LANDLORD AND TENANT, 4.

STATE. See ESTOPPEL, 4.

STATUTE OF FRAUDS. See CONTRACTS, 2–9; PRINCIPAL AND AGENT, 3.

STATUTES. See also CONSTITUTIONAL LAW, 1; INTOXICATING LIQUORS, 3.

1. A statute reconstructing or reforming an existing board of revenue is not invalid because its title is "An Act to Establish a Board of Revenue." *State, Bragg,* v. *Rogers* (Ala.) 520

2. A statute original in form and in itself intelligible and complete, although in some respects it modifies and changes existing statutes which are not recited at length, does not violate a constitutional provision against reviving or amending a law without re-enacting or publishing it at length. *Id.*

3. The elimination of a provision giving a right of appeal to resident owners only from a statute providing for annexation may be made if that provision is unconstitutional, without destroying the whole statute. *Taggart* v. *Claypole* (Ind.) 586

4. An enrolled bill signed by the governor and by the presiding officer of each of the two Houses of the legislature cannot be impeached by reference to the journals of either House, to show that a vote thereon was not taken by the yeas and nays and entered in the journal as required by the Constitution. *Lafferty* v. *Huffman* (Ky.) 203

STREET RAILWAYS. See also CARRIERS, 5, 6; NEGLIGENCE, 8; PUBLIC MONEY.

1. Evidence that the use of salt is necessary to make it possible to run street cars at a low place in which the water gathers during the day and freezes at night is not sufficient to show that an ordinance prohibiting the use of salt is unreasonable, where it does not appear that at reasonable expense the water cannot be diverted from the tracks. *State, Consolidated Traction Co.* v. *Elizabeth* (N. J. Sup.) 170

2. An ordinance prohibiting the use of salt on a street-railway track except on curves at street corners is not invalid as an impairment of the franchise of a street-railway company or a restriction of the operation of its road, merely because it will occasion inconvenience or involve expense or prevent the company from operating its road so successfully. *Id.*

3. The unreasonable overloading of a street car and its unlawful speed, which make it impossible to stop the car as soon as may be necessary to avert a collision, are gross negligence which renders the street railway company liable for a resulting accident. *Richmond R. & E. Co.* v. *Carthright* (Va.) 220

4. A person crossing a street-railway track at a street crossing is not guilty of negligence *per se* in omitting to look in both directions for the approach of a car. *Cincinnati Street R. Co.* v. *Snell* (Ohio) 276

5. A person about to cross the track of a street railway at a street crossing must exercise care proportioned to the danger to be avoided and the consequences which may result from want of it, according to the particular circumstances surrounding him, but only such care as may reasonably be expected of persons of ordinary prudence. *Id.*

6. The introduction of new forms of vehicles and of new motive power in street railways has not impaired the right of foot passengers to safe passage at street crossings; but the speed of cars must be so regulated and such warning given of their approach, at whatever cost of pains and trouble, that the footman using ordinary care may, in the absence of unavoidable accident, cross in safety. *Id.*

NOTES AND BRIEFS.

Street railways; negligence as to collision. 220

Negligence of, or of persons injured by. 276

SUBROGATION.

One whose money is loaned by an agent on a deed of trust which is invalid because not signed by the grantor's wife, and the proceeds of which are in large part received by the agent in discharge of a valid deed of trust which he held for purchase money, may by reason of the agent's adverse personal interest in the matter, which was not known to the lender but was known to the borrower, have the valid deed of trust restored and be subject to its security. *Dorrah* v. *Hill* (Miss.) 631

SUBWAYS. See also ACTION OR SUIT, 7; EVIDENCE, 3; MUNICIPAL CORPORATIONS, 6; PUBLIC MONEY.

1. The right to enter upon the Public Garden in Boston so far as is necessary to make a suitable connection between surface tracks and the subway authorized by Mass. Stat. 1894, chap. 548, is implied from the right given to make such connection on or near Boylston street, together with other provisions of the statute. *Prince* v. *Crocker* (Mass.) 610

2. The right to extend a subway upon the Public Garden in Boston under Mass. Stat. 1894, chap. 548, to that extent modifies Mass. Pub. Stat. chap. 54, § 13, restricting highways, street railways, etc., on public commons or parks. *Id.*

SUNDAY. See also CONSTITUTIONAL LAW, 7, 8, 17.

1. The common law does not prohibit ordinary labor on Sunday. *Eden* v. *People* (Ill.) 659

2. The fact that a personal injury was sustained on the Lord's Day on account of negligence of a railroad company is not a defense to recover under Mass. Stat. 1884, chap. 37. *Jordan* v. *New York, N. H. & H. R. Co.* (Mass.) 101

NOTES AND BRIEFS.

Validity of Sunday law. 659

TAXES. See also CORPORATIONS, 4; INTOXICATING LIQUORS, 2; LIFE TENANTS, 1, 2; PUBLIC MONEY; TRIAL, 12; TRUSTS, 10.

1. A state tax levied on the succession by foreign heirs, legatees, or donees to property of a deceased person, is inoperative as to a citizen and subject of Italy, who by treaty is entitled to the same right to acquire property in this

country that our citizens have. *Re Rixner's Succession* (La.) 177

2. A tax on credits in the hands of resident trustees holding the absolute legal title thereto in trust for nonresidents of the state is within the power of the legislature to impose. *Detroit v. Lewis* (Mich.) 439

3. "Inhabitants" of a state, whose credits of every kind are taxed by Mich. Pub. Acts 1893, No. 206, include resident trustees holding the absolute legal title to choses in action for the benefit of nonresidents. *Id.*

4. An express exemption of the shares of a corporation from taxation, nothing else appearing, will also exempt the company itself from taxation. *State, Singer Mfg. Co.* v. *Heppenheimer* (N. J. Err. & App.) 643

5. A franchise tax laid on the capital of a corporation less the value of its personal and real property in the state violates a charter exemption of its real and personal property "not actually and in fact within the state, . . . and the stock . . . held or owned by any of its stockholders." *Id.*

6. The value of a water-power created by a dam in a river which forms the boundary between towns is to be apportioned to the lands under it in the different towns, for the purpose of taxation, although the water-power is used entirely for the operation of a mill in one of the towns. *Amoskeag Mfg. Co.* v. *Concord* (N. H.) 621

NOTES AND BRIEFS.

Taxes; duty of life tenant to pay. 744

On credits; on trust property. 441

Effect of tax sale on land held by life tenant:—(I.) General rule; (II.) tenant in dower; (III.) tenant by curtesy; (IV.) devise for life; (V.) position of purchaser; (VI.) the statute of limitations; (VII.) decisions under state statutes. 805

TAXPAYER. See ACTION OR SUIT, 7.

TELEGRAPHS. See DAMAGES, 4.

THEATER. See INJUNCTION, 7.

TIMBER.

Failure to remove logs after they are cut, within the time named in a contract for the sale and removal of timber within a definite time, does not forfeit the title. *Macomber* v. *Detroit, L. & N. R. Co.* (Mich.) 102

NOTES AND BRIEFS.

Timber; sale of, time to remove. 103

Title to, when wrongfully severed. 422

TITLE. See EMBLEMENTS.

TOWN. See INTOXICATING LIQUORS, 1.

TRADER. See LEVY AND SEIZURE, 1, 2.

TREATIES. See also ALIENS; TAXES, 1.

NOTES AND BRIEFS.

Treaties; effect of, on alien's right to inherit, see DESCENT AND DISTRIBUTION.

TREES. See HIGHWAYS, 1, NOTES AND BRIEFS.

TRIAL.

1. Dismissing a suit on a demurrer to evidence which, with all legitimate inferences therefrom, makes out no cause of action is not a violation of the constitutional guaranty of the right to trial by jury, or of a provision that judges shall not charge juries with respect to matters of fact. *Hopkins* v. *Nashville C. & St. L. R. Co.* (Tenn.) 354

2. The practice of demurring to evidence, although cumbersome and antiquated, may be sustained when no liability is established against the defendant upon the facts or legitimate inferences therefrom. *Id.*

3. On demurrer to evidence the other party will be required to join therein, unless the case be plainly against the demurrant and his object in demurring is clearly nothing but delay. *Mapel* v. *John* (W. Va.) 800

4. Filing indictments against witnesses to prove an alibi, based solely on evidence of witnesses for the prosecution, in the presence of persons summoned to serve as jurors in the trial of the case, is improper as not calculated to give the accused a fair and impartial trial. *Atkins* v. *Com.* (Ky.) 108

5. A general verdict of guilty not fixing the value of the property, under an indictment charging burglary and larceny in the same count, is a conviction of burglary, as a conviction for larceny must find the value of the property stolen. *Love* v. *People* (Ill.) 139

6. Whether an obstructed bayou was a watercourse or not may be upon the evidence a question for the jury, *Yazoo & M. V. R. Co.* v. *Davis* (Miss.) 262

7. Reasonable prudence of a woman when ejected from a train, in undertaking to walk to a certain place, is a question for the jury. *Sloane* v. *Southern California R. Co.* (Cal.) 193

8. The question of due care in touching an electric-light wire on the outside of a building, by a person who is not an expert, is for the jury. *Griffin* v. *United Electric-Light Co.* (Mass.) 400

9. The mere fact that a woman injured by being dragged by a street car on which her clothing was caught testified that she should think the bolt on which her clothing caught had no part in throwing her down, aside from the jerking of the car, will not require the exclusion from the jury of the question as to negligence in the position of the bolt, since the jury from all the circumstances may decide that the bolt was, without her knowledge, the cause of the accident. *Tunnicliffe* v. *Bay Cities Consol. R. Co.* (Mich.) 142

10. Instructing the jury to find for plaintiff or for defendant in case they find the existence of certain enumerated facts which are within the issues, on which evidence has been given, does not violate a constitutional provision against charging with respect to matters of fact. *Ryan* v. *Los Angeles Ice & C. S. Co.* (Cal.) 524

11. A verdict is properly directed for defendant in an action for personal injuries,

where the plaintiff fails to prove affirmatively that his fault or negligence did not contribute to the injury, even though he has established all the other facts of his cause of action. *Cleson* v. *Lake Shore & M. S. R. Co.* (Ind.) 149

12. The question is for the jury whether or not a devisee of a life estate in remainder after a prior life estate, who purchased at tax sales caused by default of the first life tenant, and entered into possession after the latter's death, had accepted or renounced the devise. *Defreese* v. *Lake* (Mich.) 744

NOTES AND BRIEFS.

Trial; demurrer to evidence. 354

TROVER. See DAMAGES, 10; EMBLEMENTS.

TRUSTS. See also BANKS, 8, 9; EQUITY, 2; GIFT, 3, 4; LEVY AND SEIZURE, 3; PRINCIPAL AND SURETY, 2; TAXES, 2, 3; WILLS, 2.

1. A trust, whether declared or arising from conduct, which does not with reasonable certainty point the essential elements of a trust, is no trust at all. *Orth* v. *Orth* (Ind.) 298

2. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it. *Bath Sav. Inst.* v. *Hathorn* (Me.) 377

3. An executed trust is one fully and finally declared by the person creating it, so that nothing further remains to be done in order to make it effective. *McCartney* v. *Ridgway* (Ill.) 555

4. An executory trust is one which is not fully and finally declared, but requires some other act or acts in order to perfect it and carry out the intention of the settlor. *Id.*

5. An agreement between the devisees of lands, providing for the selection of a trustee by the parties or an appointment by the judge, and that the lands shall be transferred to such trustee by a proper and suitable conveyance to hold a portion thereof for the benefit of the sisters of such devisees, with remainder to their children no consideration moving from such children, is both voluntary and executory,—especially where by its terms it is impossible to tell what lands will go into the trust estate. *Id.*

6. A voluntary settlement in trust providing that it shall take effect by conveyance will not be held to operate as a declaration of trust. *Id.*

7. An agreement between devisees of land to convey a portion thereof to a trustee to be appointed, for the benefit of their sisters for life with remainder to the latter's children, cannot be considered as creating a trust for the benefit of the remaindermen on the ground that it creates the relation of vendor and purchaser, and that in equity vendors are trustees of the land for the purchasers, where there is no consideration as between such remaindermen and the signers of the agreement. *Id.*

8. The failure to perform a promise made by the sole beneficiary of a will to the testator, to comply with his request, contained in a letter, that a portion of the property should be used to aid certain other persons, is not such a fraud as will create a trust *ex maleficio*. *Orth* v. *Orth* (Ind.) 298

9. A letter to testator's wife containing advice as to the management of the estate, and expressing a hope that she will convey certain property to a person named, and that she will have sufficient after paying debts to assist all his children as they may need from time to time, and expressing full confidence that she will act justly toward all, closing with a desire that she will have a competence during life, and then what is left give to all the children alike,—does not create any interest in the property in favor of the children, or impose any burden upon the absolute title which is given to her by the will. *Id.*

10. Trustees against whom judgment is rendered for taxes upon the trust estate are entitled to pay it from the trust fund and be credited with the amount so paid. *Detroit* v. *Lewis* (Mich.) 439

11. A voluntary settlement intended to be effectuated by a certain mode will not be given effect by the court by applying a different mode. *McCartney* v. *Ridgway* (Ill.) 555

NOTES AND BRIEFS.

See also BANKS.

Created by promise to testator; by fraud; by parol. 299

Executory or executed. 562

Admissions and waivers by fiduciaries in actions:—(I.) By representative of infants: (*a*) by pleadings; (*b*) by consent decrees; (*c*) by agreements; (*d*) by omissions; (II.) by appearance: (*a*) by attorney; (*b*) by guardian *ad litem;* (*c*) by guardian; (*d*) by *curator ad hoc;* (III.) by trustees; (IV.) by executors and administrators; (V.) by *curator ad hoc;* (VI.) by representatives of idiots and lunatics; (VII.) by confession of judgment. 671

UNION DEPOT. See WRIT AND PROCESS, 2.

USURY.

Under a statute allowing 8 per cent interest, a loan of $850 for the term of 40 years is not rendered usurious by giving a bond for $1,000 at 6 per cent per annum payable semi-annually, although it bears date 39 days before the money is received by the borrower, and although it is stipulated that after 90 days' default upon any instalment of interest the whole of the principal shall become due and payable, where it is not stipulated that in this event the lender shall not account for interest received over and above 8 per cent per annum on the loan actually made, and there is no devise to cover up usury, or intent to make default before the full term expired. *McTighe* v. *Macon Constr. Co.* (Ga.) 208

VENDOR AND PURCHASER.

A recorded quitclaim deed "of certain real property and appurtenances and all the grantor's estate, right, title, and interest therein," is a "conveyance" within the meaning of the recording laws, under which the grantee may be

protected as a subsequent purchaser in good faith and for a valuable consideration against a prior unrecorded deed. *Wilhelm* v. *Wilken* (N. Y.) 370

BILLS AND NOTES.

Purchaser under quitclaim. 371

VENUE. See ACTION OR SUIT, 10.

VOTERS AND ELECTIONS. See also COUNTIES, 2; INJUNCTION, 3; MANDAMUS, 5; WITNESSES, 7.

1. Illegal voting at municipal elections is within Fla. Rev. Stat. § 2787, providing that whoever casts an illegal vote at "any election" in the state held according to law shall be punished. *Ex parte Senior* (Fla.) 133

2. A ballot for school directors at an election to choose one for a full term of three years, and one to fill a vacancy for one year, cannot be counted when it contains the names of two persons without anything to designate which office either is intended for. *Paye* v. *Kuykendall* (Ill.) 656

3. A ballot containing two names, with the words "long term" after one of them, cast at an election which is held only for the election of school directors, one for a long term and one to fill a vacancy, can be counted at least for the person named for the long term, although there is a failure to designate by express words the office for which the other person was named. *Id.*

4. The designation of the office to be filled, which a ballot must show under 1 Starr & C. (Ill.) Stat. p. 1008, §§ 52, 53, sufficiently appears at least as to the person named for the long term—upon a ballot containing the names of two persons, with the words "long term" following one name, without any other words to designate the office, when the election is held only for school directors, one to be chosen for a long term and one for a vacancy. *Id.*

5. An election on a proposition to relocate a county-seat is not void because of a defect in the notice of election required by the North Dakota statutes, where it appears from the vote cast that the voters were not misled by it. *State, Little,* v. *Langlie* (N. D.) 723

6. The requirements of Dak. Comp. Laws, § 565, that if the county board orders an election on a proposition to relocate the county-seat it shall be its duty to notify the voters in the general election notices to designate upon their ballot at the election the place of their choice, is substantially complied with by a notice stating that one of the purposes of the election is to vote upon the question of relocating the county-seat. *Id.*

WARRANTY. See SALE, 4–6.

WATERS. See also ACTION OR SUIT, 3; CORPORATIONS, 7; DAMAGES, 11, 12; ESTOPPEL, 5; FERRIES; INJUNCTION, 4, 5; LANDLORD AND TENANT, 4; LIMITATION OF ACTIONS; NUISANCES; RAILROADS, 7; SPECIFIC PERFORMANCE; TAXES, 6; TRIAL, 6.

1. The dedication of a portion of the Great Lakes as a public hunting ground, made by Mich. Pub. Acts 1895, act No. 112, prohibiting the cutting or destruction of rushes or other submarine vegetation on submerged lands, is valid. *People* v. *Silberwood* (Mich.) 694

2. The fee of land under the waters of Lake Erie does not belong to riparian proprietors, but to the state subject to the right of navigation. *Id.*

3. The right to raise water by means of pumps for purposes of irrigation may be included in the rights of a riparian proprietor. *Charnock* v. *Higuerra* (Cal.) 190

4. The reasonableness or lawfulness of any diversion of water is in no wise affected by the mere mode of diversion. *Id.*

5. The altitude of the land of a riparian proprietor, which makes it impossible to irrigate it solely by natural gravitation from the stream with the aid of ditches and dams thereon which will not back the water on lands of other persons, will not defeat his right to a just and equal proportion of the water for irrigating purposes. *Id.*

6. The apportionment of the flow of a stream by periods of time, rather than by a division of its quantity, so that upper and lower proprietors may each have the full flow for designated periods, instead of a portion of the flow all the time, which equity may order when the absorption and evaporation of the water would prevent any from reaching the lower proprietor if the flow was divided, may be valid as to water used for domestic purposes as well as that used for irrigation. *Wiggins* v. *Muscupiabe Land & W. Co.* (Cal.) 667

7. A land owner who discharges a large body of surface water contrary to the natural course of drainage, by ditches leading into and along a highway to a ravine, through which it flows across the land of another person who is injured thereby, is liable for the damages, when he could, as effectively and conveniently, have drained the water into the ravine on his own premises, in the first instance, at a point below the premises of the other party. *Jacobson* v. *Van Boening* (Neb.) 229

8. The refusal of a water company to supply water to a tenant in the possession and occupancy of a house, when he is ready to pay for it in advance and the company is supplying a city and its inhabitants under a franchise, cannot be justified by a by-law declining to contract for water with any persons except owners of property or their authorized agents. *State, Milsted,* v. *Butte City Water Co.* (Mont.) 697

NOTES AND BRIEFS.

Waters; state ownership of land under; use of. 694

Compelling supply of. 698

WILLS. See also CONTRACTS, 5, 6, 10; EVIDENCE, 15, 16, 23; REAL PROPERTY; TRIAL, 12; TRUSTS, 9.

1. The signature of the name of a subscribing witness to a will is not insufficient because it is written by another such witness in the presence and at the request of the former. *Re Crawford's Will* (S. C.) 77

2. The rule that a trust in personal property may be created by parol cannot be permitted to work a revocation of a will contrary to the requirements of the statute upon that subject. *Orth* v. *Orth* (Ind.) 298

3. Legacies to daughters of a testator are adeemed, at least *pro tanto*, by his conveyance to them of lands by way of gift, in the absence of any apparent or expressed intent to the contrary. *Carmichael* v. *Lathrop* (Mich.) 232

NOTES AND BRIEFS.

Wills; signature to, by witness. 79
Ademption of legacies. 232
Extrinsic trust to modify. 299

WITNESSES. See also ASSUMPSIT; CONTRACTS, 1.

1. The evidence of an accomplice is, in general, admissible against a prisoner on trial. *Love* v. *People* (Ill.) 139

2. One jointly indicted with others may be called as a witness for the state after the entry of a *nolle prosequi* against him. *Id.*

3. The wife of a defendant in an indictment may be called as a witness against his codefendants, where a *nolle prosequi* has been entered as to him. *Id.*

4. A witness cannot be compelled in any judicial or other proceeding to disclose facts or circumstances which can be used against him as admissions of guilt or connection with any criminal offense with which he may be charged, or the sources from, or means by which, evidence of its commission or his connection therewith may be obtained. *Ex parte Senior* (Fla.) 133

5. The right of privilege against disclosure of incriminatory evidence can only be claimed by the witness, and may be waived by him. *Id.*

6. A witness has the right to claim his privilege against testifying to facts which may incriminate him, and is not bound to answer where from the nature of the investigation, and the testimony sought it reasonably appears that his answer may criminate or tend to criminate him. *Id.*

7. One who votes at an election may refuse to testify as to his vote, in a suit involving the illegality of the election, on the ground that his answer may tend to criminate him; but where, with full knowledge of his rights, he consents to testify that he did vote, and that his ballot was received by the judges and inspectors of election, he may be fully examined as to his qualifications as a voter. *Ex parte Senior* (Fla.) 133

8. The answer of a witness on cross-examination, to an immaterial or irrelevant question, cannot be rebutted by other witnesses. *Carpenter* v. *Lingenfelter* (Neb.) 422

9. To permit a witness on re-examination to go into an extended account of alleged machinations of a party against whom she testifies, to entrap her into a house of ill fame and have her arrested, is error when the court has refused to permit cross-examination as to the fact of such arrest. *Tucker* v. *Tucker* (Miss.) 623

10. Evidence that a woman was arrested in a house of ill fame is not admissible to impeach her testimony. *Id.*

11. A sworn statement by a witness is not inadmissible for the purpose of impeachment, when its accuracy is denied by the witness, merely because it was procured by the agent of the party offering it without notice to the other party. *Sullivan* v. *Jefferson Ave. R. Co.* (Mo.) 167

12. A witness who can, but will not, give security for his appearance and is committed for his refusal will not be entitled to a *per diem* fee during any part of the time he may be detained to secure his attendance. *Hall* v. *Somerset County* (Md.) 449

13. A witness unable to find security because of his own misconduct or bad character will not be entitled to a *per diem* fee when detained to secure his attendance. *Id.*

14 A witness will be entitled to *per diem* fees for the term of his detention to secure his attendance in default of a recognizance, when his inability to give security arises from his misfortune, and not his fault. *Id.*

15. An expert witness does not waive his right to the extra compensation which he is entitled to by contract, by subsequently receiving statutory fees as a witness from the party who has engaged him and by testifying without making any claim for extra compensation even if he is not in fact asked any questions which call for his opinion as an expert. *Barrus* v. *Phaneuf* (Mass.) 63[illegible]

NOTES AND BRIEFS.

Witnesses; privilege of, against crimination. 133
Right to fees during detention. 449

WOMEN. See NOTARIES.

WRIT AND PROCESS.

1. No valid service of process upon a foreign corporation can be had by serving the papers upon one of its officers who is himself plaintiff in the action or attorney in fact for the plaintiff. *George* v. *American Ginning Co.* (S. C.) 764

2. An assistant ticket agent in a union depot during the absence of the head ticket agent is an "acting ticket agent" of a railroad company for which he performs the duties of ticket agent, within the meaning of Minn. Gen. Stat. 1894, § 5202, respecting service of process on that company, although he is hired, not by that company, but by the owner of the union depot. *Hilary* v. *Great Northern R. Co.* (Minn.) 448

NOTES AND BRIEFS.

Writs; service on agent of corporation. 448
Service on officer of corporation. 764

L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN APPLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY WAY AFFECTED BY LATER DECISIONS THAT HAVE CITED THESE CASES AS PRECEDENTS, WITH HOLDINGS OF CITING CASES; ALSO REFERENCES TO LATER ANNOTATIONS CITING CASES OR NOTES

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L. R. A. CASES AS AUTHORITIES.

CASES IN 32 L. R. A.

32 L. R. A. 33, KANSAS MOLINE PLOW CO. v. SHERMAN, 3 Okla. 204, 41 Pac. 623.

Fraud as invalidating transfer or conveyance.

Cited in Fluegel v. Henschel, 7 N. D. 279, 66 Am. St. Rep. 642, 74 N. W. 996, holding conveyance by debtor invalid as against existing creditors, where grantee has knowledge of debtor's fraudulent intent.

Cited in footnote to McDaniels v. J. J. Connelly Shoe Co. 60 L. R. A. 947, which sustains statute forbidding purchase of stock of goods in bulk without having claims of seller's creditors settled.

Cited in note (31 L. R. A. 632) on participation by creditor in fraudulent intent of debtor which will make transfer to pay or secure his debt invalid as to other creditors.

32 L. R. A. 73, LA SELLE v. WOOLERY, 11 Wash. 337, 39 Pac. 663.

Conflict of laws.

Followed in Clark v. Eltinge, 29 Wash. 223, 69 Pac. 736, holding money borrowed in another state by husband to buy lot and erect house will be presumed community debt in accordance with laws of forum, in absence of proof of laws of other state.

Cited in note (57 L. R. A. 354) on conflict of laws as to matrimonial property.

32 L. R. A. 77, *Re* CRAWFORD, 46 S. C. 299, 57 Am. St. Rep. 684, 24 S. E. 69.

Equivalents of personal signature.

Cited in Baker v. Irvine, 58 S. C. 441, 36 S. E. 742, upholding written acceptance of service by one authorized by telephone; Schnee v. Schnee, 61 Kan. 649, 60 Pac. 738, holding that witness to will need not touch pen or hand when name is written at his request by another.

32 L. R. A. 82, DE LA MONTANYA v. DE LA MONTANYA, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345.

Constructive service in personal actions.

Cited in Murray v. Murray, 115 Cal. 278, 56 Am. St. Rep. 97, 47 Pac. 37, holding court without jurisdiction to compel nonresident not personally served to execute bond for alimony; Boring v. Penniman, 134 Cal. 516, 66 Pac. 739,

excluding as evidence, judgment roll in personal action against nonresident showing service by publication; Cabanne v. Graf, 87 Minn. 514, 59 L. R. A. 737, 94 Am. St. Rep. 722, 92 N. W. 461, holding unconstitutional, statute providing for service in personal action against nonresident by service on agent; Smith v. Smith, 74 Vt. 23, 51 Atl. 1060, holding court without jurisdiction to decree payment of alimony, where process was not served on libelee and he did not appear.

Cited in footnote to Dunham v. Dunham, 35 L. R. A. 70, which denies validity of divorce procured in other state by woman going there for that purpose, and whose husband is served only by publication.

Cited in notes (50 L. R. A. 587) on what service of process is sufficient to constitute due process of law; (59 L. R. A. 178) on award of alimony upon constructive service.

Custody of children.

Cited in note (59 L. R. A. 177) on custody of children when international elements involved.

32 L. R. A. 92, FUCHS v. MEISEL, 102 Mich. 357, 60 N. W. 773.

Right to enforce trust in church property.

Second appeal in 113 Mich. 559, 71 N. W. 1117, sustaining right of representatives of general body of church, to whose rules all members had submitted, to use church property after withdrawal of majority of organization.

Cited in White v. Rice, 112 Mich. 409, 70 N. W. 1024, sustaining right of trustees and agents of unincorporated society to enforce trust providing use of church for such society.

Annotation in 32 L. R. A. 92, referred to particularly in Rodgers v. Burnett, 108 Tenn. 183, 65 S. W. 408, holding control of property conveyed to religious society for use as church controlled by specified synod forfeited by such society uniting with other synod.

Rights of majority.

Cited in footnotes to Smith v. Pedigo, 32 L. R. A. 838, which denies right of majority of church abandoning its religious faith to hold church property; Long v. Harvey, 34 L. R. A. 169, which holds ineffectual, attempt by majority of members of independent congregation wrongfully dropped from rolls, to hold meeting; Franke v. Mann, 48 L. R. A. 856, which denies right of majority of church members to employ pastor whose teachings inconsistent with those of sect to which local church belongs; First Baptist Church v. Fort, 49 L. R. A. 617, which holds majority of church members entitled to continue in control after changing belief.

Conclusiveness of orders of ecclesiastical courts.

Cited in note (49 L. R. A. 384) on conclusiveness of decisions of tribunals of associations or corporations.

32 L. R. A. 101, JORDAN v. NEW YORK, N. H. & H. R. CO. 165 Mass. 346, 52 Am. St. Rep. 522, 43 N. E. 111.

Who is passenger.

Cited in Young v. New York, N. H. & H. R. Co. 171 Mass. 34, 41 L. R. A. 193, 50 N. E. 455, holding one in station intending to take train, a passenger.

Duty of company to keep station and platform safe.

Cited in footnotes to Herrman v. Great Northern R. Co. 57 L. R. A. 390, which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver; Lucas v. St. Louis & S. R. Co. 61 L. R. A. 452, which denies liability of street railway company to one stumbling over stump of electric light pole around which platform built.

Care required of carrier.

Approved in Metropolitan Street R. Co. v. Hanson, 67 Kan. 259, 72 Pac. 773, holding common carrier of passengers must use utmost degree of care and skill in preparation and management of its means of conveyance.

Res ipsa loquitur.

Cited in Barnes v. New York C. & H. R. R. Co. 42 Misc. 627, 87 N. Y. Supp. 608, holding that from fact that alighting passenger slipped upon oil on station platform, jury may infer carrier's failure to exercise ordinary care.

32 L. R. A. 102, MACOMBER v. DETROIT, L. & N. R. CO. 108 Mich. 491, 62 Am. St. Rep. 713, 66 N. W. 376.

Contract for sale of timber apart from land.

Cited in Carson v. Three States Lumber Co. 108 Tenn. 687, 69 S. W. 320, holding grantee of standing trees has right to remove them within reasonable time; Bunch v. Elizabeth City Lumber Co. 134 N. C. 122, 46 S. E. 24, holding one acquiring right to cut timber for five years is without interest or estate in the timber on expiration of time fixed.

Cited in note (55 L. R. A. 526, 530) on conveyance of title to standing timber without conveying title to land.

32 L. R. A. 104, DOWLING v. LIVINGSTONE, 108 Mich. 321, 62 Am. St. Rep. 702, 66 N. W. 225.

Libel by expression of opinions or comments.

Cited in footnote to Cherry v. Des Moines Leader, 54 L. R. A. 855, which holds not actionable, article ridiculing, in exaggerated terms, extremely ridiculous entertainment.

32 L. R. A. 108, ATKINS v. COM. 98 Ky. 539, 33 S. W. 948.

Continuance in criminal case.

Cited in Fanton v. State, 50 Neb. 357, 36 L. R. A. 160, 69 N. W. 953, holding grant of continuance rests in discretion of trial court, and its determination will not be interfered with except for abuse of discretion.

32 L. R. A. 113, BOYER v. CHANDLER, 160 Ill. 394, 43 N. E. 803.

Foreclosure of mortgage.

Cited in Silverman v. Silverman, 189 Ill. 396, 59 N. E. 949, Affirming 90 Ill. App. 122, holding holder of coupon notes may foreclose before other coupon notes mature; Chandler v. O'Neil, 62 Ill. App. 419, holding holder of mortgage need not make other mortgagees parties in foreclosure; Chandler v. O'Neil, 62 Ill. App. 420, and Schlatt v. Johnson, 85 Ill. App. 445, holding bill may pray that sale be made subject to lien of trust deed.

Cited in note (37 L. R. A. 747) on proceedings to enforce mortgage for part of mortgage debt.

Possession of land as constructive notice.

Cited in Ashelford v. Willis, 194 Ill. 504, 62 N. E. 817, holding purchaser bound to take notice of right of way theretofore granted for sufficient consideration by informal contract, where way was fenced off by grantee of easement; Marden v. Dorthy, 12 App. Div. 198, 42 N. Y. Supp. 827, holding possession of land by one from whom deed was fraudulently obtained, and by grantee also, equivocal, where both resided on premises.

32 L. R. A. 116, GRAND RAPIDS v. BRAUDY, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29.

Municipal control of trades.

Cited in Kansas City v. Garnier, 57 Kan. 415, 46 Pac. 707, sustaining ordinance requiring pawnbrokers to furnish records of purchases.

Cited in footnotes to State v. Itzcovitch, 37 L. R. A. 673, which denies right of city to regulate business of second-hand stores, unless authority expressly given by legislature; Com. v. Hubley, 42 L. R. A. 403, which sustains ordinance restricting collection of rags in thickly settled part of city by unlicensed persons; Price v. People, 55 L. R. A. 588, which sustains license fee on employment agencies; State v. Hyman, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

Cited in notes (38 L. R. A. 657) on municipal power over nuisances relating to trade or business; (30 L. R. A. 437) on limit of amount of license fees.

Reasonableness of license fees.

Cited in Grand Rapids v. Norman, 110 Mich. 546, 68 N. W. 269, sustaining license fee of $30 yearly on hucksters, under law vesting right to impose not to exceed $15 a day; People v. Baker, 115 Mich. 201, 73 N. W. 115, holding license fee of $5 weekly on peddlers reasonable; People v. Blom, 120 Mich. 48, 78 N. W. 1015, sustaining ordinance imposing additional saloon license of $300, requiring certificate of character from six reputable citizens, and bond for $2,000; Walla Walla v. Ferdon, 21 Wash. 310, 57 Pac. 796, sustaining license fee of $50 a day on medicine peddlers making exhibition or public outcry.

Revocation of license.

Approved in Wallace v. Reno, 63 L. R. A. 343, footnote p. 337, which authorizes revocation of liquor license by legislature or municipal officers, with or without notice to licensee.

32 L. R. A. 122, STATE v. TAFT, 118 N. C. 1190, 54 Am. St. Rep. 768, 23 S. E. 970.

Municipal control of trades.

Cited in Rosenbaum v. Newbern, 118 N. C. 100, 32 L. R. A. 126, 24 S. E. 1, upholding ordinance requiring old-clothes dealer to submit wares to city for fumigation; State v. Higgs, 126 N. C. 1025, 48 L. R. A. 450, 35 S. E. 473, holding ordinance ordering removal of all signs over sidewalk ineffective unless signs obstruct; Stull v. De Mattos, 23 Wash. 76, 51 L. R. A. 895, 62 Pac. 451, holding ordinance imposing auctioneer's license of $25 per day not legitimate as exercise

of police power, but valid as exercise of taxing power; Paul v. Washington, 134 N. C. 371, 65 L. R. A. 908, 47 S. E. 793, upholding power of municipality to impose reasonable regulations and restrictions upon liquor traffic.

Cited in footnotes to State v. Itzcovitch, 37 L. R. A. 673, which denies right of city to regulate business of second-hand stores unless authority expressly given by legislature; Com. v. Hubley, 42 L. R. A. 403, which sustains ordinance restricting collection of rags in thickly settled part of city by unlicensed persons.

Cited in note (38 L. R. A. 657) on municipal power over nuisances relating to trade or business.

32 L. R. A. 123, ROSENBAUM v. NEWBERN, 118 N. C. 83, 24 S. E. 1.

Municipal control of trades.

Cited in footnotes to State v. Itzcovitch, 37 L. R. A. 673, which denies right of city to regulate business of second-hand stores unless authority expressly given by legislature; Com. v. Hubley, 42 L. R. A. 403, which sustains ordinance restricting collection of rags in thickly settled part of city by unlicensed persons; Price v. People, 55 L. R. A. 588, which sustains license fee on employment agencies.

Cited in notes (32 L. R. A. 120) on police power as exercised by municipalities over business of pawnbrokers, junk dealers, and dealers in second-hand clothes; (38 L. R. A. 657) on municipal power over nuisances relating to trade or business.

Uniformity of taxes under Constitution.

Cited in Schaul v. Charlotte, 118 N. C. 735, 24 S. E. 526, holding city may lay different license taxes upon brokers and pawnbrokers as different classes; F. S. Royster-Guano Co. v. Tarboro, 126 N. C. 71, 35 S. E. 231, holding tax on property and tax on privilege of selling it distinct; State v. Irvin, 126 N. C. 993, 35 S. E. 430, holding privilege tax on sellers of tobacco not violation of constitutional provision forbidding discrimination between persons of same class.

City's liability for acts of officers in abuse of discretion.

Cited in Reynolds v. Board of Education, 33 App. Div. 95, 53 N. Y. Supp. 75, holding board of education not liable for acts of truant officer.

32 L. R. A. 127, WHITE v. BREEN, 106 Ala. 159, 19 So. 59.

Memorandum under statute of frauds.

Cited in Strouse v. Elting, 110 Ala. 140, 20 So. 123, holding parol evidence admissible to show facts connecting different parts of memorandum plainly relating to same matter; Thompson v. New South Coal Co. 135 Ala. 635, 62 L. R. A. 553, 93 Am. St. Rep. 49, 34 So. 31, holding fact that check was attached to contract did not bring it within case of several writings constituting memorandum.

32 L. R. A. 131, STATE *ex rel.* CORCORAN v. CHAPEL, 64 Minn. 130, 58 Am. St. Rep. 524, 66 N. W. 205.

Constitutionality of game laws.

Cited in State v. Dow, 70 N. H. 287, 53 L. R. A. 315, 47 Atl. 734, holding statute prohibiting trout fishing as business, within police power.

Cited in footnotes to State v. Snowman, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunt-

ing; Smith v. State, 51 L. R. A. 404, which sustains statute prohibiting possession of quail during closed season.

32 L. R. A. 133, *Ex parte* SENIOR, 37 Fla. 1, 19 So. 652.

Privilege as to incrimination.

Cited in *Re* Green, 86 Mo. App. 221, holding witness not bound to answer when it reasonably appears that answer may incriminate or tend to convict him; Miskimmins v. Shaver, 8 Wyo. 464, 49 L. R. A. 855, 58 Pac. 411 (dissenting opinion), majority holding personal privilege of witness claimable only when it appears to court reasonable to conclude answer would incriminate; Wallace v. State, 41 Fla. 564, 26 So. 713, holding question whether witness's place was house of prostitution, such that court could see that it would tend to incriminate her.

Review of committal for contempt.

Cited in Miskimmins v. Shaver, 8 Wyo. 414, 49 L. R. A. 839, 58 Pac. 411, holding appeal court may inquire whether facts constitute contempt, and confer jurisdiction.

32 L. R. A. 139, LOVE v. PEOPLE, 160 Ill. 501, 43 N. E. 710.

What constitutes burglary.

Cited in footnote to State v. Crawford, 46 L. R. A. 312, which holds burglarious entry made by boring holes into granary, through which grain passes by own weight.

Consent of complainant to commission of crime.

Cited in State v. Hull, 33 Or. 63, 72 Am. St. Rep. 694, 54 Pac. 159, holding taking of property with co-operation of owner's agent, employed for purpose, not larceny; Strait v. State, 77 Miss. 697, 27 So. 617, holding one let in by person acting for owner not guilty of burglary; Evanston v. Meyers, 70 Ill. App. 207, holding it no offense where prisoner was induced to violate ordinance by persons employed by city; State v. Waghalter, 177 Mo. 687, 76 S. W. 1028, holding that when owner consents, or by his agent assists, in a taking contrived by himself, it is not larceny; People v. Mills, 178 N. Y. 298, 67 L. R. A. 131, 70 N. E. 786 (dissenting opinion), majority holding one who proposes to remove court records from files and destroy them guilty as principal, although records are given him by officer for purpose of detecting him in commission of crime.

Cited in footnote to State v. Abley, 46 L. R. A. 862, which sustains liability for burglary though clerk, without employer's knowledge, loans key at officer's request, to have duplicate made for burglar's use.

Competency of wife as witness.

Approved in Graff v. People, 108 Ill. App. 171, holding rule that wife is incompetent witness for or against husband in criminal case not applicable where husband has pleaded guilty.

32 L. R. A. 142, TUNNICLIFFE v. BAY CITIES CONSOL. R. CO. 102 Mich. 624, 61 N. W. 11.

Second appeal in 107 Mich. 262, 65 N. W. 226.

Remoteness of damage.

Cited in footnotes to Mitchell v. Rochester R. Co. 34 L. R. A. 781, which

denies right to recover for miscarriage resulting from fright caused by negligence; McKeon v. Chicago, M. & St. P. R. Co. 35 L. R. A. 252, which holds carrier liable in tort for hurrying sleeping car passenger not properly dressed, from train, resulting in miscarriage.

Cited in note (53 L. R. A. 634, 635) on extent of trespasser's liability for consequential injuries resulting from trespass.

32 L. R. A. 146, CONSUMERS' GAS TRUST CO. v. PERREGO, 144 Ind. 350, 43 N. E. 306.

Liability as to explosions.

Approved in Indianapolis Abattoir Co. v. Temperly, 159 Ind. 654, 95 Am. St. Rep. 330, 64 N. E. 906, holding landlord liable to tenant injured, without contributory fault, by explosion of gas leaking from pipes maintained by landlord.

Cited in footnotes to Purdy v. Westinghouse Electric & Mfg. Co. 51 L. R. A. 881, which holds use of barrels formerly containing explosive substance, for shipping iron, does not render employer liable for injury to employee by explosion; Vieth v. Hope Salt & Coal Co. 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on one's own premises with care and skill.

Negligence of gas company.

Cited in Richmond Gas Co. v. Baker, 146 Ind. 606, 36 L. R. A. 688, footnote p. 683, 45 N. E. 1049, holding gas company liable for escape of gas from cracked elbow in pipe, repair of which has been unsuccessfully attempted.

Cited in footnotes to Barrickman v. Marion Oil Co. 44 L. R. A. 92, which holds gas company liable for furnishing natural gas at so great a pressure as to set building on fire; McKenna v. Bridgewater Gas Co. 47 L. R. A. 790, which denies gas company's liability for explosion due to blundering act of employee of other company; Pine Bluff Water & Light Co. v. Schneider, 33 L. R. A. 366, which requires gas company with notice of break in pipes to take precautions against injury.

Evidence of negligence in connected circumstances.

Cited in Logansport & W. Valley Natural Gas Co. v. Coate, 29 Ind. App. 304, 64 N. E. 638, holding evidence admissible, in case of damage from gas leak, of leaks in other parts of pipe system.

32 L. R. A. 149, OLESON v. LAKE SHORE & M. S. R. CO. 143 Ind. 405, 42 N. E. 736.

Direction of verdict.

Cited in Meyer v. Manhattan L. Ins. Co. 144 Ind. 446, 43 N. E. 448, holding direction of verdict for defendant proper where substantial element of cause of action without support from evidence; Herod v. State, 15 Ind. App. 653, 43 N. E. 144; Cleveland, C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 56, 53 N. E. 198; Staldter v. Huntington, 153 Ind. 363, 55 N. E. 88; Dunnington v. Syfers, 157 Ind. 462, 62 N. E. 29,—holding proper, direction of verdict for defendant on entire failure of proof of essential fact; Cleveland, C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 56, 53 N. E. 198, and Menaugh v. Bedford Belt R. Co. 157 Ind. 24, 60 N. E. 694, holding that where verdict should be set aside as contrary to law and evidence, motion to have verdict directed should be granted; Goode v. Elwood

Lodge No. 166, K. of P. 160 Ind. 256, 66 N. E. 742, holding, in suit by trustee in bankruptcy to recover alleged preferential payment, verdict for defendant properly directed where payment was made with funds of insolvent's wife.

Contributory negligence.

Cited in Pennsylvania Co. v. Finney, 145 Ind. 557, 42 N. E. 816, holding brakeman descending side of moving car without looking ahead, negligent; Louisville & N. R. Co. v. Kemper, 147 Ind. 567, 47 N. E. 214, holding question of notice to plaintiff as to condition of place of work not one of contributory negligence, but of waiver; Baltimore & O. R. Co. v. Talmage, 15 Ind. App. 213, 43 N. E. 1019, and Lake Erie & W. R. Co. v. Pence, 24 Ind. App. 19, 55 N. E. 1036, holding burden on plaintiff to prove affirmatively absence of contributory negligence; Lake Erie & W. R. Co. v. Graver, 23 Ind. App. 689, 55 N. E. 968, holding fact, specially found, that plaintiff failed to stop and listen at railroad crossing, irreconcilable with verdict in his favor for personal injuries; Kauffman v. Cleveland, C. C. & St. L. R. Co. 144 Ind. 457, 43 N. E. 446; Hartzell v. Louisville, N. A. & C. R. Co. 15 Ind. App. 419, 44 N. E. 315; Whitcomb v. Standard Oil Co. 153 Ind. 518, 55 N. E. 440,— sustaining direction of verdict for defendant where there was no evidence of freedom from contributory negligence, although there was no evidence of plaintiff's negligence; Sutherland v. Cleveland, C. C. & St. L. R. Co. 148 Ind. 310, 47 N. E. 624, holding error in refusing to admit ordinance as to speed of train, harmless where freedom from contributory negligence not established; Chicago & N. W. R. Co. v. Andrews, 130 Fed. 73, holding person walking or driving upon railroad crossing without looking or listening, guilty of contributory negligence.

Distinguished in Indianapolis Union R. Co. v. Neubacher, 16 Ind. App. 55, 44 N. E. 669, holding it not negligence in law not to wait after train has passed to see if train going in opposite direction, when gates are open.

— Duty to look and listen.

Cited in Miller v. Terra Haute & I. R. Co. 144 Ind. 327, 43 N. E. 257, denying liability of railroad company for failure to whistle when injured person did not look and listen; Baltimore & O. R. Co. v. Talmage, 15 Ind. App. 206, 43 N. E. 1019, holding it contributory negligence to assume other train will not follow within minute, and failing to look and listen again; Cleveland, C. C. & St. L. R. Co. v. Griffin, 26 Ind. App. 373, 58 N. E. 503, reversing judgment where interrogatories to jury showed injury might have been avoided if plaintiff had stopped and listened attentively; Towers v. Lake Erie & W. R. Co. 18 Ind. App. 687, 48 N. E. 1046, holding driving nervous horses on crossing, without listening, clearly negligence; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 611, 53 L. R. A. 626, 84 N. W. 823, holding no contributory negligence, as matter of law, where plaintiff looks both ways at street railway crossing, but fails to see car concealed behind stationary one; Wabash R. Co. v. Biddle, 27 Ind. App. 172, 60 N. E. 12 (dissenting opinion), majority holding contributory negligence question for jury where plaintiff looked and listened at 75 and 25 feet from track, from covered wagon, and train gave no signals; Rich v. Evansville & T. H. R. Co. 31 Ind. App. 14, 66 N. E. 1028, holding duty of traveler to look and listen at crossing not excused by failure of engineer to signal approach of train; Malott v. Hawkins, 159 Ind. 134, 63 N. E. 308, holding traveler must look and listen at railroad crossing.

Cited in footnotes to Woehrle v. Minnesota Transfer R. Co. 52 L. R. A. 349,

which holds traveler's failure to look and listen when watchman absent not negligence *per se;* Lorenz v. Burlington, C. R. & N. R. Co. 56 L. R. A. 753, which holds negligence of one pursuing cow, in not looking and listening before crossing railroad track, for jury; Keenan v. Union Traction Co. 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

32 L. R. A. 154, SCOTT v. CLEVELAND, C. C. & ST. L. R. CO. 144 Ind. 125, 43 N. E. 133.

Allegation of negligence.

Cited in note (59 L. R. A. 243) on sufficiency of general allegations of negligence.

Ejection of passenger.

Cited in footnote to Atkinson v. Southern R. Co. 55 L. R. A. 223, which holds carrier liable for ejection of passenger because train does not stop at his station, as ticket seller had incorrectly told him it would.

Transmission on wrong railroad.

Cited in footnote to Beers v. Boston & A. R. Co. 32 L. R. A. 535, which denies liability for mere negligence in loss of trunk checked over wrong road.

32 L. R. A. 157, LAMAR WATER & ELECTRIC LIGHT CO. v. LAMAR, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756.

Constitutional rate of taxation.

Followed in Aurora Water Co. v. Aurora, 129 Mo. 574, 31 S. W. 946; Lamar Water & Electric Light Co. v. Lamar, 140 Mo. 155, 39 S. W. 768; Stanberry v. Jordan, 145 Mo. 381, 46 S. W. 1093; Kansas City v. Bacon, 147 Mo. 282, 48 S. W. 860; State *ex rel.* Miller v. Missouri, K. & T. R. Co. 164 Mo. 211, 64 S. W. 187; Lexington *ex rel.* Price v. Lafayette County Bank, 165 Mo. 682, 65 S. W. 943,— as to rate of taxation under Missouri Constitution.

Cited in State *ex rel.* Hill v. Wabash R. Co. 169 Mo. 573, 70 S. W. 132, holding tax under Mo. Const. art. 10, § 12, invalid unless approved by two-thirds vote.

Municipal indebtedness.

Cited in footnotes to Brashear v. Madison, 33 L. R. A. 474, which authorizes appropriation to buy fire alarm apparatus when sufficient on hand appropriated for fire purposes; La Porte v. Gamewell Fire Alarm Teleg. Co. 35 L. R. A. 686, which holds city contract for water or light does not create indebtedness for aggregate sum of all instalments; Kiehl v. South Bend, 36 L. R. A. 228, which holds indebtedness for hydrant rentals invalid where limitation of indebtedness exceeded when rentals become due; South Bend v. Reynolds, 49 L. R. A. 795, which holds limit of indebtedness not exceeded by contract for erection by individual of city hall on city land, with agreement to pay fair rental and option of purchase; State *ex rel.* Helena Waterworks Co. v. Helena, 55 L. R. A. 336, which holds contract for water supply for term of years within provision as to limitation of city indebtedness.

Municipal revenue.

Cited in Webb City & C. Waterworks Co. v. Carterville, 142 Mo. 116, 43 S. W. 625, holding "income and revenue for each year" excludes money received from sale of bonds.

Municipal contracts.

Cited in Dawson v. Dawson Waterworks Co. 106 Ga. 718, 32 S. E. 907, holding city may contract to supply city with water for one year, if enough in treasury to pay for one year; Aurora Water Co. v. Aurora, 129 Mo. 578, 31 S. W. 946, sustaining as complete contract, required to be written, ordinance allowing construction of water works, approval by voters, and acceptance by persons constructing.

Municipal ordinance subject to ratifying vote.

Cited in Saleno v. Neosho, 127 Mo. 637, 27 L. R. A. 772, 48 Am. St. Rep. 653, 30 S. W. 190, holding city may make contract subject to approval at election.

Construction of contracts.

Cited in Wiggins Ferry Co. v. Chicago & A. R. Co. 128 Mo. 245, 27 S. W. 568, holding where contract fairly and reasonably open to two constructions, one making legal and other illegal, former must be adopted.

Construction of statutes.

Cited in Robert J. Boyd Paving & Contracting Co. v. Ward, 28 C. C. A. 671, 55 U. S. App. 730, 85 Fed. 31, and Ormsby v. Ottman, 29 C. C. A. 299, 56 U. S. App. 510, 85 Fed. 496, holding it always competent to consider consequences of act, to discover intention of framers.

32 L. R. A. 167, SULLIVAN v. JEFFERSON AVE. R. CO. 133 Mo. 1, 34 S. W. 566.

Negligence.

Followed in Fuchs v. St. Louis, 167 Mo. 644, 57 L. R. A. 144, 67 S. W. 610, holding explosion of gas in sewer, causing injury, does not make out prima facie case of negligence against city.

Cited in American Brewing Asso. v. Talbot, 141 Mo. 687, 64 Am. St. Rep. 538, 42 S. W. 679, holding warehouseman not liable for damage from unprecedented flood; Graney v. St. Louis, I. M. & S. R. Co. 157 Mo. 684, 50 L. R. A. 159, 57 S. W. 276, holding railroad not liable for boy being sucked under train passing at prohibited speed, probability of such result not being proved to be known or to be apprehended; Rogers v. Meyerson Printing Co. 103 Mo. App. 692, 78 S. W. 79, holding it question for jury whether master was negligent in failing to place bars at window through which employee fell.

— Degree of care of common carrier.

Cited in Freeman v. Metropolitan Street R. Co. 95 Mo. App. 100, 68 S. W. 1057, holding error, charge to find for plaintiff unless sudden accidental stop of cable car could have been prevented by utmost human skill, diligence, and foresight by carrier; Feary v. Metropolitan Street R. Co. 162 Mo. 104, 62 S. W. 452, denying requirement of "utmost practicable human skill, diligence, and foresight," to prevent cable car from running away; Posch v. Southern Electric R. Co. 76 Mo. App. 607, requiring of carrier's servants a high degree of care, such as would be exercised by very careful and skilful railroad employees; Krone v. Southwest Missouri Electric R. Co. 97 Mo. App. 612, 71 S. W. 712, holding street railway company not liable for injury due to careless or mischievous act of stranger who gave signal which started car before plaintiff could alight; Heyde v. St. Louis Transit Co. 102 Mo. App. 541, 77 S. W. 127, holding railway company liable to passenger injured by derailment of car, if

accident could have been prevented by exercise of very high degree of care and skill; Lynch v. St. Louis Transit Co. 102 Mo. App. 642, 77 S. W. 100, denying recovery to one who sprained muscles of leg in alighting from car at place apparently safe.

Cited in footnotes to Tall v. Baltimore Steam Packet Co. 47 L. R. A. 120, which denies carrier's liability for shooting of passenger during quarrel with other passengers over game of cards; Spangler v. St. Joseph & G. I. R. Co. 63 L. R. A. 634, which holds carrier liable for injury to passenger by missile thrown through window by fellow passengers known to be intoxicated and to have threatened revenge on passengers interfering with their disorderly conduct.

Harmless error in instructions.

Followed in Wagner v. Edison Electric Illuminating Co. 82 Mo. App. 300, and Link v. Prufrock, 85 Mo. App. 623, affirming judgment, notwithstanding erroneous instructions not prejudicial or affecting the merits.

Approved in Wagner v. Edison Electric Illuminating Co. 177 Mo. 60, 75 S. W. 966, holding erroneous instructions not ground for reversal where they did not materially affect merits or prejudice appellant.

Impeachment of witness by writing.

Cited in State v. Baker, 136 Mo. 83, 37 S. W. 810, holding written statement inadmissible when admitted by witness to be ners, but claimed to be false and executed under duress.

32 L. R. A. 170, STATE, CONSOLIDATED TRACTION CO., PROSECUTOR, v. ELIZABETH, 58 N. J. L. 619, 34 Atl. 146.

Municipal control of public service corporations.

Cited in State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May, 59 N. J. L. 395, 36 L. R. A. 656, 36 Atl. 679, sustaining ordinance limiting speed of electric cars; State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May, 59 N. J. L. 399, 36 L. R. A. 654, 36 Atl. 696, sustaining ordinance requiring electric cars to have fenders; State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May, 59 N J. L. 407, 36 L. R. A. 658, 36 Atl. 678, sustaining ordinance requiring electric cars to come to full stop at intersecting streets; State, Consolidated Traction Co., Prosecutor, v. East Orange, 61 N. J. L. 205, 38 Atl. 803, sustaining ordinance prohibiting cutting of trees for running electric wires through streets until consent of town committee is obtained; State, Consolidated Traction Co., Prosecutor, v. East Orange, 61 N. J. L. 207, 38 Atl. 803, holding railroad company presumed to know its business must be conducted under reasonable rules imposed by municipality; Nicoll v. New York & N. J. Teleph. Co. 62 N. J. L. 157, 40 Atl. 627, holding grant to telephone company to use street to string wires does not mean taking of land; Fair Haven & W. R. Co. v. New Haven, 75 Conn. 454, 53 Atl. 960, upholding act imposing upon street railway duty to pay cost of paving between its tracks; Chicago v. Chicago Union Traction Co. 199 Ill. 269, 59 L. R. A. 670, 65 N. E. 243, upholding right of municipality to compel street railway to clean street between its outer rails; Fielders v. North Jersey Street R. Co. 67 N. J. L. 79, 50 Atl. 533, holding street railway company may be required to keep pavement in repair as condition of exercise of franchise in public street; Ivins v. Trenton, 68 N. J. L. 505, 53 Atl. 202, holding ordinance clearly within powers granted to common council by char-

ter will be presumed to be reasonable; Fielders v. North Jersey Street R. Co. 68 N. J. L. 361, 59 L. R. A. 463, 96 Am. St. Rep. 552, 53 Atl. 404, holding invalid as assumption of power of taxation, ordinance requiring street railway to pave and keep in repair space between tracks and for 1 foot outside.

Cited in note (39 L. R. A. 619) on municipal control over public nuisances on public streets and highways, created by street railroads and other electrical companies.

Care required of public service corporations.

Cited in Rowe v. New York & N. J. Teleph. Co. 66 N. J. L. 21, 48 Atl. 523, holding degree of care to be used by telephone company as to wires with harmless current in street changed when traction company strings dangerous wires beneath.

32 L. R. A. 172, HICKERSON v. GERMAN-AMERICAN INS. CO. 96 Tenn. 193, 33 S. W. 1041.

Waiver by insurance company.

Cited in Insurance Co. v. Morton-Scott-Robertson Co. 108 Tenn. 390, 67 S. W. 816, holding that demand for appraisal concedes liability for some amount; Fletcher v. German-American Ins. Co. 79 Minn. 342, 82 N. W. 647, holding that failure of insurer to object to amount claimed in proof of loss waived right to arbitration.

Appraisal as condition precedent to action.

Cited in Vernon Ins. Co. v. Maitlen, 158 Ind. 402, 63 N. E. 755, holding complaint alleging failure of insurance appraisers to agree upon umpire does not show compliance with or waiver of appraisement made by policy a condition precedent to right of action thereon; Connecticut F. Ins. Co. v. Cohen, 97 Md. 304, 99 Am. St. Rep. 445, 55 Atl. 675, holding insured may maintain suit on policy where failure to secure appraisal occurs without fault on his part; Hall v. Western Assur. Co. 133 Ala. 640, 32 So. 257, holding insured not bound by agreement to arbitrate, and at liberty to sue where appraiser named by insurer is not disinterested.

Cited in footnote to Grand Rapids F. Ins. Co. v. Finn, 50 L. R. A. 555, which holds appraisal of loss not required by policy not condition precedent to right of action unless demand made by insurer.

Conduct of appraiser.

Approved in Insurance Co. of N. A. v. Hegewald, 161 Ind. 640, 66 N. E. 902, holding insurance appraiser must act free from bias or partiality.

32 L. R. A. 177, RIXNER'S SUCCESSION, 48 La. Ann. 552, 19 So. 597.

Alien's right to inherit.

Cited in Rabasse's Succession, 49 La. Ann. 1411, 22 So. 767, holding Frenchmen not subject to taxes on transfers or inheritance differently from citizens.

Cited in footnote to Opel v. Shoup, 37 L. R. A. 583, which holds disability to inherit property in United States removed by treaty with King of Bavaria.

32 L. R. A. 190, CHARNOCK v. HIGUERRA, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171.

Mode of diversion of water by riparian owners.

Cited in San Luis Water Co. v. Estrada, 117 Cal. 183, 48 Pac. 1075, holding court without power to limit place of diversion of water when no one injured by change; Coleman v. Le Franc, 137 Cal. 216, 69 Pac. 1011, holding diversion of flood water not unlawful, in absence of proof of injury or excessive use; Jones v. Conn, 39 Or. 45, 54 L. R. A. 636, footnote p. 630, 87 Am. St. Rep. 634, 64 Pac. 855, sustaining riparian right to use water for irrigating nonriparian land; Miller v. Rickey, 127 Fed. 584, holding bill to restrain diversion of water need not allege particular point of diversion or means and methods used.

Cited in note (41 L. R. A. 741) on correlative rights of upper and lower proprietors as to use and flow of water in stream.

Right to pump water from stream for irrigation.

Cited in footnote to Forbell v. New York, 51 L. R. A. 695, which authorizes injunction against city draining subsurface water by pumping works.

Diversion at point above by lower proprietor.

Approved in California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co. 127 Fed. 742, holding lower riparian owner not entitled to divert water from stream for his own use at point above lands of upper riparian proprietor.

Diversion essential to appropriation.

Approved in Walsh v. Wallace, 26 Nev. 327, 99 Am. St. Rep. 692, 67 Pac. 914, holding actual diversion for beneficial use essential to valid appropriation of water.

Parties in water rights action.

Cited in Brown v. Farmers' High Line Canal & Reservoir Co. 26 Colo. 73, 56 Pac. 183, holding stockholders necessary parties in action involving prorating of rights.

32 L. R. A. 193, SLOANE v. SOUTHERN CALIFORNIA R. CO. 111 Cal. 668, 44 Pac. 320.

Ejection of passenger.

Cited in Hot Springs R. Co. v. Deloney, 65 Ark. 181, 67 Am. St. Rep. 913, 45 Pac. 351, holding railroad company liable for ejection of passenger holding ticket improperly made out by agent.

Cited in footnotes to Scofield v. Pennsylvania Co. 56 L. R. A. 224, which denies right to eject, for nonpossession of ticket, passenger continuing journey after ticket taken up, against protest, before stopping off; Illinois C. R. Co. v. Harper, 64 L. R. A. 283, which denies right to eject passenger presenting ticket not specifying route to place of destination because of regulations requiring her to take another route.

Damages in tort; mental suffering.

Cited in Mack v. South Bound R. Co. 52 S. C. 334, 40 L. R. A. 684, footnote p. 679, 68 Am. St. Rep. 913, 29 S. E. 905, sustaining liability for personal injuries from fright, without other physical injuries; Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 242, 47 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, sustaining action for physical injury from mental shock, when injury ought to have

been foreseen by wrongdoer; Denver & R. G. R. Co. v. Roller, 49 L. R. A. 85, 41 C. C. A. 34, 100 Fed. 750, sustaining recovery for injury to health, which was reasonable and natural consequence of, and proximately caused by, fright resulting from negligence; Hickey v. Welch, 91 Mo. App. 10, holding actionable, act which is wilful, malicious, or accompanied by inhumanity and oppression, resulting in mental anguish though without physical harm; Preiser v. Wielandt, 48 App. Div. 574, 62 N. Y. Supp. 890, holding actionable, wilful tort causing injuries by miscarriage due to fright and excitement alone.

Cited in footnotes to Smith v. Postal Teleg. Cable Co. 47 L. R. A. 323, which denies right of recovery for sickness due to fright caused by grossly negligent act of one knowing result would follow; Kline v. Kline, 58 L. R. A. 397, which sustains right to damages for mental suffering for assault by pointing gun with threat to shoot unless house abandoned; Homans v. Boston Elev. R. Co. 57 L. R. A. 292, which holds carrier liable for nervous shock to passenger from jar to nervous system, accompanying blow; Watson v. Dilts, 57 L. R. A. 559, which holds one liable for frightening woman, causing nervous prostration, by stealthily entering her home in nighttime; Mabry v. City Electric R. Co. 59 L. R. A. 590, which holds carrier liable for injury to feelings and sensibilities of passenger wrongfully ejected, though without physical injury; Sanderson v. Northern P. R. Co. 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury but without contemporaneous injury, unless fright proximate result of legal wrong; Lewis v. Holmes, 61 L. R. A. 274, which authorizes, for breach of contract for wedding trousseau, recovery for bride's mortification and humiliation, and inability to attend entertainments planned for her; Reed v. Maley, 62 L. R. A. 900, which holds that merely soliciting woman to have sexual intercourse gives her no right of action.

Distinguished in Watkins v. Kaolin Mfg. Co. 131 N. C. 542, 60 L. R. A. 620, footnote p. 617, 42 S. E. 983, sustaining action for physical injury or disease resulting from fright or nervous shocks caused by negligence.

— Measure.

Cited in Thomas v. Gates, 126 Cal. 7, 58 Pac. 315, holding damages for assault include compensation for corporal pain, mental suffering, wounded sensibility, and sense of wrong; Campbell v. Los Angeles Traction Co. 137 Cal. 569, 70 Pac. 624, holding damages recoverable without special averment, for physical suffering and hastening development of existing disease, as direct result of violence.

— Excess.

Cited in Clare v. Sacramento Electric Power & Light Co. 122 Cal. 506, 55 Pac. 326, holding $2,000 not excessive for damages to nervous system, impairment of sight, and loss of hearing of one ear.

— Pleading.

Cited in Trabing v. California Nav. & Improv. Co. 121 Cal. 140, 53 Pac. 644, holding proper, statement of one sum as damages, in action for assault and imprisonment; Peers v. Nevada Power, Light & Water Co. 119 Fed. 404, holding it sufficient to prove case entitling to exemplary damages without claiming them in complaint.

Distinguished in Foerst v. Kelso, 131 Cal. 377, 63 Pac. 681, holding demurrable, as uncertain, complaint in action for injury to health, person, and real and personal property, failing to state amount of damage to property.

Harmless error.

Cited in Higgins v. San Diego Sav. Bank, 129 Cal. 186, 61 Pac. 943, holding where cause tried on merits, and no substantial right affected by ruling, no reversal; Procter v. Southern California R. Co. 130 Cal. 24, 62 Pac. 306, holding error in refusing, in damage action tried without jury, to strike out averment and a finding as to particular injury on which no evidence was offered, harmless; Mabb v. Stewart, 133 Cal. 566, 65 Pac. 1085, holding error in refusal to charge that punitive damages would be improper not cured by charge that only compensatory damages proper.

Pleading by corporation.

Cited in Blair v. Sioux City & P. R. Co. 109 Iowa, 384, 80 N. W. 673, sustaining striking out answers of corporation by officer, denying personal knowledge of facts easily obtainable from corporation's books.

32 L. R. A. 199, WHITE v. YAWKEY, 108 Ala. 270, 54 Am. St. Rep. 159, 19 So. 360.

Measure of damages.

Followed in Ivy Coal & Coke Co. v. Alabama Coal & Coke Co. 135 Ala. 584, 93 Am. St. Rep. 46, 33 So. 547, holding in trover for coal, trespass being unintended, measure of damages is value after cut.

Cited in Birmingham Mineral R. Co. v. Tennessee Coal, I. & R. Co. 127 Ala. 147, 28 So. 679, and Central Coal & Coke Co. v. John Henry Shoe Co. 69 Ark. 304, 63 S. W. 49, holding measure of damages in trover, against purchaser from wilful trespasser of timber cut from plaintiff's land, is value at time of sale; Chappell v. Puget Sound Reduction Co. 27 Wash. 68, 91 Am. St. Rep. 820, 67 Pac. 391, holding measure of damages in trover for cutting timber, against unintentional trespasser, is value of timber standing, land not being injured; Brinkmeyer v. Bethea, 139 Ala. 378, 35 So. 996, holding measure of damages for removal of dirt, clay, and topsoil by trespasser is difference in value of property before and immediately after trespass.

Cited in footnotes to Keystone Lumber Co. v. Kolman, 34 L. R. A. 821, which requires licensee to repay trespasser enhanced value of timber before recovering; Woods v. Nichols, 48 L. R. A. 773, which holds measure of recovery in trover by one retaining title as security for purchase price limited to balance due, less depreciation by use.

Distinguished in Warrior Coal & Coke Co. v. Mabel Min. Co. 112 Ala. 626, 20 So. 918, holding measure of damages in trespass to realty, actual damage to land.

Damage to freehold.

Cited in Johnson v. C. & N. W. Land & Gravel Co. 30 C. C. A. 37, 58 U. S. App. 552, 86 Fed. 271, holding true owner out of possession cannot maintain trespass for injury to freehold or conversion of portion of it, against one in open, hostile possession claiming title.

32 L. R. A. 201, VANSANDT v. WIER, 109 Ala. 104, 19 So. 424.

Estoppel of married woman.

Cited in Jackson v. Knox, 119 Ala. 323, 24 So. 724, holding married woman not estopped by parol sale of land.

Cited in footnote to Hunt v. Reilly, 59 L. R. A. 206, which holds wife's fail-

ure to notify purchaser of rights after learning of forgery of her name to husband's deed will not estop her to claim dower.

32 L. R. A. 203, LAFFERTY v. HUFFMAN, 99 Ky. 80, 35 S. W. 123.

Impeaching act of legislature.

Followed in Com. v. Shelton, 99 Ky. 122, 35 S. W. 128; Com. v. Hardin County Court, 99 Ky. 190, 35 S. W. 275; Wilson v. Hines, 99 Ky. 228, 35 S. W. 627; Ritchie v. Richards, 14 Utah, 352, 47 Pac. 670, — holding journals of house and senate not admissible to impeach act.

Cited in Taylor v. Beckham, 108 Ky. 300, 49 L. R. A. 264, 94 Am. St. Rep. 357, 56 S. W. 177, holding court without jurisdiction to go behind record in legislative journals in election contest and admit evidence not appearing there.

Cited in footnotes to Union Bank v. Oxford, 34 L. R. A. 487, which holds act authorizing creation of town indebtedness rendered void by failure to enter yeas and nays on journal; Stanly County v. Snuggs, 39 L. R. A. 439, which holds fatal, omission to enter yeas and nays in journal on second and third readings on bill authorizing tax; State *ex rel.* Cheyenne v. Swan, 40 L. R. A. 195, which sustains court's right to examine journals to determine whether alleged statutes passed; People v. Dettenthaler, 44 L. R. A. 164, which holds bill in which enacting clause added without authority by clerk of one branch of legislature void.

Disapproved in Cohn v. Kingsley, 5 Idaho, 443, 38 L. R. A. 84, footnote p. 74, 49 Pac. 985, holding legislatve journals must show constitutional requirements were observed in passage of any law, and if they fail to do so it is conclusive evidence they were not observed.

Elections.

Cited in footnote to State *ex rel.* Harrison v. Menaugh, 43 L. R. A. 408, which sustains statute changing time of electing town trustees so that more than four years elapse between elections.

32 L. R. A. 208, McTIGHE v. MACON CONSTR. CO. 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 701.

De facto corporations.

Cited in Brown v. Atlanta R. & Power Co. 113 Ga. 468, 39 So. 71, holding necessary to make *de facto* corporation that there be either charter or law under which it could exist with powers it assumes to exercise, colorable compliance with it, and user of rights claimed; Petty v. Brunswick & W. R. Co. 109 Ga. 674, 35 S. E. 82, holding one dealing with association as legal entity estopped to deny legality of its existence; Deitch v. Staub, 53 C. C. A. 143, 115 Fed. 315, holding member of loan association estopped to deny legality of *de facto* corporation by execution of instrument recognizing legality; Gilkey v. How, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, holding attempt to comply with incorporation law, followed by organization and transaction of business, constitutes *de facto* corporation; Bergeron v. Hobbs, 96 Wis. 656, 65 Am. St. Rep. 85, 71 N. W. 1056 (dissenting opinion), majority holding bona fide recording of incorporation papers not being actual filing does not constitute *de facto* corporation.

Distinguished in Hawkinsville & F. S. R. Co. v. Waycross, Air-Line R. Co. 114 Ga. 245, 39 S. E. 844, holding corporation involved a *de facto* corporation.

Mortgage of after-acquired property.

Followed in Hawkins v. Mercantile Trust & D. Co. 96 Ga. 583, 23 S. E. 498, holding railroad mortgage covered property intended to be used only in connection with other after-acquired property not actually bought, although purchased property was found unsuitable for railroad purposes and sold.

Cited in Central Trust Co. v. Chattanooga, R. & C. R. Co. 36 C. C. A. 244, 94 Fed. 279, Affirming 89 Fed. 389, holding railroad mortgage covers unbuilt part of road.

Distinguished in Georgia Southern & F. R. Co. v. Barton, 101 Ga. 471, 28 S. E. 842, holding no power in railroad to mortgage income, under Ga. Code 1882, § 1689.

Foreclosure sale of land in different states.

Approved in Mead v. Brockner, 82 App. Div. 481, 81 N. Y. Supp. 594, holding court of one state has power to direct sale of mortgaged land a portion of which is situated in adjoining state.

32 L. R. A. 214, PRICE v. PLANTERS' NAT. BANK, 92 Va. 468, 23 S. E. 887.

Liability to debts of married woman's separate estate.

Cited in Duval v. Chelf, 92 Va. 493, 23 S. E. 893, and Miller v. Miller, 92 Va. 514, 23 S. E. 891, holding wife presumed to have intended to charge separate estate, unless contract expresses contrary intention; Dezendorf v. Humphreys, 95 Va. 478, 28 S. E. 880, holding courts have no more power than woman in charging her separate estate.

32 L. R. A. 220, RICHMOND R. & ELECTRIC CO. v. GARTHRIGHT, 92 Va. 627, 53 Am. St. Rep. 839, 24 S. E. 267.

Error not requiring reversal.

Cited in Lynchburg v. Wallace, 95 Va. 647, 29 S. E. 675 (dissenting opinion), majority reversing for instructions; Wright v. Independence Nat. Bank, 96 Va. 732, 70 Am. St. Rep. 889, 32 S. E. 459, holding no reversal for instructions when, with proper instructions, verdict must have been the same; Leftwich v. Richmond, 100 Va. 168, 40 S. E. 651; Brock v. Bear, 100 Va. 564, 42 S. E. 307; Farmers' Benev. F. Ins. Asso. v. Kinsey, 101 Va. 244, 43 S. E. 338,—holding error in giving or refusing instructions not ground for reversal, if different verdict could not have been rightly found upon correct instructions, or if party complaining could not have been prejudiced; Richmond Traction Co. v. Hildebrand, 99 Va. 51, 34 S. E. 888, refusing to reverse when court can see from whole record that, even without error in instructions, different verdict could not be rightly found; Kimball v. Borden, 95 Va. 207, 28 S. E. 207, holding misdirection presumed to have affected verdict, unless it plainly appears the error did not; Richmond Passenger & Power Co. v. Steger, 101 Va. 322, 43 S. E. 612, holding rule that verdict will not be set aside for erroneous instructions if jury could not, upon correct instructions, have properly found any other, not applicable where evidence is so conflicting that if jury had found for adverse party, court could not have disturbed verdict.

Excessive damages.

Cited in Norfolk & W. R. Co. v. Ampey, 93 Va. 137, 25 S. E. 226, and Norfolk v. Johnakin, 94 Va. 287, 26 S. E. 830, holding verdict should not be dis-

turbed unless amount shows prejudice, partiality, or corruption, or that jury misled by mistaken view of merits.

Street car at crossing.

Approved in Bass v. Norfolk R. & Light Co. 100 Va. 6, 40 S. E. 100, holding street car has only same right at street crossings as traveling public; Bass v. Norfolk R. & Light Co. 100 Va. 3, 40 S. E. 100, holding jury may find street railway company guilty of negligence if car approaches crossing at excessive rate of speed.

32 L. R. A. 223, BUSH v. JOHNSON COUNTY, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023.

Liability of public officers for losses.

Cited in Hazelet v. Holt County, 51 Neb. 723, 71 N. W. 717; Sheibley v. Dixon County, 61 Neb. 414, 85 N. W. 399; Montmorency County v. Putnam, 122 Mich. 582, 81 N. W. 573,—holding adjustment by county board of accounts of officer not judicial, and so not final; Whitney v. State, 53 Neb. 301, 73 N. W. 696, holding custodian liable for amount of check received, instead of cash, from predecessor; Thomssen v. Hall County, 63 Neb. 785, 57 L. R. A. 307, footnote p. 303, 89 N. W. 389, and Van Trees v. Territory, 7 Okla. 364, 54 Pac. 495, holding county treasurer liable on bond for loss of money by bank failure; Gartley v. People, 24 Colo. 160, 49 Pac. 272, and Lamb v. Dart, 108 Ga. 613, 34 S. E. 160, holding county treasurer liable without negligence for money deposited in bank afterwards insolvent; Adams v. Weisberger, 62 Neb. 329, 87 N. W. 16, holding utmost care and diligence no defense to action against constable and his sureties for taking insufficient security on replevin bond; State *ex rel.* School Dist. v. Dorton, 145 Mo. 314, 46 S. W. 948, holding one, neither *de jure* nor *de facto* treasurer of school district, accepting check from treasurer to himself as treasurer, liable therefor by estoppel.

Cited in footnotes to Healdsburg v. Mulligan, 33 L. R. A. 461, which denies liability of city treasurer on bond for money forcibly taken by robbers; Tillinghast v. Merrill, 34 L. R. A. 678, which holds supervisor liable for public money lost by failure of private bankers; Maloy v. Bernalillo County, 52 L. R. A. 126, which holds county treasurer's liability on bond absolute, except for loss from overruling necessity; Northern P. R. Co. v. Owens, 57 L. R. A. 634, which holds clerk of court liable on bond for loss by bank failure of money received as clerk; Dreyer v. People, 58 L. R. A. 869, which holds loss of public funds from failure of bank ceasing business, to carry out agreement to pay all officers' checks to unlimited amount, no defense to indictment for failure to pay over.

Distinguished in State v. Gramm, 7 Wyo. 354, 40 L. R. A. 698, footnote p. 690, 52 Pac. 533, denying liability on bond of state treasurer for loss of public money by bank failure; State *ex rel.* Wayne County v. Russell, 51 Neb. 779, 71 N. W. 785, holding county may compel clerk to account by mandamus after his term, as to fees received.

Deposit of public moneys.

Cited in Paxton v. State, 59 Neb. 476, 80 Am. St. Rep. 689, 81 N. W. 383, holding transfer of certificate of deposit in solvent bank equivalent to manual delivery of money.

Cited in footnote to Allibone v. Ames, 33 L. R. A. 585, which holds deposit

of public money by county treasurer in bank designated as depository not unlawful loan.

Distinguished in *Re* State Treasurer's Settlement, 51 Neb. 134, 36 L. R. A. 752, 70 N. W. 532, holding deposit of public money in legal depository is in law a loan.

32 L. R. A. 229, JACOBSON v. VAN BOENING, 48 Neb. 80, 58 Am. St. Rep. 684, 66 N. W. 993.

Surface water drainage.

Followed in Kearney v. Themanson, 48 Neb. 76, 66 N. W. 996, holding owner not liable for damages to adjoining owner from proper exercise of right to raise embankment to keep out surface water.

Approved in Fremont E. & M. Valley R. Co. v. Harlin, 50 Neb. 713, 36 L. R. A. 423, 61 Am. St. Rep. 578, 70 N. W. 263, holding railroad company liable for damages from embankment ditches unless constructed with due care with reference to rights of adjacent owners.

Cited in Gilmore v. Armstrong, 48 Neb. 95, 66 N. W. 998, denying injunction restraining further maintenance by defendant of dam and ditch constructed by agreement of parties, but, by mistake, on plaintiff's land; Rath v. Zembleman, 49 Neb. 352, 68 N. W. 488, holding no recovery for drainage into stream across land of plaintiff admitting stream was natural waterway; Town v. Missouri P. R. Co. 50 Neb. 775, 70 N. W. 402, holding question of liability of railroad constructing embankment for obstructing surface water, one of negligence in construction, and for jury; Andrews v. Steele City, 2 Herdman (Neb.) 682, 89 N. W. 739, holding city may not accumulate surface waters and by means of ditch discharge them upon land of another.

Cited in footnotes to Carland v. Aurin, 48 L. R. A. 862, which denies right of city lot owner to prevent natural flow of surface water from higher ground by raising surface of lot; Brandenberg v. Zeigler, 55 L. R. A. 414, which denies owner's right to drain surface water from pond on neighbor's land by cutting through natural rim of basin; Franklin v. Durgee, 58 L. R. A. 112, which denies right to fill depressions in land, casting surface water back on highway to its injury.

Distinguished in Churchill v. Beethe, 48 Neb. 90, 35 L. R. A. 443, 66 N. W. 992, holding act of municipality in discharging surface waters through culvert under highway, in large volume on private property, not illegal.

32 L. R. A. 232, CARMICHAEL v. LATHROP, 108 Mich. 473, 66 N. W. 350.

Second appeal in 112 Mich. 301, 70 N. W. 575.

32 L. R. A. 236, FISHER v. FIELDING, 67 Conn. 91, 52 Am. St. Rep. 270, 34 Atl. 714.

Conclusiveness of foreign judgment.

Approved in MacDonald v. Grand Trunk R. Co. 71 N. H. 452, 59 L. R. A. 452, footnote p. 448, 93 Am. St. Rep. 550, 52 Atl. 982, holding foreign judgment for defendant on merits is bar to action in local courts; American Mut. L. Ins. Co. v. Mason, 159 Ind. 17, 64 N. E. 525, holding judgment of court of any state having jurisdiction conclusive on merits until reversed or set aside, and not open to collateral attack.

"Duly shown" as implying hearing.

Approved in Thompson v. Troup, 74 Conn. 123, 49 Atl. 907, holding charter provision allowing removal for sufficient cause duly shown implies opportunity to be heard as to sufficiency of cause.

32 L. R. A. 253, BROWN v. RUSSELL, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005.

Privileges as reward for public services.

Cited in Opinion of the Justices, 175 Mass. 602, 49 L. R. A. 565, 57 N. E. 675, holding power in legislature to grant to representatives of dead office holder, salary he would receive if living.

— Preference of veterans.

Cited in Opinion of the Justices, 166 Mass. 595, 34 L. R. A. 60, footnote p. 58, 44 N. E. 625, holding constitutional, act providing that veterans passing civil service examination are to be preferred; Ayers v. Hatch, 175 Mass. 491, 56 N. E. 612, holding veteran does not, as assessor, hold office or employment in public service entitling him to hearing before removal; State v. Garbroski, 111 Iowa, 501, 56 L. R. A. 572, 82 Am. St. Rep. 524, 82 N. W. 959, holding unconstitutional, statute exempting veterans from payment of peddler's license; State v. Shedroi, 75 Vt. 284, 63 L. R. A. 181, 98 Am. St. Rep. 825, 54 Atl. 1081, holding exemption of veterans from statutory requirement that peddlers pay license tax is denial of equal protection of laws; Goodrich v. Mitchell, 68 Kan. 770, 64 L. R. A. 947, footnote p. 945, 75 Pac. 1034, upholding constitutionality of act preferring veterans for appointment to office in every public department and upon all public works of state.

Cited in footnote to *Re* Keymer, 35 L. R. A. 447, which holds exemption of veterans from competitive examination unconstitutional.

Class legislation.

Cited in Dixon v. Poe, 159 Ind. 497, 60 L. R. A. 310, 95 Am. St. Rep. 309, 65 N. E. 518, holding act requiring redemption in money of checks issued by merchants in payment for assigned wages of coal miners is void as class legislation.

Public officers.

Cited in Opinion of the Justices, 95 Me. 586, 51 Atl. 224 (minority opinion), Emery, Whitehouse and Peabody, JJ., holding office of fish and game commissioner and that of trustee of state institution "offices of profit;" Atty. Gen. v. Drohan, 169 Mass. 535, 61 Am. St. Rep. 301, 48 N. E. 279, holding quo warranto will not lie to try title to membership in political committee, as public office; State v. Spaulding, 102 Iowa, 644, 647, 72 N. W. 288, holding treasurer of commissioners of pharmacy, appointed by them, not public officer; State *ex rel.* Crow v. Vallins, 140 Mo. 537, 41 S. W. 887 (dissenting opinion), majority holding one performing duties of chief of police a public officer.

Cited in footnotes to Baltimore v. Lyman, 52 L. R. A. 406, which holds superintendent of public instruction not a municipal officer; State v. Loechner, 59 L. R. A. 916, which holds member of city board of education, ministerial officer.

32 L. R. A. 260, COLUMBUS BUGGY CO. v. TURLEY, 73 Miss. 529, 55 Am. St. Rep. 550, 19 So. 232.

32 L. R. A. 262, YAZOO & M. VALLEY R. CO. v. DAVIS, 73 Miss. 678, 55 Am. St. Rep. 562, 19 So. 487.

Surface waters.

Cited in Illinois C. R. Co. v. Wilbourn, 74 Miss. 290, 21 So. 1, holding no absolute liability on railroad for obstruction of surface waters by embankment, unless construction improper.

32 L. R. A. 265, HARVEY v. LINVILLE IMPROV. CO. 118 N. C. 693, 54 Am. St. Rep. 749, 24 S. E. 489.

Voting trust.

Cited in footnote to Smith v. San Francisco & N. P. R. Co. 35 L. R. A. 309, which holds valid, agreement by purchasers of majority of stock to vote same as unit for specified period.

32 L. R. A. 266, GREGG v. GROESBECK, 11 Utah, 310, 40 Pac. 202.

Conditional transfer of note.

Cited in State Bank v. Burton-Gardner Co. 14 Utah, 423, 48 Pac. 402, holding guarantors of note, delivering it to payee subject to condition that others sign, not liable without such signatures.

32 L. R. A. 270, MOTT v. UNDERWOOD, 148 N. Y. 463, 51 Am. St. Rep. 711, 42 N. E. 1048.

Oysters as subject of larceny.

Criticized in People v. Wanzer, 43 Misc. 137, 88 N. Y. Supp. 281, holding oysters or clams planted in public waters in inclosed bed subject of larceny.

Right to fish.

Cited in note (60 L. R. A. 516) on right of cotenant to fish.

32 L. R. A. 273, DAILEY v. SUPERIOR COURT, 112 Cal. 94, 53 Am. St. Rep. 160, 44 Pac. 458.

Injunction against publications.

Cited in Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 147, 56 L. R. A. 957, 90 Am. St. Rep. 440, 67 S. W. 391, denying right to enjoin publication of invitation to boycott.

Freedom of speech and press.

Cited in note (32 L. R. A. 833) on constitutional freedom of speech and of the press.

32 L. R. A. 276, CINCINNATI STREET R. CO. v. SNELL, 54 Ohio St. 197, 43 N. E. 207.

Negligence at railroad crossing or station.

Cited in Ficker v. Cleveland, C. C. & St. L. R. Co. 6 Ohio N. P. 37, holding it not negligence as matter of law in child of five running from way, on which defendant permitted him to go, upon track in front of car approaching without warning; Baltimore & O. R. Co. v. McClellan, 69 Ohio St. 158, 68 N. E. 816, holding verdict should be directed for defendant company where deceased stepped on railroad track without looking or listening, and was struck by passing train.

Cited in footnote to Atlantic City R. Co. v. Goodin, 45 L. R. A. 671, which holds passenger starting across intervening track after alighting not required to look and listen for trains.

— Street railroads.

Cited in Smith v. Union Trunk Line, 18 Wash. 356, 45 L. R. A. 173, 51 Pac. 400, holding contributory negligence in failing to look and listen, for jury, where car approached, without warning and at high speed, car from which plaintiff alighted; Bass v. Norfolk R. & Light Co. 100 Va. 7, 40 S. E. 100, holding failure to look and listen before crossing street railway track not negligence, as matter of law; Ames v. Waterloo & C. F. Rapid Transit Co. 120 Iowa, 658, 95 N. W. 161 (dissenting opinion), majority upholding verdict directed for defendant railway company, where deceased walked upon track without looking and was struck by car running at excessive speed; Stanley v. Cedar Rapids & M. C. R. Co. 119 Iowa, 532, 93 N. W. 489, holding question whether person injured at crossing exercised ordinary care and prudence, ordinarily for jury.

Cited in footnotes to Everett v. Los Angeles Consol. Electric R. Co. 34 L. R. A. 350, which holds bicyclist negligent in continuing on track until struck by street car; Baltimore Traction Co. v. Helms, 36 L. R. A. 215, which holds attempt by one alighting from street car to cross other track without looking for car, negligence; Hoelzel v. Crescent City R. Co. 38 L. R. A. 708, which requires pedestrian to stop, look, and listen before crossing electric railway track; Citizens' R. Co. v. Ford, 46 L. R. A. 457, which holds ordinance requiring person "riding or driving" to check up or halt at crossing not applicable to electric car; Kansas City-Leavenworth R. Co. v. Gallagher, 64 L. R. A. 344, which sustains right of one about to cross street car tracks to believe that car is running at lawful speed and is under control; Gargan v. West End Street R. Co. 49 L. R. A. 421, which denies passenger's right of action for falling over disarranged fender while attempting to pass behind car in dark, after alighting; Chattanooga Electric R. Co. v. Boddy, 51 L. R. A. 885, which holds one going behind street car from which he has alighted to parallel track, where he is struck, not a passenger; Tesch v. Milwaukee Electric R. & Light Co. 53 L. R. A. 618, which requires traveler to look and listen before crossing street car track at place reasonably certain to effect purpose; Smith v. Union Trunk Line, 45 L. R. A. 169, which holds running two cable cars past each other at much frequented crossing without signal, gross negligence; Roberts v. Spokane Street R. Co. 54 L. R. A. 184, which holds street car company not free from negligence *per se* in having cars meet at busy street crossing while running at rate of 2½ miles an hour.

Distinguished in Evansville Street R. Co. v. Gentry, 147 Ind. 412, 37 L. R. A. 380, footnote p. 378, 62 Am. St. Rep. 421, 44 N. E. 311, holding rules as to crossing steam railroads not strictly applicable to street railroads; Moore v. St. Louis Transit Co. 95 Mo. App. 737, holding failure to look and listen for street car not contributory negligence *per se*, when car going in same direction had just passed; Bethel v. Cincinnati Street R. Co. 15 Ohio C. C. 385, holding it negligence precluding recovery to turn from behind wagon across track, without looking for car, between street crossings; Schausten v. Toledo Consol. Street R. Co. 18 Ohio C. C. 695, holding it contributory negligence to drive closed vehicle across street railroad track without looking and listening.

32 L. R. A. 280, BRADLEY v. SOUTHERN NEW ENGLAND TELEPH. CO. 66 Conn. 559, 34 Atl. 499.

Control over trees on highway.

Approved in Bronson v. Albion Teleph. Co. (Neb.) 60 L. R. A. 427, footnote p. 426, 93 N. W. 201, holding telephone company liable to abutting owner for injury to trees along street.

Cited in footnotes to Vanderhurst v. Tholcke, 35 L. R. A. 267, which holds determination of city council that trees on sidewalk are obstruction, conclusive; Wyant v. Central Teleph. Co. 47 L. R. A. 497, which sustains telephone company's right to do necessary trimming of trees in highway without giving owner opportunity to do so; Stretch v. Cassopolis, 51 L. R. A. 345, which denies right to remove shade trees from street without notice to abutter; Miller v. Detroit, Y. & A. A. R. Co. 51 L. R. A. 955, which sustains street railway company's right to remove obsructing shade trees, without compensation to abutter; Hazlehurst v. Mayes, 64 L. R. A. 805, which denies owner's right of action for necessary trimming of trees in highway for installation of electric lighting system for city.

32 L. R. A. 283, MEYER v. ESTES, 164 Mass. 457, 41 N. E. 683.

Restrictions on sale of personal property.

Cited in Garst v. Hall & L. Co. 179 Mass. 591, 55 L. R. A. 638, 61 N. E. 219, holding that maker of proprietary article cannot control price at which purchaser from him resells it.

Cited in note (55 L. R. A. 633) on right of purchaser of personal property to sell or use it, free from restrictions affecting it in vendor's hands.

Measure of damages.

Cited in note (56 L. R. A. 303) on conflict of laws as to measure of damages.

Penalty or liquidated damages.

Cited in footnotes to Chicago House-Wrecking Co. v. United States, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; State v. Larson, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty; Kilbourne v. Burt & B. Lumber Co. 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages; Salem v. Anson, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages.

32 L. R. A. 289, WESNER v. O'BRIEN, 56 Kan. 724, 54 Am. St. Rep. 604, 44 Pac. 1090.

Award of alimony.

Approved in Benner v. Benner, 63 Ohio St. 227, 58 N. E. 569, sustaining service by publication in action for alimony against nonresident to appropriate real property in state.

Cited in footnote to Sprague v. Sprague, 42 L. R. A. 419, which holds action for alimony barred by preceding judgment for alimony in action for divorce brought by husband, of which court had jurisdiction.

Divorce.

Cited in footnote to Dunham v. Dunham, 35 L. R. A. 70, which denies validity of divorce in other state by woman going there solely to get divorce.

Cited in note (59 L. R. A. 178) on conflict of laws on subject of divorce.

32 L. R. A. 293, HANSON v. LITTLE SISTERS OF THE POOR, 79 Md. 434, 32 Atl. 1052.

Charitable gifts.

Followed in Erhardt v. Baltimore Monthly Meeting of Friends, 93 Md. 680, 49 Atl. 561, sustaining as sufficiently certain, trust to corporation empowered to conduct educational and religious operations, to hold as should seem best and apply income to use of school kept by it.

Cited in *Re* Merchant, 143 Cal. 542, 77 Pac. 475, upholding bequest to charitable society with request that the money be used to equip hospital.

Cited in footnotes to People *ex rel.* Ellert v. Cogswell, 35 L. R. A. 269, which sustains trust for educating boys and girls, not confined to poor ones; *Re* John, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; Thompson v. Brown, 62 L. R. A. 398, which upholds devise of fund for distribution by executor "to the poor in his discretion."

— Object germane to purpose of corporation.

Approved in Dye v. Beaver Creek Church, 48 S. C. 455, 59 Am. St. Rep. 724, 26 S. E. 717, holding object of trust for tuition of poor children germane to purposes of foundation of Baptist Church.

— Right to dispute trust.

Followed in *Re* Stickney, 85 Md. 106, *sub nom.* Congregational Church Bldg. Soc. v. Everitt, 35 L. R. A. 697, footnote p. 693, 60 Am. St. Rep. 308, 36 Atl. 654, and Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy, 91 Md. 438, 46 Atl. 965, denying right of heirs or next of kin to question legal capacity of corporation to take bequest in excess of statutory amount.

Approved in Brigham v. Peter Bent Brigham Hospital, 126 Fed. 801, holding gift to corporation in excess of its legal capacity to take can be attacked in direct proceedings instituted by state, but not collaterally by heirs; Farrington v. Putnam, 90 Me. 427, 38 L. R. A. 348, footnote p. 339, 37 Atl. 652, holding bequest to charitable corporation in excess of amount permitted by statute voidable by state only.

Corporation's right to take assignment of cause of action.

Cited in footnote to John V. Farwell Co. v. Josephson, 37 L. R. A. 138, which denies right to interpose want of corporate power to take assignment of cause of action as defense.

32 L. R. A. 298, ORTH v. ORTH, 145 Ind. 184, 57 Am. St. Rep. 185, 44 N. E. 17, 42 N. E. 277.

Precatory words in will.

Cited in Mitchell v. Mitchell, 143 Ind. 116, 42 N. E. 465, holding devise of land not affected by subsequent statement in will, of testator's "request and wish" as to disposition by devisee; Rogers v. Winklespleck, 143 Ind. 376, 42 N. E. 746, holding fee simple absolute given by devise of residue to wife "subject to a di-

vision" among children "in accordance with their obedience to her, as she shall deem proper."

Cited in Fowler v. Duhme, 143 Ind. 260, 42 N. E. 623, and Mulvane v. Rude, 146 Ind. 481, 45 N. E. 659, holding devise in fee not cut down unless by provisions as clear, certain, and effective as those creating the fee.

Cited in footnotes to Jewell v. Louisville Trust Co. 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention on liberal terms, of specified person in employ of firm of which testator a partner; Williams v. Baptist Church, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church, and "suggesting" as to application.

Trust by operation of law.

Approved in Alexander v. Spaulding, 160 Ind. 181, 66 N. E. 694, holding constructive trust is based on actual or legal fraud and generally arises where there is no intention to create trust.

Distinguished in Ransdel v. Moore, 153 Ind. 419, 53 L. R. A. 762, 53 N. E. 767, holding husband, preventing death-bed devise by promise, and so inheriting, trustee by operation of law.

32 L. R. A. 309, McDONALD v. PITTSBURGH, C. C. & ST. L. R. CO. 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447.

Recovery for death of child.

Cited in footnotes to Alabama & V. R. Co. v. Williams, 51 L. R. A. 837, and Robinson v. Georgia R. & Bkg. Co. 60 L. R. A. 557, footnote p. 555, which deny mother's right of action for death of illegitimate child.

Distinguished in Citizens Street R. Co. v. Cooper, 22 Ind. App. 463, 72 Am. St. Rep. 319, 53 N. E. 1092, holding one irregularly adopting child has no right to recover for its death.

Inheritance.

Cited in Bray v. Miles, 23 Ind. App. 468, 54 N. E. 446 (dissenting opinion), majority holding adopted child entitled to share in estate as one of "children;" Watson v. Richardson, 110 Iowa, 676, 80 N. W. 407, holding, on facts, no general and notorious recognition of bastard by putative father; Alabama & V. R. Co. v. Williams, 78 Miss. 216, 51 L. R. A. 837, 84 Am. St. Rep. 624, 28 So. 853, holding mother does not inherit from her bastard child.

Strict compliance with statute.

Approved in Chicago & S. E. R. Co. v. Glover, 159 Ind. 168, 62 N. E. 11, denying to assignee of labor claim recovery for statutory penalty for nonpayment, where strict compliance with statute not shown.

32 L. R. A. 311, FAILEY v. FEE, 83 Md. 83, 55 Am. St. Rep. 326, 34 Atl. 839.

Mutual insurance associations.

Approved in Laker v. Royal Fraternal Union, 95 Mo. App. 366, holding that terms of benefit certificate ordinarily control by-laws, but both make up the contract and are to be construed together when by-laws are made part of policy.

Cited in note (47 L. R. A. 681) on conflict between by-laws and certificate or policy of mutual benefit society or insurance company.

—**Insolvency.**

Cited in note (38 L. R. A. 99, 104) on distribution of assets of insolvent insurance company.

Distinguished in Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 274, holding member of insolvent loan and building association who has given notice of withdrawal before insolvency not entitled to preference, at winding up, over other stockholders.

Powers of receiver.

Cited in footnote to Castleman v. Templeman, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors.

Distinguished in Stockley v. Thomas, 89 Md. 666, 43 Atl. 766, holding receiver of insolvent foreign corporation will not be appointed unless clear that he will be able to exercise powers for which he is appointed.

32 L. R. A. 315, NIXON v. REID, 8 S. D. 507, 67 N. W. 57.

Ferries.

Cited in note (59 L. R. A. 519, 526, 538, 539, 544) on establishment, regulation, and protection of ferries.

32 L. R. A. 321, JARRETT v. GOODNOW, 39 W. Va. 602, 20 S. E. 575.

Injunctions against judgments.

Cited in footnote to National Surety Co. v. State Bank, 61 L. R. A. 394, which sustains injunction in Federal court against using unconscionable judgment of state court to extort from defendant money not justly due.

Cited in note (31 L. R. A. 748) on injunctions against judgments for defenses existing prior to their rendition.

32 L. R. A. 329, COLUMBUS, H. VALLEY & T. R. CO. v. BURKE, 54 Ohio St. 98, 43 N. E. 282.

Damages on dissolution of injunction.

Approved in Cassem v. Ernst, 84 Ill. App. 76, holding no cause of action on bond after dissolution merely by agreement in consideration of payment of money.

Cited in Welch v. Benham, 6 Ohio N. P. 34, holding no action on injunction bond after interlocutory judgment, not being final determination; Lewis v. Jones, 65 S. C. 160, 43 S. E. 525, holding defendant entitled to reference to ascertain damages by reason of injunction, where complaint was dismissed for failure of proof.

Judgment on appeal on conceded facts.

Cited in Minnear v. Holloway, 56 Ohio St. 153, 46 N. E. 636, holding, when all material facts conceded by pleadings, appeal court, reversing for error in application of law to facts, may remand or render judgment which lower court should have rendered.

Ultra vires.

Cited in Benedict v. Market Nat. Bank, 4 Ohio N. P. 232, holding indorsement of note by corporation, proceeds going to individual, *ultra vires*.

32 L. R. A. 340, CINCINNATI STREET R. CO. v. WRIGHT, 54 Ohio St. 181, 43 N. E. 688.

Followed without discussion in Brown v. Hull, 55 Ohio St. 657, 48 N. E. 1110.

Exceptions.

Approved in Weaver v. Columbus, S. & H. Valley R. Co. 55 Ohio St. 496, 45 N. E. 717, holding, where case withdrawn from jury and judgment rendered for defendant, time within which to take bill of exceptions runs from overruling motion for new trial.

Negligence of children.

Followed in Cleveland Terminal & Valley R. Co. v. Heiman, 16 Ohio C. C. 494, holding ordinary care by children is that degree which children of same age and ordinary prudence are accustomed to exercise in similar circumstances.

Imputed negligence.

Cited in New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 343, 64 N. E. 130, holding negligence of each of two persons in carriage imputable to the other, as a joint enterprise.

32 L. R. A. 344, PEOPLE *ex rel.* EINSFELD v. MURRAY, 149 N. Y. 367, 74 N. Y. S. R. 593, 44 N. E. 146.

Appropriation of public funds.

Cited in Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 522, 51 L. R. A. 684, 80 Am. St. Rep. 767, 59 N. E. 353, holding appropriation of dog-license fee to use of private corporation unconstitutional; Mahon v. Board of Education, 171 N. Y. 265, 89 Am. St. Rep. 810, 63 N. E. 1107, holding payment of pension to teacher retired before establishment of pension system unconstitutional.

License laws.

Approved in *Re* Lyman, 46 App. Div. 392, 61 N. Y. Supp. 884, holding excise law providing for revocation of license after hearing without jury, constitutional; Kresser v. Lyman, 74 Fed. 768, holding excise law does not make contract between state and licensee, so that later act may not impair it.

Cited in *Re* Place, 27 App. Div. 568, 50 N. Y. Supp. 640, holding excise law not a tax law, but for regulation and control of traffic; *Re* Bradley, 22 Misc. 304, 49 N. Y. Supp. 1100, holding excise law enacted under police power; Augner v. New York, 14 App. Div. 469, 43 N. Y. Supp. 803 (dissenting opinion), majority upholding recovery from city, as an implied contract, proportionate part of money paid for license terminated by liquor tax law; People v. Durante, 19 App. Div. 294, 79 N. Y. S. R. 1074, 45 N. Y. Supp. 1073, holding liquor license may be mortgaged; People *ex rel.* Lawton v. Lyman, 33 Misc. 245, 68 N. Y. Supp. 331, holding false statement makes liquor license void.

— Apportionment of taxes.

Followed in People *ex rel.* Plattsburgh v. Williams, 162 N. Y. 243, 56 N. E. 625, holding that under provisions of liquor tax law, 1896, giving state one third of revenue, local statute appropriating "all excise money" to poor fund is limited to remaining two thirds.

Cited in footnote to State v. Camp Sing, 32 L. R. A. 635, which sustains license tax, part of which given to county.

—Dog license.

Approved in Fox v. Mohawk & H. River Humane Soc. 20 Misc. 467, 46 N. Y. Supp. 232, holding dog license law not tax law.

Cited in Fox v. Hohawk & H. River Humane Soc. 20 Misc. 468, 46 N. Y. Supp. 232, holding dog license statute a general statute, not requiring subject expressed in title.

Construction of Constitution.

Cited in Rathbone v. Wirth, 150 N. Y. 506, 514, 34 L. R. A. 425, 45 N. E. 15; People *ex rel.* Tyroler v. City Prison, 157 N. Y. 143, 43 L. R. A. 274, 68 Am. St. Rep. 763, 51 N. E. 1006 (dissenting opinions), majority holding construction placed by legislature upon limitations on its powers by Constitution not conclusive.

Distinguished in Rathbone v. Wirth, 6 App. Div. 303, 40 N. Y. Supp. 535, holding construction of Constitution in accordance with long course of legislative sanction not applicable unless legislation uniform in character, long acquiesced in, and never questioned in courts.

Right of local self government.

Cited in People *ex rel.* Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 446, 63 L. R. A. 894, 67 N. E. 69, upholding taxation by state officers of special corporate franchises granted by municipal corporations.

32 L. R. A. 350, OPINION OF THE JUSTICES, 165 Mass. 599, 43 N. E. 927.

Right of woman to hold office.

Cited in footnotes to State *ex rel.* Monnett v. Adams, 41 L. R. A. 727, which holds woman ineligible to office of notary public; *Re* Maddox, 55 L. R. A. 298, which denies rignt of woman to practise law.

Cited in note (38 L. R. A. 214) on right of women to hold office.

32 L. R. A. 351, WESTERN U. TELEG. CO. v. McMULLEN, 58 N. J. L. 155, 33 Atl. 384.

Duty of employer to employee.

Cited in Curley v. Hoff, 62 N. J. L. 761, 42 Atl. 731, holding where work and place of working correspond, rule of duty of employer to provide safe place extends only to reasonable care as to latent dangers; Smith v. Erie R. Co. 67 N. J. L. 641, 59 L. R. A. 304, 52 Atl. 634, holding railroad company responsible for injury to employee, due to negligence of trackmen charged with inspection and repair of tracks; Carroll v. Tidewater Oil Co. 67 N. J. L. 683, 52 Atl. 275, holding master liable for injury sustained by servant in removal of defective machine.

Cited in note (44 L. R. A. 38, 59) on duty of master to instruct and warn servants as to perils of employment.

Liability for injuries by electric wires.

Cited in footnotes to Atlanta Consol. Street R. Co. v. Owings, 33 L. R. A. 798, which holds corporation permitting wire charged with dangerous current to come in contact with wire of another company liable for injury to employee of latter; Newark Electric Light & Power Co. v. Garden, 37 L. R. A. 725, which requires electric light company to use due care in insulating wires maintained on same

pole with wires of other companies; Anderson v. Inland Teleph. & Teleg. Co. 41 L. R. A. 410, which holds telephone lineman negligent in touching span wire in contact with trolley wire, insulation of which broken; Boyd v. Portland General Electric Co. 52 L. R. A. 509, which holds want of sufficient assistance to promptly replace wires broken by severe storm not excuse, as matter of law, for delay; Mitchell v. Raleigh Electric Co. 55 L. R. A. 398, which sustains telephone company employee's right to presume that electric light wires properly insulated.

Assumption of risk.

Approved in Johnson v. Devoe Snuff Co. 62 N. J. L. 423, 41 Atl. 936, holding employee failing to protest against new dangers discovered by him beyond contract of hiring assumes risk; Benjamin Atha & I. Co. v. Costello, 63 N. J. L. 29, 42 Atl. 766, holding employee assumes risk of dangers which he could discover by ordinary care.

Cited in Durand v. New York & L. B. R. Co. 65 N. J. L. 658, 48 Atl. 1013, holding employee assumes all risks against which he may protect himself by ordinary observation and care.

32 L. R. A. 354, HOPKINS v. NASHVILLE, C. & ST. L. R. CO. 86 Tenn. 409, 34 S. W. 1029.

Demurrer to evidence.

Followed in Summers v. Louisville & N. R. Co. 96 Tenn. 462, 35 S. W. 210, and Corbett v. Smith, 101 Tenn. 370, 47 S. W. 694, holding demurrer to evidence constitutional; Southern Queen Mfg. Co. v. Morris, 105 Tenn. 657, 58 S. W. 651, holding upon demurrer being overruled, damages, if unliquidated, must be assessed by jury upon evidence contained in demurrer.

Approved in Illinois C. R. Co. v. Brown, 96 Tenn. 561, 35 S. W. 560; Thane v. Douglass, 102 Tenn. 308, 52 S. W. 155; Artenberry v. Southern R. Co. 103 Tenn. 267, 52 S. W. 878,—holding demurrer to evidence must incorporate evidence and admit its truth, with all legitimate inferences; Barr v. Southern R. Co. 105 Tenn. 545, 58 S. W. 849, holding demurrer, when filed, becomes part of record, and bill of exceptions not necessary for review.

Distinguished in Bridgeport Wooden Ware Mfg. Co. v. Louisville & N. R. Co. 103 Tenn. 492, 53 S. W. 739, holding demurrer to evidence not proper upon facts agreed upon by parties.

32 L. R. A. 367, KNISLEY v. PRATT, 148 N. Y. 372, 42 N. E. 986.

Motion for reargument denied in 149 N. Y. 582, 43 N. E. 988.

Negligence.

Cited in Sutter v. New York C. & H. R. R. Co. 79 App. Div. 368, 79 N. Y. Supp. 1106, as to fellow-servant rule; Obanhein v. Arbuckle, 80 App. Div. 469, 81 N. Y. Supp. 133, holding contract of employer to remedy defects of appliances and indemnify employee for injury not against public policy.

Assumption of risk.

Followed in Graves v. Brewer, 4 App. Div. 330, 38 N. Y. Supp. 566, sustaining nonsuit where plaintiff injured from contact with exposed cogs; Monzi v. Friedline, 33 App. Div. 219, 53 N. Y. Supp. 482, holding one cleaning elevator cable in motion assumed obvious risks and waived protection of statute prohib-

iting those under eighteen cleaning moving machinery; Dorney v. O'Neill, 34 App. Div. 499, 54 N. Y. Supp. 235, holding risk of collision with objects in dark passage assumed; Thompson v. Cary Mfg. Co. 62 App. Div. 282, 70 N. Y. Supp. 1086, as to assumption of risk from operation of defective machine in violation of statute; Nolan v. Metropolitan Street R. Co. 65 App. Div. 186, 72 N. Y. Supp. 501, holding one digging in trench under track and putting hand on rail assumes risk; Vilas v. Vanderbilt, 20 Misc. 52, 44 N. Y. Supp. 267, holding master only liable for latent defect which he ought to know existed, and which servant did know of.

Approved in Shields v. Robins, 3 App. Div. 585, 38 N. Y. Supp. 214, holding use of elevator without cover waived performance of duty of employer to protect shaft; De Young v. Irving, 5 App. Div. 504, 38 N. Y. Supp. 1089, holding no right of recovery where plaintiff, ordered in violation of statute to clean machinery in motion, knowingly consented; Renninger v. New York C. & H. R. R. Co. 11 App. Div. 568, 42 N. Y. Supp. 813, holding brakeman failing to observe drawhead before coupling assumed risk; Carlson v. Monitor Iron Works, 38 App. Div. 39, 55 N. Y. Supp. 992, declaring that one employed in putting castings in tumblers assumes risk from obvious projections; Hutchinson v. Charles F. Parker & Co. 39 App. Div. 138, 57 N. Y. Supp. 168, holding that one knowing unexploded dynamite often remained after blast assumed risk of explosion by negligence of another; Johansen v. Eastmans Co. 44 App. Div. 272, 60 N. Y. Supp. 708, holding no assumption of risk, as matter of law, by servant shoveling fat and unfamiliar with machinery, from unprotected overhead revolving shaft without projection; Burns v. Nichols Chemical Co. 65 App. Div. 427, 72 N. Y. Supp. 919, holding plaintiff, injured in falling through elevator opening not fenced as required by law, assumed risk; Di Pietro v. Empire Portland Cement Co. 70 App. Div. 504, 75 N. Y. Supp. 275, holding employee going voluntarily on scaffold near exposed cogs assumes risk; Ingram v. Fosburgh, 73 App. Div. 132, 76 N. Y. Supp. 344, holding one riding in elevator against orders of employer, with knowledge of danger, assumed risk; Mull v. Curtice Bros. Co. 74 App. Div. 563, 77 N. Y. Supp. 813, holding one continuing to operate machine not relieved by factory law from consequences of voluntary act; Hayes v. Fay, 22 Misc. 322, 49 N. Y. Supp. 112, holding question of assumed obvious risk for jury; Perschke v. Hencken, 78 N. Y. S. R. 266, 44 N. Y. Supp. 265, holding statement of foreman that appliance is safe does not affect assumption of risk; E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 223, 51 U. S. App. 74, 79 Fed. 903, holding factory act does not impose on employer liability for injuries to employee arising from obvious risk of unprotected cogs; The Saratoga, 87 Fed. 358, holding shipowner to defend on ground of assumption of risk of open hatchway must show custom to keep open and unlighted; Anderson v. C. N. Nelson Lumber Co. 67 Minn. 82, 69 N. W. 630, holding imposition by statute of duty of guarding machinery does not affect rule as to assumption of risks; Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 157, 59 L. R. A. 702, 96 Am. St. Rep. 380, 91 N. W. 1034, holding continuance of brakeman at work knowing speed ordinance violated is assumption of risk of unlawful speed; McCarthy v. Emerson, 77 App. Div. 565, 79 N. Y. Supp. 180, holding employee assumes obvious risks of business as well under factory act as otherwise; Jenks v. Thompson, 83 App. Div. 345, 82 N. Y. Supp. 274, holding doctrine of assumption of risk applies to cases arising under labor act; Sitts v. Waiontha Knitting Co. 94 App. Div. 43, 87

N. Y. Supp. 911, holding employee assumes risk of accident from hand coming in contact with unguarded rollers; St. Louis Cordage Co. v. Miller, 63 L. R. A. 561, 61 C. C. A. 491, 126 Fed. 509, holding factory act does not abolish defense of assumption of risk from obvious dangers in respect to gearing and machinery.

Cited in Horton v. Vulcan Iron Works Co. 13 App. Div. 513, 43 N. Y. Supp. 699, holding risk from set screw on revolving shaft assumed by person passing beneath it; Meehan v. Judson, 43 App. Div. 51, 59 N. Y. Supp. 578, holding doctrine of assumption of risk not applicable where inexperienced employee was injured by reason of defective jack, work itself not being hazardous; Munn v. L. Wolff Mfg. Co. 94 Ill. App. 126, holding employee cannot recover for injury when continuing to work, with knowledge of risk, at appliance not protected as required by ordinance; Young v. Syracuse, B. & N. Y. R. Co. 45 App. Div. 305, 61 N. Y. Supp. 202 (dissenting opinion), majority holding assumption of risk not applicable where master has not used reasonable care in providing safe place to work.

Cited in footnote to Stager v. Troy Laundry Co. 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Cited in note (47 L. R. A. 175, 191) on *volenti non fit injuria* as defense to actions by injured servants.

Distinguished in Dowd v. New York, O. & W. R. Co. 170 N. Y. 472, 63 N. E. 541, holding burden on defendant to show plaintiff assumed risk from practice of kicking cars upon siding where he was repairing cars; Marino v. Lehmaier, 173 N. Y. 534, 61 L. R. A. 813, 66 N. E. 572, holding child, prohibited by labor law on account of youth from being employed in factory, not chargeable with assumption of risk; Marino v. Lehmaier, 173 N. Y. 534, 61 L. R. A. 813, 66 N. E. 572, holding child whose employment in factory is forbidden by statute because of immature age is not, as matter of law, chargeable with contributory negligence or assumption of risk.

Disapproved in Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L. R. A. 76, 37 C. C. A. 503, 96 Fed. 302, holding continuance in employment with knowledge that employer has not complied with safety statute not assumption of risk; Monteith v. Kokomo Wood Enameling Co. 159 Ind. 160, 58 L. R. A. 949, footnote p. 944, 64 N. E. 610, holding employee has right of action for injuries caused by master's failure to comply with statutory duty to guard circular saw.

Master's statutory liability.

Approved in Indiana Mfg. Co. v. Wells, 31 Ind. App. 463, 68 N. E. 319, holding master's statutory liability for failure to provide belt-shifters arises when inspector's order to furnish them has not been complied with; Brown v. Wittner, 43 App. Div. 137, 59 N. Y. Supp. 385, holding landlord's violation of statutory duty to light stairway gives tenant right of action for damages resulting therefrom.

Contributory negligence.

Cited in note (49 L. R. A. 44) on contributory negligence in entering or remaining in employment.

32 L. R. A. 370, WILHELM v. WILKEN, 149 N. Y. 447, 52 Am. St. Rep. 743, 44 N. E. 82.

Title under quitclaim deed.

Approved in Schott v. Dosh, 49 Neb. 193, 59 Am. St. Rep. 531, 68 N. W. 346, holding grantee of recorded quitclaim deed, in good faith and without notice, takes as against grantee of prior unrecorded deed.

Cited in Sanders v. Riedinger, 30 App. Div. 282, 51 N. Y. Supp. 937, holding evidence that quitclaim grantee from tax lessee entered under agreement for sale, believing and claiming he had fee, sufficient to support finding of possession as owner, and basis for title by adverse possession.

32 L. R. A. 373, CUNNINGHAM v. DAVENPORT, 147 N. Y. 43, 49 Am. St. Rep. 641, 41 N. E. 412.

Revocable trusts.

Cited in Moloney v. Tilton, 22 Misc. 688, 51 N. Y. Supp. 19, holding that as against beneficiary in recorded declaration of trust, reserving power to sell and reinvest for beneficiary, grant to third person knowing facts, void; Fellows v. Fellows, 69 N. H. 345, 348, 46 Atl. 474, holding conveyance of land in consideration of bond for payment to third person on death of grantor creates trust for third person revocable before death of grantor.

Trust in bank deposit.

Followed in Haux v. Dry Dock Sav. Inst. 2 App. Div. 167, 37 N. Y. Supp. 917, and Decker v. Union Dime Sav. Inst. 15 App. Div. 554, 44 N. Y. Supp. 521, holding question whether trust created depends on intention of donor at time of deposit; *Re* Mueller, 15 App. Div. 69, 44 N. Y. Supp. 280, holding depositor not intending to give beneficiary interest in fund does not devest himself of legal title; Domestic Missions v. Mechanics' Sav. Bank, 40 App. Div. 123, 24 Misc. 597, 54 N. Y. Supp. 28, holding that deposit "in trust" created trust valid on death of depositor before beneficiary, although bank's rules not followed; Jenkins v. Baker, 36 Misc. 56, 72 N. Y. Supp. 546, and *Re* Snyder, 37 Misc. 59, 74 N. Y. Supp. 832, holding presumption of trust from deposit "in trust for" another rebutted by depositor's testimony denying intention to make trust.

Approved in Harrison v. Totten, 29 Misc. 700, 62 N. Y. Supp. 754, holding mere fact of deposit being made "in trust for" another, who never heard of it, does not entitle him to fund on depositor's death; Williams v. Brooklyn Sav. Bank, 51 App. Div. 333, 64 N. Y. Supp. 1021, holding deposit in trust for another establishes prima facie intention to create trust, although book kept, beneficiary ignorant, and part withdrawn; Meislahn v. Meislahn, 56 App. Div. 567, 67 N. Y. Supp. 480, holding deposit "in trust for" daughter, with statement that depositor had money in trust for daughters, establishes intention to make trust; Washington v. Bank for Savings, 65 App. Div. 340, 72 N. Y. Supp. 752, holding that where beneficiary of deposit in trust had no existence, depositor's representative has title; Lee v. Kennedy, 25 Misc. 142, 54 N. Y. Supp. 155, holding no trust created where money deposited "for" another, subject to condition not performed; Miller v. Seamen's Bank for Saving, 33 Misc. 710, 68 N. Y. Supp. 983, holding deposit in trust unexplained gives title to beneficiary at depositor's death; *Re* Barefield, 36 Misc. 748, 74 N. Y. Supp. 472, holding no trust presumed from bare deposit "in trust for" another, with declaration of depositor of no intention to

make trust; *Re* Totten, 38 Misc. 351, 77 N. Y. Supp. 928, holding, where intention of depositor shown from circumstances to be not to transfer beneficial interest, no trust presumed; Booth v. Oakland Bank of Savings, 122 Cal. 25, 54 Pac. 370, holding trust established by direction to bank to make account subject to check of both beneficiary and depositor, and notice to beneficiary; Dickie v. Adams, 40 Misc. 91, 81 N. Y. Supp. 336, denying recovery from estate of depositor to alleged beneficiary in absence of proof of declaration of depositor creating trust, or that trust fund forms part of estate; *Re* Smith, 40 Misc. 335, 81 N. Y. Supp. 1035, holding no trust exists in favor of husband's administrator in fund deposited by wife, in trust for husband, without his knowledge, with intent he should take if he survived her; *Re* Barefield, 177 N. Y. 393, 101 Am. St. Rep. 814, 69 N. E. 732, holding deposit by daughter of her money in trust for mother does not create trust where such was not her intention and she retained book.

Explained in Jenkins v. Baker, 77 App. Div. 511, 78 N. Y. Supp. 1074, holding fact of opening bank account in trust is declaration of trust and sufficient to prove trust in favor of beneficiary.

Cited in Proseus v. Porter, 20 App. Div. 46, 46 N. Y. Supp. 656, holding fact that depositor, after giving beneficiary pass book of fund "in trust," drew on account not conclusive against trust; Jackson v. Murray, 25 App. Div 141, 49 N. Y. Supp. 195, holding withdrawal of money "in trust" for another, after injunction, contempt of court; Bishop v. Seaman's Bank for Savings, 33 App. Div. 182, 53 N. Y. Supp. 488, holding presumption in favor of trust from deposit in trust, without rebutting evidence, although beneficiary died before trustee; Martin v. Martin, 46 App. Div. 448, 61 N. Y. Supp. 813, holding deposit in name of another, with addition that depositor "may draw," constituted trust for the other, although beneficiary did not know it and depositor kept book; Haynes v. McKee, 19 Misc. 512, 43 N. Y. Supp. 1126, holding where beneficiary of trust on death of trustee delivers fund to executor, who distributes, it cannot be recovered as money had and received; Jennings v. Hennessy, 26 Misc. 266, 55 N. Y. Supp. 833, holding trust in savings bank deposit revocable before death of depositor; Peoples Sav. Bank v. Webb, 21 R. I. 221, 42 Atl. 874, holding deposit as "trustee for" another subject to testimony of depositor denying intention to create trust; *Re* Totten, 89 App. Div. 371, 85 N. Y. Supp. 928, holding deposit of money in bank in several accounts in trust for designated person creates trust, although all but one of accounts drawn out by depositor.

Cited in footnotes to Bath Sav. Institution v. Hathorn, 32 L. R. A. 377, which holds prima facie trust created by words "in trust for" in entry of savings bank deposit; Leaphart v. Commercial Bank, 33 L. R. A. 700, which holds money deposited in bank by one described as "manager," subject to check; Duckett v. National Mechanics' Bank, 39 L. R. A. 84, which holds bank liable to trust estate for crediting to individual account check stating that it is for deposit to credit of specified person, "trustee."

Distinguished in Farleigh v. Cadman, 159 N. Y. 172, 53 N. E. 808, holding irrevocable trust created in fund deposited expressly in trust for beneficiary present at time; Grafing v. Heilmann, 1 App. Div. 262, 37 N. Y. Supp. 253, holding money in name of depositor in trust for another, a valid trust although depositor kept pass book and drew interest; Robertson v. McCarty, 54 App. Div. 107, 66 N. Y. Supp. 327, holding fact of deposit in trust without other evidence of depositor's intent made irrevocable trust, although beneficiary did not know it and depositor

kept book; *Re* Barefield, 82 App. Div. 465, 81 N. Y. Supp. 843, holding unexplained deposit in trust creates valid trust, subject to denial by depositor of such intention; Washington v. Seamen's Bank for Saving, 29 Misc. 493, 61 N. Y. Supp. 971, refusing interpleading in action against bank of apparent beneficiary of deposit, depositor's representative claiming bank knew name of beneficiary was fictitious; *Re* Biggars, 39 Misc. 430, 80 N. Y. Supp. 214, holding valid, trust for person for whose benefit deposit made, although he knew nothing of it and depositor retained book and drew on account.

Annotation in 32 L. R. A. 373, referred to particularly in Milholland v. Whalen, 89 Md. 217, 44 L. R. A. 207, footnote p. 205, 43 Atl. 43, holding valid trust created by deposit in savings bank in trust for owner and another, payable to order of either, with balance to survivor.

Intent with which account opened.

Approved in *Re* Anthony, 40 Misc. 498, 82 N. Y. Supp. 789, holding ownership of fund in special account opened by husband in name of wife depends upon intent with which account was opened.

Stay of proceedings.

Approved in Jenkins v. Baker, 91 App. Div. 402, 86 N. Y. Supp. 958, holding assumed conflict between decisions of appellate division and court of appeals not ground for stay of proceedings.

32 L. R. A. 377, BATH SAV. INST. v. HATHORN, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836.

Trusts in personal property.

Followed in Norway Sav. Bank v. Merriam, 88 Me. 150, 33 Atl. 840, holding necessary for valid trust in bank deposit, unequivocal language or act showing intention.

Approved in Whitehouse v. Whitehouse, 90 Me. 476, 60 Am. St. Rep. 278, 38 Atl. 374, holding valid, trust in check retained by drawer with declaration of trust for another; Booth v. Oakland Bank of Savings, 122 Cal. 25, 54 Pac. 370, holding trust established by direction to bank to make account subject to check of both beneficiary and depositor, and notice to beneficiary.

Cited in Hewett v. Hurley, 88 Me. 434, 34 Atl. 274, holding valid, trust in check to daughter of drawer for monument fund; Hallowell Sav. Inst. v. Titcomb, 96 Me. 69, 51 Atl. 249, holding unequivocal declaration of trust, although conditional, may constitute valid trust on performance of condition; Peoples Sav. Bank v. Webb, 21 R. I. 222, 42 Atl. 878, holding deposit as "trustee for" another, subject to testimony of depositor denying intention to create trust; Milholland v. Whalen, 89 Md. 215, 44 L. R. A. 207, footnote p. 205, 43 Atl. 43, holding valid trust created by deposit in savings bank in trust for owner and another, payable to order of either with balance to survivor; Brown v. Crafts, 98 Me. 47, 56 Atl. 213, holding intended, but not completed, gift cannot be enforced as trust; Martin v. Martin, 43 Or. 123, 72 Pac. 639, holding parol evidence competent to show that transfer of personalty by conveyance absolute in form was in trust.

Cited in footnote to Duckett v. National Mechanics' Bank, 39 L. R. A. 84, which holds bank liable to trust estate for crediting to individual account check stating that it is for deposit to credit of specified person, "trustee."

Gifts inter vivos.

Cited in *Re* Munson, 25 Misc. 589, 56 N. Y. Supp. 151, and Chambers v. M'Creery,

45 C. C. A. 326, 106 Fed. 368, holding it necessary, to establish gift *inter vivos*, to show intent of donor to devest title, without reserving use of gift for certain time or for life.

32 L. R. A. 380, BITTENHAUS v. JOHNSTON, 92 Wis. 588, 66 N. W. 805.

Validity of statute.

Distinguished in State v. Wendler, 94 Wis. 373, 68 N. W. 759, sustaining neither of two enrolled bills approved by governor, one not corresponding with same original but containing amendments, and other correct but without amendments.

Constitutional law.

Cited in Rider-Wallis Co. v. Fogo, 102 Wis. 540, 78 N. W. 767, sustaining statute providing for appointment of receivers of insolvent debtors without jury trial of facts, as not violating constitutional jury trial provision.

Fisheries.

Cited in footnotes to State v. Higgins, 38 L. R. A. 561, which holds statute prohibiting noncitizens of county from fishing without license, void; Gustafson v. State, 43 L. R. A. 615, which holds void, act limiting to taxpayers right to take oysters in public waters; State v. Dow, 53 L. R. A. 314, which sustains statute against fishing for trout with intent to sell or trade.

Cited in note (39 L. R. A. 590, 591) on governmental control over right of fishery.

Class legislation.

Approved in Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 156, 36 L. R. A. 57, 60 Am. St. Rep. 105, 70 N. W. 68, holding statute permitting commission of drunkards to gold cure instituted at expense of county not within police powers.

Cited in State *ex rel.* Winkler v. Benzenberg, 101 Wis. 177, 76 N. W. 345, holding unconstitutional, statute compelling licensing of plumbers, but requiring only one member of firm or corporation to be licensed; State *ex rel.* Kellogg v. Currens, 111 Wis. 436, 56 L. R. A. 255, 87 N. W. 561, sustaining statute requiring physicians to pass examination, but admitting graduates of certain schools without examination; State *ex rel.* New Richmond v. Davidson, 114 Wis. 573, 58 L. R. A. 741, 90 N. W. 1067, sustaining statute reimbursing city for debt incurred in time of great disaster from cyclone, as for public purpose.

Official destruction of private property.

Distinguished in Houston v. State, 98 Wis. 486, 42 L. R. A. 48, 74 N. W. 111, holding state not responsible in damages for destruction of healthy cattle by negligent tort of state officers under color of statute.

32 L. R. A. 383, SHAKMAN v. UNITED STATES CREDIT SYSTEM CO. 92 Wis. 366, 53 Am. St. Rep. 920, 66 N. W. 528.

Insurance.

Cited in Sloman v. Mercantile Credit Guarantee Co. 112 Mich. 262, 70 N. W. 886, holding ambiguity in policy is to be resolved in favor of insured; State v. Hogan, 8 N. D. 306, 45 L. R. A. 169, 73 Am. St. Rep. 759, 78 N. W. 1051, holding guaranty of fixed revenue of land with contract to pay fixed amount per acre of

crop, insurance; People *ex rel.* Kasson v. Rose, 174 Ill. 314, 44 L. R. A. 126, footnote p. 124, 51 N. E. 246, holding guaranteeing fidelity of officers and performance of contracts insurance; Ellison v. Straw, 119 Wis. 508, 97 N. W. 168, holding life insurance is promise to pay certain sum upon death of assured; Knights Templars & M. Life Indemnity Co. v. Vail, 206 Ill. 415, 68 N. E. 1103, holding contract of policy holder in benefit society not changed by acceptance of bond at variance with provisions of constitution of company.

Cited in footnote to Smith v. National Credit Ins. Co. 33 L. R. A. 511, which denies right to rescind policy for insolvency of credit insurance company during period covered.

Abatement by dissolution of corporation.

Cited in footnote to Shayne v. Evening Post Pub. Co. 55 L. R. A. 777, which holds libel suit against dissolved corporation properly revived against trustees.

32 L. R. A. 388, HOVEN v. WEST SUPERIOR IRON & STEEL CO. 93 Wis. 201, 67 N. W. 46.

Insurance against liability for personal injuries.

Approved in Cornell v. Travelers' Ins. Co. 66 App. Div. 563, 73 N. Y. Supp. 341, sustaining recovery on policy insuring against liability for injuries to others than employees for expenses of successful defense.

Cited in Fenton v. Fidelity & C. Co. 36 Or. 290, 48 L. R. A. 772, footnote p. 770, 56 Pac. 1096, holding indemnity against liability for injuries to employees assignable though employer insolvent; Employers Liability Assur. Corp. v. Light, Heat & Power Co. 28 Ind. App. 441, 63 N. E. 54, holding policy giving insured right to engage immediate medical service for injured person does not include living expenses; Sanders v. Frankfort, M. Acci. & Plate Glass Ins. Co. 72 N. H. 493, 101 Am. St. Rep. 688, 57 Atl. 655, holding employer's liability policy a contract to indemnify against liability.

—Inuring to employee injured.

Cited in Moore v. Los Angeles Iron & Steel Co. 89 Fed. 77, holding insurance against liability for injuries to employees inures directly to benefit of employee, under California statute; Bain v. Atkins, 181 Mass. 244, 57 L. R. A. 792, footnote p. 791, 92 Am. St. Rep. 411, 63 N. E. 414, denying right of injured person to sue insurer against loss through liability for injuries, after settlement with insured.

Cited in footnote to Embler v. Hartford Steam Boiler Inspection & Ins. Co. 44 L. R. A. 512, which denies right of personal representatives of employee to recover on policy taken out by employer insuring against injury to employees.

Distinguished in Frye v. Bath Gas & Electric Co. 97 Me. 245, 59 L. R. A. 446, 94 Am. St. Rep. 500, 54 Atl. 395, holding employer's liability policy does not inure to benefit of injured employee so that he can enforce payment of it after employer's insolvency.

32 L. R. A. 391, STATE *ex rel.* MYLREA v. JANESVILLE WATER POWER CO. 92 Wis. 496, 66 N. W. 512.

Estoppel.

Followed in Reuter v. Lawe, 94 Wis. 306, 34 L. R. A. 736, 59 Am. St. Rep. 891, 68 N. W. 955, holding public estopped to claim plat originally dedicated by owner as park, for which he was later taxed and compelled to make improvements thereon.

— Of railroad.

Cited in Northern P. R. Co. v. Ely, 25 Wash. 391, 54 L. R. A. 531, 87 Am. St. Rep. 766, 65 Pac. 555, holding railroad company estopped by acquiescence in acquisition by settlers of its land, making great expenditures and improvements upon it.

Forfeiture of franchise.

Followed in Ashland v. Ashland Water Co. 110 Wis. 97, 85 N. W. 695, holding application to begin action to forfeit franchise not granted on petition on information and belief, met by answer putting allegations all in issue, supported by competent affidavits.

Approved in Milwaukee Electric R. & Light Co. v. Milwaukee, 95 Wis. 42, 36 L. R. A. 46, 60 Am. St. Rep. 81, 69 N. W. 794, holding no power in city to maintain action to forfeit franchise of street railroad; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 517, 83 N. W. 851, holding owner of abutting property cannot enjoin street railroad from accepting franchise; Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 36, 36 L. R. A. 50, 60 Am. St. Rep. 74, 69 N. W. 791, holding voluntary surrender of franchise of street railroad not presumed from nonuser of part of line, or taking up track on part.

Cited in footnotes to Du Bois v. Du Bois City Waterworks Co. 34 L. R. A. 92, which holds cancelation of contract by city for water supply not justified by inadequacy of supply; Palestine Water & Power Co. v. Palestine, 40 L. R. A. 203, which holds flagrant disregard of duty to furnish wholesome water, ground for forfeiting water company's franchise.

Distinguished in Allen v. Clausen, 114 Wis. 249, 90 N. W. 181, holding court, where unlawful act justified by pretended franchise which grantor had no power to grant, may investigate such power.

Purchase of waterworks.

Cited in note (61 L. R. A. 47) on municipal contract to purchase waterworks.

32 L. R. A. 394, CHITTY v. CHITTY, 118 N. C. 647, 24 S. E. 517.

Residence.

Cited in *Re* Grimes, 94 Fed. 801, holding creditor objecting to exemption on ground of not being domiciled in state has burden to show change of domicil; *Re* Dinglehoef, 109 Fed. 867, holding woman not resident of state of which her husband had never been resident and in which she had never been, except on visit short time.

32 L. R. A. 396, STATE v. OSTWALT, 118 N. C. 1208, 24 S. E. 660.

Appeal in criminal action.

Followed in State v. Ballard, 122 N. C. 1026, 29 S. E. 899, and State v. Bruce, 122 N. C. 1041, 30 S. E. 141, holding no appeal from acquittal in bastardy proceedings.

Approved in State v. Savery, 126 N. C. 1088, 49 L. R. A. 586, 36 S. E. 22, holding no appeal by state from general verdict of not guilty, as upon quashing of indictment, when entered because warrant issued without affidavit.

Bastardy proceedings as criminal.

Followed in State v. White, 125 N. C. 677, 34 S. E. 532, holding exclusive original jurisdiction of bastardy proceedings in justice of peace.

Cited in McDonald v. Morrow, 119 N. C. 675, 26 S. E. 132, and State v. Nelson, 119 N. C. 799, 25 S. E. 863, to proposition that bastardy is criminal offense; State v. Pierce, 123 N. C. 747, 31 S. E. 847, holding that where statute makes act unlawful or sets penalty therefor, such act is crime; State v. Mitchell, 119 N. C. 788, 25 S. E. 1020 (dissenting opinion), majority holding defendant in bastardy action may waive right to be confronted by accusers as in criminal proceeding; State v. White, 125 N. C. 686, 34 S. E. 532 (dissenting opinion), majority holding one convicted in bastardy proceedings may be discharged from jail on complying with insolvent debtor's act.

Overruled in State v. Liles, 134 N. C. 737, 47 S. E. 750, holding proceeding in bastardy a civil action.

32 L. R. A. 400, GRIFFIN v. UNITED ELECTRIC LIGHT CO. 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675.

Contributory negligence in regard to electric wires.

Followed in Reagan v. Boston Electric Light Co. 167 Mass. 413, 45 N. E. 743, holding question of due care in one not an expert touching electric light wire on outside of building, for jury.

Approved in Perham v. Portland Electric Co. 33 Or. 476, 40 L. R. A. 809, 72 Am. St. Rep. 730, 53 Pac. 14, holding question whether workman repairing bridge on which wires strung used due care, for jury; Griffith v. New England Teleph. & Teleg. Co. 72 Vt. 444, 52 L. R. A. 920, 48 Atl. 643, holding where person killed while sitting by telephone in thunder storm, has knowledge as to whether wires properly protected from lightning, question for jury; Will v. Edison Electric Light Co. 19 Lanc. L. Rev. 338, holding painter at work on building not guilty of contributory negligence in grasping uninsulated wire in emergency.

Cited in footnote to Anderson v. Inland Teleph. & Teleg. Co. 41 L. R. A. 410, which holds telephone lineman negligent in touching span wire in contact with trolley wire, insulation of which broken.

Negligence of owner of electric wires.

Approved in Wagner v. Brooklyn Heights R. Co. 69 App. Div. 351, 74 N. Y. Supp. 809, holding ordinary care of company operating wires carrying heavy current includes inspection which would preserve insulation from dangerous condition; Knowlton v. Des Moines Edison Light Co. 117 Iowa, 456, 90 N. W. 818, holding it duty of electric light company to insulate or put out of the way wires along highway or public places, to avoid danger to persons who might otherwise, without negligence, be injured; Geismann v. Missouri Edison Electric Co. 173 Mo. 677, 73 S. W. 654, holding it duty of electric company to insulate wires in all places where people have a right to go, and holding it liable, on failure to do so, for injuries resulting to one exercising due care; Com. Electric Co. v. Melville, 110 Ill. App. 249, holding negligence of licensee in failing to properly insulate electric wires, whereby another licensee is injured, question for jury.

Cited in Perham v. Portland Electric Co. 33 Or. 476, 40 L. R. A. 809, footnote p. 799, 72 Am. St. Rep. 730, 53 Pac. 14, holding it negligent to string over bridge dangerous electric wires with which employee must come in contact when making repairs; Griffith v. New England Teleph. & Teleg. Co. 72 Vt. 444, 52 L. R. A. 920, footnote p. 919, 48 Atl. 643, requiring telephone company to exercise care to prevent accident by conducting lightning into house over wires; Brown v. Edison Electric Illuminating Co. 90 Mo. 406, 46 L. R. A. 747, footnote p. 745, 78 Am. St.

Rep. 442, 45 Atl. 185, holding prima facie presumption of negligence arises from injury to boy by contact with exposed point of charged wire within few inches of small roof just below second story window; Riley v. New England Teleph. & Teleg. Co. 184 Mass. 155, 68 N. E. 17 (dissenting opinion), majority holding telegraph company liable to traveler injured while in exercise of due care, by reason of telegraph pole erected under municipal license.

Cited in footnotes to McLaughlin v. Louisville Electric-Light Co. 34 L. R. A. 812, which requires utmost care necessary to keep insulation of electric wires perfect at place where persons have right to be; Bland v. Shreveport Belt R. Co. 36 L. R. A. 114, which holds fall of pole on removal of guy wire gives right of action for injury to lineman; Moran v. Corliss Steam-Engine Co. 45 L. R. A. 267, which holds employer using defectively insulated wire with slight current liable for injury to employee due to outside contact with dangerous current; Brush Electric Light & Power Co. v. Lefevre, 49 L. R. A. 771, which denies liability for death by uninsulated electric light wire running above awning 16 feet above street; Boyd v. Portland General Electric Co. 52 L. R. A. 509, which holds want of sufficient assistance to promptly replace wires broken by severe storm not excuse, as matter of law, for delay; Cumberland Teleg. & Teleph. Co. v. Martin, 63 L. R. A. 469, which denies liability of telephone company negligently stretching inadequately insulated wire over roof of store porch, to passerby killed, while taking refuge under roof from storm, by lightning escaping from wire.

Liability of other than master for injuries to servant performing duty.

Cited in note (46 L. R. A. 98) on right of servant to recover damages from persons other than his master for injuries received in performance of duty.

32 L. R. A. 404, PLATE v. DURST, 42 W. Va. 63, 24 S. E. 580.

Appeal and error.

Cited in Cunningham v. Bucky, 42 W. Va. 672, 35 L. R. A. 851, 57 Am. St. Rep. 876, 26 S. E. 442, holding no reversal for errors of instruction where verdict plainly accords with evidence; McCray v. Fairmont, 46 W. Va. 444, 33 S. E. 245, and Arthur v. Charleston, 51 W. Va. 136, 41 S. E. 171, as to practice of asking several instructions to same point.

Distinguished in Webb v. Big Kanawha & O. R. Packet Co. 43 W. Va. 815, 29 S. E. 519, holding reversal proper where it is doubtful whether error in admitting evidence was prejudicial to appellant.

Services to parent.

Approved in Harris v. Orr, 46 W. Va. 265, 76 Am. St. Rep. 815, 33 S. E. 257, holding enforceable, promise of father to pay son for caring for and supporting him; Gorrell v. Taylor, 107 Tenn. 570, 64 S. W. 888, holding presumption that services of child to parent were rendered gratuitously overcome by evidence of express contract or exceptional circumstances.

32 L. R. A. 408, FIRST NAT. BANK v. HARKNESS, 42 W. Va. 156, 24 S. E. 548.

Pledge.

Distinguished in First Nat. Bank v. Caperton, 74 Miss. 869, 60 Am. St. Rep. 540, 22 So. 60, holding mortgage on products of manufacturer, subject to constant substitution and mortgagor's right to keep, use, and sell, void as to creditors.

32 L. R. A. 413, HONAKER v. BOARD OF EDUCATION, 42 W. Va. 170, 57 Am. St. Rep. 847, 24 S. E. 544.

Powers of school officials.

Approved in County School Comrs. v. Goldsborough, 90 Md. 204, 44 Atl. 1055, holding no power conferred on school commissioners as individuals; McGee v. Franklin Pub. Co. 15 Tex. Civ. App. 222, 39 S. W. 335, holding no discretion in school trustees in purchasing articles not of class authorized by legislature; Cunningham v. Board of Education, 53 W. Va. 323, 44 S. E. 129, holding members of board of education can do no official business except when assembled as board, and by due notice to all members.

32 L. R. A. 416, KIRK v. NORFOLK & W. R. CO. 41 W. Va. 722, 56 Am. St. Rep. 899, 24 S. E. 639.

Damage to trespassing animals.

Cited in footnotes to Johnson v. Oregon Short Line R. Co. 53 L. R. A. 744, which holds railroad company liable for horses killed on unfenced track; Beinhorn v. Griswold, 59 L. R. A. 771, which denies liability of owner of unfenced land for death of trespassing animals by drinking poisonous liquids used in his business.

Use of salt on tracks.

Cited in footnote to State, Consolidated Co., Prosecutor, v. Elizabeth, 32 L. R. A. 170, which holds valid, ordinance prohibiting use of salt on street car tracks except on curves.

32 L. R. A. 420, CARSON-RAND CO. v. STERN, 129 Mo. 381, 31 S. W. 772.

Actions by foreign corporations.

Followed in Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 575, 74 S. W. 128, holding foreign corporation may, after complying with the statutory requirements to enable it to do business, maintain suit on contract made before such compliance.

Approved in Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 535, 91 Am. St. Rep. 87, 69 S. W. 572, holding foreign corporation complying, after action begun, with statute prohibiting maintenance of such action if statute not obeyed, entitled to continue action.

Distinguished in Ehrhardt v. Robertson Bros. 78 Mo. App. 411, holding void, contracts of foreign corporation which has not complied with statute permitting it to do business in state.

Disapproved in Heileman Brewing Co. v. Peimeisl, 85 Minn. 124, 88 N. W. 441, holding foreign corporation which has not complied with statute permitting it to do business cannot maintain action growing out of unlawful business.

Sale of homestead for debts.

Cited in Keene v. Wyatt, 160 Mo. 16, 63 S. W. 116 (dissenting opinion), majority holding homestead may be sold at death of deceased homesteader, for his debts.

32 L. R. A. 422, CARPENTER v. LINGENFELTER, 42 Neb. 728, 60 N. W. 1022.

Cross-examination.

Approved in Barton v. State, 154 Ind. 672, 57 N. E. 515, holding answer of witness to immaterial question on cross-examination binding on examining party.

Accession.

Cited in footnote to Eaton v. Langley, 42 L. R. A. 474, which sustains owner's right to recover crossties cut by other person by mistake.

Measure of damages.

Cited in Anderson v. Besser, 131 Mich. 485, 91 N. W. 737, holding damages in trover for removal of timber in good faith is market value at place of sale, less cost of cutting and transportation, and referring particularly to annotation in 32 L. R. A. 422.

32 L. R. A. 435, PETAJA v. AURORA IRON MIN. CO. 106 Mich. 463, 58 Am. St. Rep. 505, 66 N. W. 951, 64 N. W. 335.

Fellow servant doctrine.

Approved in Frazee v. Stott, 120 Mich. 628, 79 N. W. 896, holding employees of mill changing rollers, fellow servants of operator of rollers.

Cited in footnote to Wellston Coal Co. v. Smith, 55 L. R. A. 99, which holds miner intrusted with duties of mine boss not fellow servant of other miners.

Cited in notes (51 L. R. A. 534, 613) on vice principalship considered with reference to superior rank of negligent servant; (54 L. R. A. 110, 111, 138) on vice principalship as determined with reference to character of act which caused injury.

Duty of master as to safety of servant.

Cited in Turner v. St. Clair Tunnel Co. 111 Mich. 582, 36 L. R. A. 137, 66 Am. St. Rep. 397, 70 N. W. 146, as to duty to make place of labor safe; Corson v. Coal Hill Coal Co. 101 Iowa, 228, 70 N. W. 185, holding master must keep in repair roof of mine entry under which servant passes in charge of cars; Oleson v. Maple Grove Coal & Min. Co. 115 Iowa, 77, 87 N. W. 736, holding doctrine that master must provide safe place not applicable where place becomes unsafe during progress of work; Wahlquist v. Maple Grove Coal & Min. Co. 116 Iowa, 721, 89 N. W. 98, holding employee cannot recover for injuries received by reason of the defect he is employed to repair.

Cited in footnotes to Ellsworth v. Metheney, 51 L. R. A. 389, which holds mine owner required to properly guard electric wire in passageway where miners accustomed to go; Finn v. Cassidy, 53 L. R. A. 877, which holds safe place not *per se* provided by contractor having employees work in tunnel under foundation of chimney, with knowledge that undisturbed earth saturated with water; Schmalstieg v. Leavenworth Coal Co. 59 L. R. A. 707, which holds mine owner liable for injury to employee from negligence of fire boss whose employment required by statute; Tradewater Coal Co. v. Johnson, 61 L. R. A. 161, which holds master liable for failure of loaders to remove loose coal hanging in mine, rendering it unsafe for other employees.

Assumption of risk.

Cited in Larsson v. McClure, 95 Wis. 540, 70 N. W. 662, and Mielke v. Chicago & N. W. R. Co. 103 Wis. 5, 74 Am. St. Rep. 834, 79 N. W. 22, holding risk from negligence of fellow servant causing fall of cliff assumed by plaintiff digging at its base.

Cited in footnote to Hanley v. California Bridge & Constr. Co. 47 L. R. A. 597, which denies assumption by servant of risk of caving-in of completed part of tunnel.

32 L. R. A. 439, DETROIT v. LEWIS, 109 Mich. 155, 66 N. W. 958.

Taxation of personalty.

Cited in footnotes to Hamilton v. Wilson, 48 L. R. A. 238, which holds void, statute for taxation of personal judgments with specified exceptions; Minneapolis & N. Elevator Co. v. Traill County, 50 L. R. A. 267, which sustains statute taxing grain in elevators, etc., in proprietor's name.

— Of nonresidents.

Approved in Howell v. Gordon, 127 Mich. 521, 86 N. W. 1042, holding credits of nonresident not taxable.

Cited in Augusta v. Kimball, 91 Me. 609, 41 L. R. A. 477, footnote p. 475, 40 Atl. 566, holding nonresident trustees not taxable for property held by them outside of state; Frankfort v. Fidelity Trust & S. V. Co. 111 Ky. 675, 64 S. W. 470, holding mortgage and bonds secured thereby, belonging to nonresident, not taxable although trustee named therein is resident.

Cited in footnote to Schmidt v. Failey, 37 L. R. A. 442, which holds money in receiver's hands taxable in state though largely paid over by receivers in other states.

Distinguished in Baars v. Grand Rapids, 129 Mich. 576, 89 N. W. 328, holding mortgages owned by nonresident not taxable although in possession of local agent.

32 L. R. A. 442, VINING v. MILLAR, 109 Mich. 205, 67 N. W. 126.

Chattel mortgage.

Second appeal in 116 Mich. 144, 74 N. W. 459, holding intervening creditor does not waive benefit of statute as to mortgage without change of possession, by taking mortgage; third appeal in 121 Mich. 235, 80 N. W. 1133, holding holder of unrecorded mortgage cannot claim possession as such, and also as managing partner, as against subsequent mortgagees.

Cited in footnote to McFadden v. Blocker, 58 L. R. A. 879, which requires chattel mortgage to be executed, acknowledged, and recorded according to law of place where property located.

Cited in note (64 L. R. A. 361) on conflict of laws as to chattel mortgages.

32 L. R. A. 445, HARDING v. PEOPLE, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624.

Constitutional law — Special or class legislation.

Approved in Bailey v. People, 190 Ill. 36, 54 L. R. A. 841, 83 Am. St. Rep. 116, 60 N. E. 98, holding act prohibiting lodging-house keepers from allowing more than six persons to sleep in one room, unconstitutional as discrimination between classes; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 510, 98 Am. St. Rep. 254, 68 N. E. 938, holding act making possession of certain articles by junk dealers prima facie evidence that such possession is unlawful makes unconstitutional distinction between such dealers and other persons; Pierce v. Dillingham, 203 Ill. 165, 62 L. R. A. 894, 67 N. E. 846, Affirming 96 Ill. App. 315, holding rule of board of live-stock commissioners prescribing tuberculin test for cattle imported for dairy or breeding purposes, but exempting all other kinds, invalid; People *ex rel.* Rinne v. Blocki, 203 Ill. 374, 67 N. E. 809, holding ordinance declaring switch-tracks a nuisance must be general, and not single out particular track; Kellyville Coal Co. v. Harrier, 207 Ill. 629, 99 Am. St. Rep. 240, 69 N. E. 927,

holding unconstitutional, statute prohibiting employer engaged in mining or manufacturing from setting off amount due for supplies against demand for wages.

— Enjoyment of liberty and property.

Cited in Palmer v. Tingle, 55 Ohio St. 445, 45 N. E. 313, holding unconstitutional, act giving lien on owner's property to subcontractors and those supplying material to contractor.

Cited in footnote to Third Nat. Bank v. Divine Grocery Co. 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent.

— Acts controlling labor.

Cited in *Re* Morgan, 26 Colo. 444, 47 L. R. A. 64, 77 Am. St. Rep. 269, 58 Pac. 1071, holding unconstitutional, act prohibiting work in mines and smelters more than eight hours a day.

Cited in footnotes to State v. Wilson, 47 L. R. A. 71, which sustains statute against screening coal mined at quantity rates, before weighing and crediting to employees; *Re* Preston, 52 L. R. A. 523, which holds void, statute against screening coal before weighing and crediting to miner.

Distinguished in Whitebreast Fuel Co. v. People, 175 Ill. 54, 51 N. E. 853, holding act providing for enforcement of agreements made under it not unconstitutional as impairing contract rights.

32 L. R. A. 448, HILARY v. GREAT NORTHERN R. CO. 64 Minn. 361, 67 N. W. 80.

Liability of carrier for connecting carrier's acts.

Cited in footnotes to Scott v. Cleveland, C. C. & St. L. R. Co. 32 L. R. A. 154, which holds railroad company whose ticket given by mistake to one calling for ticket of other company in union depot not liable for agent's mistake; Beers v. Boston & A. R. Co. 32 L. R. A. 535, which denies liability for mere negligence in loss of trunk checked over wrong road; Herrman v. Great Northern R. Co. 57 L. R. A. 390, which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver.

Appeal.

Cited in Plano Mfg. Co. v. Kaufert, 86 Minn. 15, 89 N. W. 1124, holding proper, appeal from order denying motion to set aside service of summons upon defendant appearing for that purpose only.

32 L. R. A. 449, HALL v. SOMERSET COUNTY, 82 Md. 618, 51 Am. St. Rep. 484, 34 Atl. 771.

32 L. R. A. 451, BARR v. LAMASTER, 48 Neb. 114, 66 N. W. 1110.

Cited in Barr v. Little, 54 Neb. 557, 74 N. W. 850, for statement of facts.

Partition.

Followed in Phillips v. Dorris, 56 Neb. 294, 76 N. W. 555, holding administrator cannot maintain partition action against heir, not being joint tenant or tenant in common.

Easements.

Cited in Calmelet v. Sichl, 48 Neb. 511, 58 Am. St. Rep. 700, 67 N. W. 467,

holding agreement for construction by both parties of wall on land of one for three stories does not allow other to extend further for his sole use.

32 L. R. A. 455, COLE v. HINES, 81 Md. 476, 32 Atl. 196.

Conditional sales.

Approved in Laclede Power Co. v. Ennis Stationary Co. 79 Mo. App. 307, holding vendor may not retake property, thereby rescinding sale, and then sue for consideration in contract; Cable Co. v. Wasegizig, 130 Mich. 391, 90 N. W. 24, holding acceptance by vendor in conditional sale of part payment after default waives right to declare forfeiture therefor.

Cited in footnotes to Maxwell v. Tufts, 33 L. R. A. 854, which holds conditional sale not within act for recording of chattel mortgages; Perkins v. Grobben, 39 L. R. A. 815, which holds action for balance of purchase price of property conditionally sold precluded by retaking property, giving vendee credit for part of price; Post Printing & Pub. Co. v. Insurance Co. of N. A. 44 L. R. A. 272, which holds insurer required to pay conditional purchaser cost of property to him, instead of to seller; Bishop v. Minderhout, 52 L. R. A. 395, which holds loss of property conditionally sold falls on vendor; Burch v. Pedigo, 54 L. R. A. 808, which holds title reserved to secure purchase price devested by transfer of purchase money note.

32 L. R. A. 467, SEANOR v. McLAUGHLIN, 165 Pa. 150, 30 Atl. 717.

Cited in North v. Yorke, 12 Montg. Co. L. Rep. 168, on point not disclosed in opinion.

Conditional sales.

Approved in Perkins v. Grobben, 116 Mich. 179, 39 L. R. A. 818, 72 Am. St. Rep. 512, 74 N. W. 469, holding where contract of conditional sale provides suit on notes shall not waive right to retake, vendor cannot regain title and then sue on notes; North v. Yorke, 13 Montg. Co. L. Rep. 41, holding receipt of property by conditional vendor destroys obligation of vendee.

Cited in Albright v. Meredith, 58 Ohio St. 202, 50 N. E. 719, holding when vendor sues for unpaid instalments, and levies on property, he admits title in vendee, and mortgagee from vendee has precedence over levy.

Election of remedies.

Approved in Geiser Mfg. Co. v. Crissinger, 17 Pa. Co. Ct. 48, denying right to property leased, after foreclosure of mortgage given to secure payment.

Cited in Shaylor v. Parsons, 17 Pa. Co. Ct. 146, holding bailor selling property rescinds contract of bailment; Gaffney v. Megrath, 23 Wash. 498, 63 Pac. 520, holding election to sue attorney for value of property received by him in satisfaction of judgment excludes remedy of garnishment on it; Jacob v. Groff, 19 Pa. Super. Ct. 147, 19 Lanc. L. Rev. 100, holding lessor, under lease providing for giving of lessee's note, to be surrendered on payment, having not discounted ended contract; North v. Yorke, 41 W. N. C. 455, 6 Pa. Super. Ct. 357, holding defense in action for unpaid rental, that plaintiff retook property, which was worth more than unpaid rental, sufficient; Smith v. Barber, 153 Ind. 329, 53 N. E. 1014, holding suit by conditional vendor for purchase price is evidence of election to treat property as vendee's; Laclede Power Co. v. Ennis Stationary Co. 79 Mo.

App. 307, and Turk v. Carnahan, 25 Ind. App. 128, 81 Am. St. Rep. 85, 57 N. E. 729, holding conditional vendor cannot retake property, rescinding sale, and then sue for consideration of contract.

Cited in note (32 L. R. A. 456) on rights and liabilities of vendor and purchaser by conditional sale on default of payment.

Distinguished in Tufts v. Brace, 103 Wis. 345, 79 N. W. 414, holding vendor retaking property, and removing same beyond state, constitutes rescission of conditional sale.

32 L. R. A. 473, GOODWIN v. PROVIDENT SAV. LIFE ASSUR. SOC. 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157.

Life insurance.

Approved in Massachusetts Ben. Life Asso. v. Robinson, 104 Ga. 279, 42 L. R. A. 272, 30 S. E. 918, holding policy, incontestable after three years' premiums paid, "except that error in age is open to adjustment," not contestable on ground of misrepresentations, fraudulent or not; Seiler v. Economic Life Asso. 105 Iowa, 91, 43 L. R. A. 539, 74 N. W. 941, holding policy not contestable after two years, and containing no condition as to suicide, not avoided as against beneficiary by suicide of insured; Sun L. Ins. Co. v. Taylor, 108 Ky. 412, 94 Am. St. Rep. 383, 56 S. W. 668, holding incontestable clause applicable where insured committed suicide; Royal Circle v. Achterrath, 204 Ill. 560, 63 L. R. A. 456, 98 Am. St. Rep. 224, 68 N. E. 492, holding clause in mutual benefit certificate relieving society from liability for death by suicide not available on expiration of period, after which policy only requires compliance with laws of association and payment of dues; Welch v. Union Cent. L. Ins. Co. 108 Iowa, 229, 50 L. R. A. 776, 78 N. W. 853, holding policy nominally "incontestable for any cause except misstatement of age" may be avoided for fraud; Patterson v. Natural Premium Mut. L. Ins. Co. 100 Wis. 127, 42 L. R. A. 261, 69 Am. St. Rep. 899, 75 N. W. 980, holding incontestable provision covers false statements as to health.

Cited in notes (42 L. R. A. 247) on incontestability of life insurance under provisions of policy or of statute; (63 L. R. A. 846, 867) on conflict of laws as to contracts of insurance.

— Compliance with statute.

Approved in Seiler v. Economic Life Asso. 105 Iowa, 91, 43 L. R. A. 539, 74 N. W. 941, holding attachment to policy of copy of application without name of applicant, but merely word "signed," not compliance with statute requiring attachment of "true copy."

Distinguished in Johnson v. Des Moines L. Ins. Co. 105 Iowa, 277, 75 N. W. 101, holding substantial changes requiring construction, in wording of copy, not compliance with statute requiring "true copy" of application to be attached to policy.

— Fraud.

Cited in footnote to John Hancock Mut. L. Ins. Co. v. Dick, 43 L. R. A. 566, which holds suit for cancelation of receipt renewing lapsed life policy, obtained by fraud, within jurisdiction of equity.

— Construction.

Approved in Kendrick v. Mutual Ben. L. Ins. Co. 124 N. C. 321, 70 Am. St. Rep. 592, 32 S. E. 728, holding instruction to agents that if premium not paid

within thirty days, health certificate was required, not binding on insured who relied on statement of policy permitting payment during life.

Cited in Thennen v. Iowa Mut. Ben. Asso. 101 Iowa, 566, 37 L. R. A. 589, 70 N. W. 712, holding insurance contract is to be construed most strongly against insurer; Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 557, 60 L. R. A. 839, 97 Am. St. Rep. 330, 93 N. W. 569, holding breaking of plate-glass window by explosion of gas generated to clean clothes not caused by blowing up of building within exemption in insurance policy.

Distinguished in Smith v. Covenant Mut. Ben. Asso. 16 Tex. Civ. App. 612, 43 S. W. 819, holding rule requiring construction in favor of insured not applicable where insured merely understood "advance premium" in policy to be applicable on mortuary calls, contract being clear.

— Defense of insurer.

Cited in Hartford L. Ins. Co. v. Hyde, 101 Tenn. 402, 48 S. W. 968, holding insurer setting up nonpayment of assessment must prove assessment duly made as authorized by by-laws and policy.

Foreign laws.

Cited in footnote to Aslanian v. Dostumian, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

Distinguished in Summitt v. United States L. Ins. Co. 123 Iowa, 685, 99 N. W. 563, holding book of statutes of another state, certified as published by authority, admissible in evidence.

32 L. R. A. 479, ANDERSON v. PACIFIC BANK, 112 Cal. 598, 53 Am. St. Rep. 228, 44 Pac. 1063.

Insolvent banks.

Distinguished in Argues v. Union Sav. Bank, 133 Cal. 144, 65 Pac. 307, holding ordinary suit for collection of debt not maintainable against state bank in liquidation under California bank commissioners act.

32 L. R. A. 481, IONIA, E. & B. FARMERS' MUT. F. INS. CO. v. IONIA CIRCUIT JUDGE, 100 Mich. 606, 59 N. W. 250.

Control of superior over subordinate courts.

Approved in Thomas v. Kent Circuit Judge, 116 Mich. 109, 74 N. W. 381, holding mandamus proper remedy to compel dissolution of injunction, when question of law merely.

Cited in note (51 L. R. A. 55, 108, 109) on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal.

Mutual insurance companies.

Approved in Peake v. Yule, 123 Mich. 680, 82 N. W. 514, holding member of mutual insurance company, surrendering policy, liable for share of losses while policy in force, and deficiency from assessments not paid; Mutual F. Ins. Co. v. Jean, 96 Md. 259, 94 Am. St. Rep. 570, 53 Atl. 950, holding member of mutual fire insurance company not liable for losses incurred before he became a member, and referring with approval to annotation in 32 L. R. A. 481.

Cited in footnote to Farmers' Mut. Ins. Asso. v. Burch, 34 L. R. A. 806, which gives lien of mutual insurance company on insured property of members for losses, precedence over member's homestead right.

32 L. R. A. 490, COREY v. SHERMAN, 96 Iowa, 114, 64 N. W. 828.

Appeal in equity.

Followed in Zion Church of Evangelical Asso. v. Parker, 114 Iowa, 6, 86 N. W. 60, holding defect in petition not objected to on trial, waived.

Approved in McLachlan v. Gray, 105 Iowa, 261, 74 N. W. 773, holding defendant denying right to injunction may contend for first time on appeal that plaintiff has remedy at law; Des Moines Sav. Bank v. Morgan Jewelry Co. 123 Iowa, 435, 99 N. W. 121, holding objection to form of proceeding cannot be first raised on appeal.

Mutual insurance companies.

Followed in Smith v. Sherman, 113 Iowa, 607, 85 N. W. 747, holding guaranty fund in form of shares, intended as mere advancement, did not make mutual insurance company joint stock company.

Approved in Mutual Guananty F. Ins. Co. v. Barker, 107 Iowa, 146, 70 Am. St. Rep. 149, 77 N. W. 868, and Smith v. Sherman, 113 Iowa, 609, 85 N. W. 747, holding void, policy issued by mutual insurance company to one not a member; Sherman v. Frasier, 112 Iowa, 239, 83 N. W. 886, holding fraud of agent of mutual insurance company in representing condition of company waived, as defense to action on notes, by member benefiting by contract; Smith v. Sherman, 113 Iowa, 607, 85 N. W. 747, holding by-laws of mutual insurance company, published and acted upon, valid although not adopted by directors.

Distinguished in Corson v. Iowa Mut. F. Ins. Asso. 115 Iowa, 490, 88 N. W. 1086, holding mutual fire insurance company must attach copy of application to policy.

Equity jurisdiction.

Approved in State v. Sunapee Dam Co. 72 N. H. 120, 55 Atl. 899, sustaining, as preventing multiplicity of suits, jurisdiction of equity to entertain bill to prevent unreasonable use of waters of lake by numerous riparian owners.

32 L. R. A. 520, STATE *ex rel.* BRAGG v. ROGERS, 107 Ala. 444, 19 So. 909.

Constitutional provisions as to statutes.

Approved in State *ex rel.* Winter v. Sayre, 118 Ala. 35, 24 So. 89, holding title "to authorize governor, with consent of senate, to appoint" comprehends clause for appointment by governor, to hold until assembly sits; Hawkins v. Roberts, 122 Ala. 144, 27 So. 327, holding act establishing county board of revenue and abolishing court of county commissioners does not contain two subjects, since abolishing implied from establishment; Williams v. Board of Revenue, 123 Ala. 437, holding title of act for working and repairing roads included construction of roads.

Distinguished in Lindsay v. United States Sav. & L. Asso. 120 Ala. 172, 42 L. R. A. 787, 24 So. 171, holding act invalid because title not including subject of legalization of past transactions.

— Prohibiting statutory amendment without re-enactment at length.

Approved in *Ex parte* Thomas, 113 Ala. 6, 21 So. 369, holding act containing inconsistent provisions not within constitutional prohibition; Birmingham Union R. Co. v. Elyton Land Co. 114 Ala. 74, 21 So. 314, holding act providing for condemnation in manner provided by certain statute does not violate prohibition; Cobb v. Vary, 120 Ala. 267, 24 So. 442, holding act original in form not within

provision; Thomas v. State, 124 Ala. 54, 27 So. 315, holding act original in form and intelligible in itself, though title calls it amendatory, does not violate provision; Montgomery v. Birdsong, 126 Ala. 647, 28 So. 522, holding act original in form and intelligible in itself, although providing means for enforcement of earlier statute, does not violate provision; Little v. State, 137 Ala. 665, 35 So. 134, holding act, in form original and complete, does not violate constitutional provision forbidding amendment of statute by reference to its title only; Sisk v. Cargile, 138 Ala. 171, 35 So. 114, holding act providing for special levy of taxes to pay bonds authorized by original act not unconstitutional as amendment of existing law by reference to title only; *Re* Dietrick, 32 Wash. 476, 73 Pac. 506, holding constitutional provision requiring statute amended to be fully set out in amendatory act not applicable to independent and complete act although, in effect, it modifies former law.

Distinguished in Bates v. State, 118 Ala. 107, 24 So. 448, holding act violated prohibition by not setting out act as amended.

Control of superior over lower courts.

Cited in Wilson v. Duncan, 114 Ala. 667, 21 So. 1017, holding city court has power to issue remedial writs to probate court.

32 L. R. A. 524, RYAN v. LOS ANGELES ICE & COLD STORAGE CO. 112 Cal. 244, 44 Pac. 471.

Duty of master.

Followed in Mansfield v. Eagle Box & Mfg. Co. 136 Cal. 626, 69 Pac. 425, holding employer liable for injuries to youth ordered by foreman, without warning of danger, to work buzz-saw with which he was not familiar.

Approved in O'Connor v. Golden Gate Woolen Mfg. Co. 135 Cal. 544, 87 Am. St. Rep. 127, 67 Pac. 966, holding employer liable for failure to inform young and inexperienced servant of danger of cogwheels near place of work; Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 168, 76 N. W. 566, holding employer liable for injuries to laborer ordered by foreman to clean belt in motion.

Cited in Tedford v. Los Angeles Electric Co. 134 Cal. 80, 54 L. R. A. 92, 66 Pac. 76, holding electric company liable to inexperienced servant ordered by foreman to do lineman's work.

Cited in footnote to Louisville, N. A. & C. R. Co. 34 L. R. A. 293, which denies right to use locomotive after learning of defects, before making repairs.

Cited in notes (41 L. R. A. 57) on knowledge as element of employer's liability to injured servant; (44 L. R. A. 60) on duty of master to instruct and warn servants as to perils of employment.

Fellow servants.

Cited in note (51 L. R. A. 525, 561, 583, 607) on vice principalship considered with reference to superior rank of negligent servant.

Negligence.

Cited in footnote to Vieth v. Hope Salt & Coal Co. 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on one's own premises with care and skill.

Warranty.

Cited in footnote to Boston Woven Hose & Rubber Co. v. Kendall, 51 L. R.

A. 781, which holds purchaser entitled to recover for breach of warranty of boiler, though liable to servant injured by explosion.

32 L. R. A. 527, *Re* HASKELL, 112 Cal. 412, 44 Pac. 725.

Constitutionality of municipal taxation.

Approved in *Re* McKenna, 126 Cal. 432, 58 Pac. 916, holding unreasonable, ordinance imposing license tax on merchants using trading stamps, several times greater than tax on other merchants; Los Angeles County v. Eikenberry, 131 Cal. 466, 63 Pac. 766, sustaining county license tax as not in conflict with general law, city ordinance for same purpose not being general law; Hill v. Abbeville, 59 S. C. 428, 38 S. E. 11, sustaining, against allegation of discrimination, ordinance taxing occupations, Constitution merely declaring licenses must be just and not requiring uniformity; *Ex parte* Lemon, 143 Cal. 563, 65 L. R. A. 949, 77 Pac. 455, upholding classification of restaurants for purpose of taxation, into those where meals are prepared by proprietor and those where they are not; Standard Oil Co. v. Spartanburg, 66 S. C. 41, 44 S. E. 377, holding ordinance imposing license tax on sellers of oil not discriminative for failure to make reasonable classification of other avocations of like character and impose tax thereon.

Cited in footnotes to Knisely v. Cotterel, 50 L. R. A. 87, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; Morton v. Macon, 50 L. R. A. 485, which denies power to subject to prohibitory license tax, business of loaning money on household furniture; People *ex rel.* Valentine v. Coolidge, 50 L. R. A. 493, which holds void, act requiring large bond from merchants selling farm produce; Stull v. De Mattos, 51 L. R. A. 892 which sustains license tax of $25 per day on sales of merchandise at auction; Harrodsburg v. Renfro, 51 L. R. A. 897, which holds void, ordinance imposing greater license tax for sale of liquors on main street of town than elsewhere; Price v. People, 55 L. R. A. 588, which sustains license fee on employment agencies; State v. Garbroski, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement of peddling license; Com. use of Titusville v. Clark, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business less then $1,000; Rosenbloom v. State, 57 L. R. A. 922, which sustains license tax on peddlers, though venders of own products exempt.

32 L. R. A. 530, POMPONIO v. NEW YORK, N. H. & H. R. CO. 66 Conn. 528, 50 Am. St. Rep. 124, 34 Atl. 491.

Duty toward licensees.

Approved in Manlove v. Cleveland, C. C. & St. L. R. Co. 29 Ind. App. 699, 65 N. E. 212, holding licensee using track as footpath does so at his own risk; Iola Portland Cement Co. v. Moore, 65 Kan. 767, 70 Pac. 864, holding owner of tracks used for switching purposes by another company liable to member of latter company's train crew injured by obstruction placed upon track by owner without notice.

Cited in footnote to Ryerson v. Bathgate, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation.

Negligence in kicking cars.

Cited in footnote to Tobey v. Burlington, C. R. & N. R. Co. 33 L. R. A. 496,

which holds it negligent to kick cars at speed of more than 6 miles an hour in violation of ordinance.

Appellate review.

Cited in Rooney v. Woolworth, 74 Conn. 723, 52 Atl. 411, holding finding that one injured by falling through doorway, used it under implied invitation, is conclusive of law reviewable on appeal.

32 L. R. A. 535, BEERS v. BOSTON & A. R. CO. 67 Conn. 417, 52 Am. St. Rep. 293, 34 Atl. 541.

Liability of railroad for loss of baggage.

Approved in Wood v. Maine C. R. Co. 98 Me. 101, 99 Am. St. Rep. 339, 56 Atl. 457, holding carrier not liable as insurer of baggage unaccompanied in its transportation by owner.

Cited in note (55 L. R. A. 652) on liability of carrier for baggage not accompanied by passenger.

32 L. R. A. 539, MURRAY v. LEHIGH VALLEY R. CO. 66 Conn. 512, 34 Atl. 506.

Duty and liability of railroads.

Cited in Wanzer v. Chippewa Valley Electric R. Co. 108 Wis. 329, 84 N. W. 423, holding railroad company bound to exercise highest degree of care reasonably expected of human diligence and foresight, in view of mode of carriage, and consistent with practical operation.

— Liability for negligence of others.

Approved in Doyle v. Toledo, S. & M. R. Co. 127 Mich. 99, 54 L. R. A. 463, 89 Am. St. Rep. 456, 86 N. W. 524, holding railroad company liable to employee for injuries received by him on car from falling of shed not owned by company.

Cited in Baldwin v. Fair Haven & W. R. Co. 68 Conn. 572, 37 Atl. 418, holding railroad company liable for injuries from fellow passenger to passenger alighting, when conductor not at post.

Cited in note (37 L. R. A. 81) on which of two or more persons is master of another who is conceded to be servant of one of them.

Distinguished in Brady v. Chicago & G. W. R. Co. 57 L. R. A. 715, 52 C. C. A. 52, 114 Fed. 100, holding railroad company not liable to employee for negligence of servants of depot corporation under contract with railroad; New York, N. H. & H. R. Co. v. Baker, 50 L. R. A. 203, 39 C. C. A. 240, 98 Fed. 694, holding railroad company not liable to employee for negligence of employee of municipal board, given by statute charge of elevated tracks of railroad; Stoddard v. New York, N. H. & H. R. Co. 181 Mass. 423, 63 N. E. 927, holding railroad company not liable to postal clerk, considered a passenger, injured while unloading mail in car just detached from defendant's train in union station, and run into by car of another road.

32 L. R. A. 543, HANSLEY v. JAMESVILLE & W. R. CO. 115 N. C. 602, 44 Am. St. Rep. 474, 20 S. E. 528.

Damages.

Cited in Cable v. Southern R. Co. 122 N. C. 900, 29 S. E. 377, as containing rule as to measure of damages.

Distinguished in Farmers Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 590, 29 L. R. A. 702, 53 Am. St. Rep. 606, 23 S. E. 43, holding measure of damages in action resulting from obstruction of navigable stream was value of plaintiff's boat for time delayed, including wages of crew.

— Exemplary.

Approved in Waters v. Greenleaf-Johnson Lumber Co. 115 N. C. 655, 20 S. E. 718, holding facts not sufficiently indicative of malice or insult to justify punitive damages; Remington v. Kirby, 120 N. C. 325, 26 S. E. 917, holding exemplary damages in trespass proper only where malice or threats, oppression, or insolence shown; Story v. Norfolk & S. R. Co. 133 N. C. 62, 45 S. E. 349, holding there is evidence of aggravation justifying punitive damages, where conductor refused to allow passenger with ticket to board train, falsely charging him with being drunk.

Cited in Chappell v. Ellis, 123 N. C. 262, 68 Am. St. Rep. 822, 31 S. E. 709, holding vindictive damages not to be given for mental anguish inflicted without malice, oppression, or insult; Pickens v. South Carolina & G. R. Co. 54 S. C. 502, 32 S. E. 567, holding exemplary damages not recoverable unless act of defendant is wilful.

Distinguished in Thomas v. Southern R. Co. 122 N. C. 1006, 30 S. E. 343, holding punitive damages not proper in action for damages from failure of train to stop at flag station, unless failure of engineer was wilful.

Carriers.

Cited in Daniel v. Petersburg R. Co. 117 N. C. 610, 23 S. E. 327, holding railroad company liable for act of employee, killing passenger when acting within scope of employment; Exton v. Central R. Co. 63 N. J. L. 356, 56 L. R. A. 511, 46 Atl. 1099, holding relation of carrier and passenger established where person purchases ticket at station, intending to be a passenger; Seawell v. Carolina C. R. Co. 132 N. C. 859, 44 S. E. 610, holding one who has purchased ticket and is awaiting train at station a passenger, entitled to protection by carrier from violence.

Cited in footnote to Hughson v. Winthrop S. B. Co. 58 L. R. A. 432, which denies liability to passenger left behind by steamer, already full, leaving before advertised time.

Distinguished in Smith v. Wilmington & W. R. Co. 130 N. C. 307, 41 S. E. 481, holding nonsuit proper where passenger put off beyond station, but without actual damage.

32 L. R. A. 555, McCARTNEY v. RIDGWAY, 160 Ill. 129, 43 N. E. 826.

Trusts.

Approved in Pratt v. Griffin, 184 Ill. 519, 56 N. E. 819, holding fact that deed of husband and wife passed into possession of husband till he died does not constitute delivery, without proof of intention of wife to make possession delivery to grantees.

Cited in Weaver v. Weaver, 182 Ill. 297, 74 Am. St. Rep. 173, 55 N. E. 338, holding no trust relation created between mother and son, where latter executes assignment of life insurance as gift and gives notice he will keep for her.

Gifts inter vivos.

Approved in Neville v. Jennings, 75 Ill. App. 511, holding donor's death before

delivery of gift delivered to agent, to be later delivered to donee, revocation of authority of agent to deliver.

Cited in Geer v. Goudy, 174 Ill. 525, 51 N. E. 623, holding oral promise by father to convey land to son not enforceable in equity unless acted upon by son by expenditures, with consent of father.

Suretyship.

Cited in Wyatt v. Dufrene, 106 Ill. App. 217, holding extension of time of payment without consent of surety releases latter from liability; Stevens v. Partridge, 109 Ill. App. 494, holding executrix has right to stand on exact terms of bond given by her testator as surety, and the bond is discharged where obligees have varied terms of contract.

Cited in footnote to Abshire v. Salyer, 56 L. R. A. 936, which holds sureties on guardian's bond given to obtain release from future liabilities of surety on prior bond, liable for past defalcations.

Correction of mistake.

Approved in Strayer v. Dickerson, 205 Ill. 270, 68 N. E. 767, holding equity will not rectify mistake in voluntary conveyance in aid of its enforcement against grantor.

32 L. R. A. 566, CECIL v. GREEN, 161 Ill. 265, 43 N. E. 1105.

Statutory construction.

Approved in White v. Wagar, 185 Ill. 205, 50 L. R. A. 63, 57 N. E. 56, holding statute authorizing issue of search warrant for "forged bank notes and other forged instruments" does not include forged labels and trademarks; Gundling v. Chicago, 176 Ill. 346, 48 L. R. A. 232, 52 N. E. 44, holding cigarettes not included in statute allowing city to regulate sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions.

Place of public accommodation.

Cited in Burks v. Bosso, 81 App. Div. 539, 81 N. Y. Supp. 384 (dissenting opinion), majority holding shoe-polishing stand place of public accommodation.

32 L. R. A. 568, MT. STERLING NAT. BANK v. GREENE, 99 Ky. 262, 35 S. W. 911.

Refusal by bank to pay check.

Cited in American Nat. Bank v. Morey, 113 Ky. 861, 58 L. R. A. 957, footnote p. 956, 69 S. W. 759, as to measure of damages for bank's wrongful refusal to pay check of student in strange city.

Cited in footnote to J. M. James Co. v. Continental Nat. Bank, 51 L. R. A. 255, which sustains conclusive presumption of damage to trader by bank's wrongful refusal to pay check.

Measure of damages.

Cited in footnote to Cumberland Teleph. & Teleg. Co. v. Hendon, 60 L. R. A. 849, which holds damages for wrongfully disconnecting telephone to be amount which will compensate for injuries from breach of contract.

32 L. R. A. 570, SWEETING v. MUTUAL F. INS. CO. 83 Md. 63, 34 Atl. 826.

32 L. R. A. 575, BASSETT v. ATWATER, 65 Conn. 355, 32 Atl. 937.

Mandamus.

Cited in State v. Towers, 71 Conn. 663, 42 Atl. 1083, holding mandamus does not issue in favor of telephone company to compel street commissioner to give consent for conduits in street, under statute authorizing company to put wires in conduits; State *ex rel.* Berger v. Hurley, 73 Conn. 536, 48 Atl. 215, holding mandamus not issuable unless right of relator in controversy clear.

32 L. R. A. 578, FESLER v. BRAYTON, 145 Ind. 71, 44 N. E. 37.

Injunction.

Cited in footnotes to State *ex rel.* Cranmer v. Thorson, 33 L. R. A. 582, which denies right to enjoin certifying of proposed constitutional amendment; State *ex rel.* McCaffery v. Aloe, 47 L. R. A. 393, which denies right to injunction to protect purely political right of citizen as voter.

Elections.

Cited in State *ex rel.* Harrison v. Menaugh, 151 Ind. 273, 43 L. R. A. 413, 51 N. E. 117, holding statute changing time of election to more than four years after preceding election does not violate constitutional prohibition as to creation of office of more than four years' tenure.

Cited in footnote to Weaver v. Toney, 50 L. R. A. 105, which denies right to enforce in equity, right to have inspector of certain party at polls.

Constitutional law.

Cited in Isenhour v. State, 157 Ind. 520, 87 Am. St. Rep. 228, 62 N. E. 40, holding litigant not entitled to have court decide constitutional question in which he has no special interest.

32 L. R. A. 586, TAGGART v. CLAYPOLE, 145 Ind. 590, 44 N. E. 18.

Constitutional law.

Cited in Latshaw v. State, 156 Ind. 198, 59 N. E. 471, holding constitutional, statute exempting from liability for costs in matrimonial actions, women having property of value less than certain amount.

Cited in footnotes to McClain v. Williams, 43 L. R. A. 287, which holds right of appeal subject to legislative restriction; Kansas City v. Clark, 52 L. R. A. 321, which sustains exemption of agricultural lands from statute extending city boundaries.

—Elimination of part of statute.

Approved in State v. Ray, 153 Ind. 336, 54 N. E. 1067, holding act authorizing appointment of officer who, contrary to Constitution, might be person not elector of county, effective after elimination of invalid part.

Cited in Indianapolis Brewing Co. v. Claypool, 149 Ind. 206, 48 N. E. 228 (dissenting opinion), majority holding remainder of statute, after unconstitutional part eliminated, inoperative because no means left to carry provisions into effect.

Right to appeal.

Cited in footnote to Johnson v. State, 51 L. R. A. 272, which sustains statute requiring exception to obtain reversal for error in charge.

Annexation proceedings.

Approved in Pittsburgh, C. C. & St. L. R. Co. v. Indianapolis, 147 Ind. 294, 46 N. E. 641, holding "resident freeholder" of annexed territory excludes railroad running through it.

32 L. R. A. 588, WADSWORTH v. MARSHALL, 88 Me. 263, 34 Atl. 30.

Contributory negligence in statutory actions.

Distinguished in Boston Excelsior Co. v. Bangor & A. R. Co. 93 Me. 67, 47 L. R. A. 86, 44 Atl. 138, holding contributory negligence no defense in statutory action for damage from fire communicated from locomotive.

32 L. R. A. 590, WHITE v. CUSHING, 88 Me. 339, 51 Am. St. Rep. 402, 34 Atl. 164.

Negotiable instruments.

Cited in American Gas & Ventilation Mach. Co. v. Wood, 90 Me. 520, 43 L. R. A. 453, 38 Atl. 548, construing as one contract, promissory note and contemporaneous agreement referring thereto.

32 L. R. A. 592, WHITE v. OAKES, 88 Me. 367, 34 Atl. 175.

Warranty.

Cited in footnotes to Bierman v. City Mills Co. 37 L. R. A. 799, which holds warranty implied that felt cloth sold for making ulsters was free from latent defect; J. Thompson Mfg. Co. v. Gunderson, 49 L. R. A. 859, which denies implied warranty that shoes and gatherers of planting machine will scour in ordinary soil.

Guaranty.

Approved in Pence v. Adams, 116 Iowa, 466, 89 N. W. 1065, holding guaranty, procured after sale made, without any new consideration, not enforceable.

Conditional sale.

Approved in Laclede Power Co. v. Ennis Stationery Co. 79 Mo. App. 307, holding seller cannot retake property and then recover unpaid part of price, less value of property.

Cited in note (32 L. R. A. 466) on rights and liabilities of vendor and purchaser by conditional sale on default of payment.

32 L. R. A. 593, BROWN & H. CO. v. WUNDER, 64 Minn. 450, 67 N. W. 357.

32 L. R. A. 595, *Re* GARCELON, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414.

Affidavit denying genuineness of instrument.

Cited in Moore v. Copp, 119 Cal. 432, 51 Pac. 630, and Myers v. Sierra Valley Stock & Agri. Asso. 122 Cal. 675, 55 Pac. 689, holding omission of plaintiff to file affidavit denying genuineness of instrument set up as defense does not prevent his disputing it on any ground but nongenuineness.

Public policy.

Approved in Wells, Fargo & Co. v. Enright, 127 Cal. 673, 49 L. R. A. 649, 60 Pac. 439, sustaining contract not to plead statute of limitations; Eissler v. Hoppel, 158 Ind. 86, 62 N. E. 692, holding contract between expectant heir with

other party to action to establish rights in estate, renouncing expectancy, valid defense to action contesting other party's will; Daniels v. Benedict, 38 C. C. A. 604, 97 Fed. 379, holding valid, agreement of wife with husband, releasing expectant interest in his estate.

Cited in *Re* Davis, 106 Cal. 456, 457, 39 Pac. 756, sustaining validity of agreement between husband and wife relinquishing claims on each other's property so as to cut off right of succession of surviving wife.

Cited in note (33 L. R. A. 266) on validity of sale of expectancy by prospective heir.

Distribution.

Approved in *Re* Ryder, 141 Cal. 370, 74 Pac. 993, holding superior court without jurisdiction on distribution to determine claim of grantee of decedent as against heir at law.

32 L. R. A. 605, BROWN v. JARVIS ENGINEERING CO. 166 Mass. 75, 55 Am. St. Rep. 382, 43 N. E. 1118.

Scope of employment.

Approved in Gibson v. International Trust Co. 177 Mass. 103, 52 L. R. A. 929, 58 N. E. 278, holding janitor of defendant's building in moving stool from under boy operating elevator, causing accident when he fell, not within scope of employment; Perlstein v. American Exp. Co. 177 Mass. 532, 52 L. R. A. 960, 59 N. E. 194, holding express company may show where its servant was authorized to drive, to prove him not within scope of employment at time of accident; Wabash R. Co. v. Linton, 26 Ind. App. 598, 60 N. E. 313, holding demurrable, complaint for killing horse, charging act to defendant railroad's agents, without showing they acted within scope of employment.

Cited in Driscoll v. Towle, 181 Mass. 419, 63 N. E. 922, holding it, on facts, question for jury whether driver of horse knocking down plaintiff was servant of master or third person.

32 L. R. A. 606, COM. v. MURPHY, 166 Mass. 171, 44 N. E. 138.

Military parades.

Cited in footnote to White v. State, 37 L. R. A. 642, which denies right to arrest person refusing to make way for military parade.

32 L. R. A. 608, WAY v. ABINGTON MUT. F. INS. CO. 166 Mass. 67, 55 Am. St. Rep. 379, 43 N. E. 1032.

Fire insurance.

Approved in Collins v. Delaware Ins. Co. 9 Pa. Super. Ct. 579, 580, 44 W. N. C. 232, 7 Del. Co. Rep. 366, holding it question for jury whether damage from smoke resulted from fire "out of proper place."

Cited in footnote to Leonard v. Orient Ins. Co. 54 L. R. A. 706, which authorizes recovery for insured building destroyed by fire breaking out immediately after one corner knocked down by explosion in neighboring building.

32 L. R. A. 610, PRINCE v. CROCKER, 166 Mass. 347, 44 N. E. 446.

Public works.

Cited in Browne v. Turner, 176 Mass. 12, 56 N. E. 969, sustaining statute pro-

viding for building of subway at city's expense, and leasing to railway company; Sears v. Street Comrs. 180 Mass. 279, 62 L. R. A. 148, 62 N. E. 397, holding provision for approaches to union terminal station constitutes public purpose so as to justify special assessment.

Cited in note (48 L. R. A. 472) on power of legislature to impose burdens on municipalities and to control their local administration and property.

— Operation.

Cited in Mahoney v. Boston, 171 Mass. 429, 50 N. E. 939, holding building of subway, authorized by legislature and under control of persons appointed in part by governor, is a public work and city not liable for injury to person working in it.

Cited in footnote to Oren *ex rel.* Barbour v. Pingree, 46 L. R. A. 407, which holds void, statute empowering city to purchase and operate street railways.

— Contracts for.

Cited in Morse v. Norfolk County, 170 Mass. 556, 49 N. E. 925, holding county not liable for legal expenses of commissioners, to build county courthouse, on appearance before legislative committee to investigate acts; Sylvester v. Webb, 179 Mass. 241, 52 L. R. A. 520, 60 N. E. 495, holding not void as against public policy, contract of school committee with contractor who is member of committee, and whose vote made majority accepting bid.

— Compensation for property taken.

Cited in *Re* Certain Land, 119 Fed. 456, holding city not entitled to compensation for part of land taken by Federal government for postoffice.

Taxpayer's action.

Approved in Wadsworth v. Concord, 133 N. C. 593, 45 S. E. 948; holding taxpayer can sue to restrain town from paying out money under alleged invalid public lighting contract.

32 L. R. A. 615, PALMER SAV. BANK v. INSURANCE CO. OF N. A. 166 Mass. 189, 55 Am. St. Rep. 387, 44 N. E. 211.

Insurance.

Cited in Brown v. Greenfield Life Asso. 172 Mass. 500, 53 N. E. 129, holding life policies enforceable by administrator, under statute, when consent of beneficiary appears or is to be presumed.

— Who may enforce fire policy.

Approved in Zehring's Estate, 4 Pa. Super. Ct. 250, holding widow, having interest in land sold subject to dower, may enforce in her name policy issued nominally to holder of land, and that insurer paying her is protected.

Cited in Virginia-Carolina Chemical Co. v. Sundry Ins. Co. 108 Fed. 459, holding policy issued to insured, loss payable to him or another, as interest may appear, is enforceable in name of other after insured indorses on it disclaimer of interest.

— Rights of mortgagees.

Approved in Attleborough Sav. Bank v. Security Ins. Co. 168 Mass. 149, 60 Am. St. Rep. 373, 46 N. E. 390, holding interest of mortgagee, in policy payable to him "as his interest may appear," limited to that existing at date; Heller, H. & Co. v. National Marine Bank, 89 Md. 621, 45 L. R. A. 445, 73 Am. St. Rep. 212, 43 Atl.

800, holding, unless special agreement in policy, mortgagee not entitled to insurance, in spite of insolvency of mortgagor.

Cited in Peck v. Girard F. & M. Ins. Co. 16 Utah, 124, 67 Am. St. Rep. 600, 51 Pac. 255, and Capital City Ins. Co. v. Jones, 128 Ala. 365, 86 Am. St. Rep. 152, 30 So. 674, holding mortgagee, when debt exceeded loss, entitled to sue in own name on policy executed to mortgagor, "loss payable to mortgagee as interest may appear;" Brown v. Commercial F. Ins. Co. 21 App. D. C. 339, sustaining right of mortgagee to sue on policy payable to him as his interest may appear; Franklin Ins. Co. v. Wolff, 23 Ind. App. 555, 54 N. E. 772, holding mortgagee to whom policy is payable as interest may appear cannot enforce policy which mortgagor could not.

Cited in footnotes to Pioneer Sav. & L. Co. v. Providence-Washington Ins. Co. 38 L. R. A. 397, which holds change of title by deed from mortgagor to mortgagee pending application for insurance not fatal to insurance; Hocking v. Virginia F. & M. Ins. Co. 39 L. R. A. 148, which denies mortgagee's right to recover where mortgagor burns building; Boyd v. Thuringia Ins. Co. 55 L. R. A. 165, which holds question of forfeiture of policy payable to mortgagee not determined by provisions as to mortgagor's acts; Shadgett v. Phillips & C. Co. 56 L. R. A. 461, which holds mortgagee not entitled to insurance procured by donee for own benefit, by latter's knowledge of mortgagor's failure to keep agreement to insure; Farmers' Loan & T. Co. v. Penn Plate-Glass Co. 56 L. R. A. 710, which denies mortgagee's lien on proceeds of insurance on premises by grantee for own benefit.

32 L. R. A. 619, BARRUS v. PHANEUF, 166 Mass. 123, 44 N. E. 141.

32 L. R. A. 620, HUGHES v. GROSS, 166 Mass. 61, 55 Am. St. Rep. 375, 43 N. E. 1031.

Termination of contract of employment.

Followed in Nickerson v. Russell, 172 Mass. 589, 53 N. E. 141, holding dissolution of firm, not followed by closing of business, does not terminate employment.

Cited in footnote to Madden v. Jacobs, 50 L. R. A. 827, which holds clerk's employment for year not terminated by burning of property and dissolution of employing firm.

Waiver.

Approved in Marlborough Gaslight Co. v. Neal, 166 Mass. 220, 44 N. E. 139, holding where, according to contract, statement is delivered before payment to one party, failure to make certain objections amounted to waiver of further statement.

Cited in Lydig v. Braman, 177 Mass. 218, 58 N. E. 696, holding defense of statute of frauds not open if not raised at trial.

32 L. R. A. 621, AMOSKEAG MFG. CO. v. CONCORD, 66 N. H. 562, 34 Atl. 241.

Assessment for dams.

Disapproved in Union Water Power Co. v. Auburn, 90 Me. 67, 37 L. R. A. 653, footnote p. 651, 60 Am. St. Rep. 240, 37 Atl. 331, denying right to assess where dam is situated, if water power is used elsewhere.

32 L. R. A. 623, TUCKER v. TUCKER, 74 Miss. 93, 19 So. 955.

Alienation of affections.

Cited in footnotes to Beach v. Brown, 43 L. R. A. 114, which sustains divorced

wife's right of action in own name for prior alienation of husband's affections; Houghton v. Rice, 47 L. R. A. 311, which denies right of action against other woman for alienating husband's affections when unaccompanied by adultery.

— By parent.

Approved in Eagon v. Eagon, 60 Kan. 704, 57 Pac. 942, holding parent sued for alienation of son's affection from plaintiff entitled to have jury pass on integrity of intentions; Stanley v. Stanley, 27 Wash. 580, 68 Pac. 187, sustaining nonsuit on evidence that parent wished son not to live with plaintiff, employed lawyer for divorce, and threatened disinheritance, when no proof that threat communicated, and lawyer not employed at son's request.

Cited in Oakman v. Belden, 94 Me. 284, 80 Am. St. Rep. 396, 47 Atl. 553, holding erroneous, charge that if separation of plaintiff's wife from him was due to active interference of her parents, they were responsible.

Cited in footnote to Gernerd v. Gernerd, 40 L. R. A. 549, which sustains wife's right of action against one inducing her husband to leave her, though parent's right to give him advice in good faith is upheld.

32 L. R. A. 625, HADDEN v. METHODIST SOCIETY, 51 N. J. Eq. 154, 330, 26 Atl. 464, 30 Atl. 429.

Validity of gift to unincorporated charity.

Cited in American Bible Soc. v. American Tract Soc. 62 N. J. Eq. 219, 50 Atl. 67, upholding devise of real estate to unincorporated charitable society.

Cited in footnotes to Lane v. Eaton, 38 L. R. A. 669, which holds devise in trust for local branch of Salvation Army void, unless society becomes incorporated; *Re* Winchester, 54 L. R. A. 281, which holds valid, bequest payable to unincorporated educational society with existing organization; Stewart v. White, 55 L. R. A. 211, which denies power of unincorporated church society to acquire title to land by adverse possession.

32 L. R. A. 631, DORRAH v. HILL, 73 Miss. 787, 19 So. 961.

32 L. R. A. 635, STATE v. CAMP SING, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516.

Constitutionality of statute.

Approved in State v. Clancy, 20 Mont. 500, 52 Pac. 267, sustaining statute providing for signature of warrant by county attorney, not necessarily conflicting with constitutional provision for oath or affirmation.

License taxes.

Cited in Cache County v. Jensen, 21 Utah, 228, 61 Pac. 303, holding void, license tax on sheep raising imposed by county commissioners for revenue only; *Ex parte* Pfirrmann, 134 Cal. 147, 66 Pac. 205, holding license tax not necessarily tax for purposes of revenue, but may be imposed as police regulation; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 490, 98 Am. St. Rep. 572, 72 Pac. 982, holding license system may be resorted to for purposes of revenue or regulation, or both.

Cited in footnote to People *ex rel.* Einsfeld v. Murray, 32 L. R. A. 344, which holds valid, excise law graduating according to population of cities, excise taxes which are divided between cities and state.

Municipal debt.

Approved in Palmer v. Helena, 19 Mont. 68, 47 Pac. 209, holding exception of constitutional prohibition allowing city to exceed debt limit for purpose of constructing sewer system does not apply to city having sewer system at adoption of Constitution.

32 L. R. A. 643, STATE, SINGER MFG. CO., PROSECUTOR, v. HEPPENHEIMER, 58 N. J. L. 633, 34 Atl. 1061.

Taxation of corporations.

Cited in Hancock v. Singer Mfg. Co. 62 N. J. L. 334, 42 L. R. A. 858, 41 Atl. 846, holding franchise tax included in exemption of stock in hands of stockholders; Cooper Hospital v. Camden, 68 N. J. L. 695, 54 Atl. 419, holding exemption from taxation in charter of private corporation irrepealable contract.

Cited in footnotes to Hancock v. Singer Mfg. Co. 42 L. R. A. 852, which holds franchise tax included in exemption of stock in hands of stockholders from any tax or impost; Deposit Bank of Owensboro v. Daviess County, 44 L. R. A. 825, which holds extension of corporate charter subject to act previously passed, making all grants to corporations amendable though original charters contained irrevocable exemption.

Cited in note (60 L. R. A. 72, 82, 85, 109) on corporate taxation in United States as affected by contract clause in Federal Constitution.

32 L. R. A. 645, GLEASON v. BOEHM, 58 N. J. L. 475, 34 Atl. 880.

Landlord and tenant.

Cited in footnotes to McGinley v. Alliance Trust Co. 56 L. R. A. 334, which holds lessor of apartment house retaining control of stairways liable for injury to tenants from lack of repair of stair railing; Kuhn v. Sol Heavenrich Co. 60 L. R. A. 585, which denies implied contract obligation of one leasing building in sections, to keep in repair part remaining in his possession.

32 L. R. A. 647, STATE v. SARVIS, 45 S. C. 668, 55 Am. St. Rep. 806, 24 S. E. 53.

Burning one's own house.

Cited in footnote to People v. De Winton, 33 L. R. A. 374, which holds burning one's own house not arson.

32 L. R. A. 651, PELTIER v. BRADLEY, D. & C. CO. 67 Conn. 42, 34 Atl. 712.

Highways.

Followed in Lord v. Lamonte, 72 Conn. 39, 43 Atl. 491, holding general rule as to travelers on highway is that each must use reasonable care, and standard of duty being dependent on peculiar circumstances, findings as to negligence cannot be reviewed.

Cited in footnotes to Perlstein v. American Exp. Co. 52 L. R. A. 959, which holds violation of statute for turning to right shown by collision with one driving close to sidewalk on right-hand side of highway; Winter v. Harris, 54 L. R. A. 643, which holds person on left of center of full width of road in fault though on right of center of macadamized part; Neal v. Rendall, 63 L. R. A. 668, which holds that driving on wrong side of road may be found to be proximate cause of collision with vehicle traveling in opposite direction.

Bicycles.

Approved in North Chicago Street R. Co. v. Cossar, 203 Ill. 614, 68 N. E. 88, holding rider of bicycle required to use same degree of care as driver of team.

Cited in footnotes to Cook v. Fogarty, 39 L. R. A. 488, which holds riding bicycle on highway in dark, without light or signal, contributory negligence; Moore v. District of Columbia, 41 L. R. A. 208, which holds reasonableness of ordinance prohibiting riding bicycle with handle bars more than 4 inches below saddle a question of fact.

Cited in note (47 L. R. A. 294) on bicycle law.

Negligence.

Cited in Finken v. Elm City Brass Co. 73 Conn. 427, 47 Atl. 670, as to establishment of fact of negligence.

Appeal on facts.

Followed in Thresher v. Dyer, 69 Conn. 408, 37 Atl. 979, and Bergin v. Southern New England Teleph. Co. 70 Conn. 67, 39 L. R. A. 196, 38 Atl. 888, refusing to retry question of fact determined by trial court proceeding according to rules of law.

32 L. R. A. 654, FIDELITY & C. CO. v. WATERMAN, 161 Ill. 632, 44 N. E. 283.

Accident insurance.

Approved in Fidelity & C. Co. v. Loewenstein, 46 L. R. A. 452, 38 C. C. A. 31, 97 Fed. 19, Affirming 88 Fed. 477, holding inhaling gas while asleep not within exception of injuries from "anything accidentally or otherwise taken, administered, absorbed, or inhaled."

Cited in footnotes to Preferred Acci. Ins. Co. v. Robinson, 61 L. R. A. 145, which denies right to recover under accident policy for inflammation of eyes from accidental contact with poison ivy; Maryland Casualty Co. v. Hudgins, 64 L. R. A. 349, which holds death by accidentally eating spoiled oysters within clause of policy exempting from liability for injuries from poison or anything accidentally or otherwise taken or absorbed.

Distinguished in McGlother v. Provident Mut. Acci. Co. 32 C. C. A. 320, 60 U. S. App. 705, 89 Fed. 687, holding exception of "death resulting from poison" extends to death from poison taken in belief it was medicine; Kasten v. Interstate Casualty Co. 99 Wis. 77, 40 L. R. A. 653, 74 N. W. 534, holding septic poison from germs propagated in cotton inserted after drawing of tooth covered by exception of injuries from poison taken, administered, absorbed, or inhaled.

Appeal.

Followed in Case v. Phillips, 182 Ill. 190, 55 N. E. 66, holding objections not raised in appellate court cannot be raised in supreme court.

32 L. R. A. 656, PAGE v. KUYKENDALL, 161 Ill. 319, 43 N. E. 1114.

Ballots.

Cited in Hope v. Flentge, 140 Mo. 413, 47 L. R. A. 828, 41 S W. 1002 (dissenting opinion), majority holding failure to erase group under one party caption having nomination for only one office invalidates ballot for all other offices in another unerased column.

Distinguished in State *ex rel.* Vogler v. Mahncke, 16 Tex. Civ. App. 563, 41 S.

W. 185, holding valid ballot stating name of candidate, but not office, evidence showing that person was running for particular office, and no other of same name running for any office.

32 L. R. A. 659, EDEN v. PEOPLE, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108.

Sabbath observance.

Approved in McCurdy v. Alaska & C. Commercial Co. 102 Ill. App. 123, holding common law does not prohibit pursuit of citizen's ordinary work on Sunday.

— Contracts.

Approved in Collins Ice Cream Co. v. Stephens, 189 Ill. 205, 59 N. E. 524, holding valid, contract to perform Sunday work not disturbing peace.

— Validity of Sunday laws.

Cited in Foll v. People, 66 Ill. App. 411, holding Sunday labor not criminal unless disturbing peace and good order; Denver v. Bach, 26 Colo. 533, 46 L. R. A. 850, footnote p. 848. 58 Pac. 1089, holding void. ordinance prohibiting sale of clothing on Sunday without applying to all kinds of merchants; State v. Sopher, 25 Utah, 324, 60 L. R. A. 470, footnote p. 468, 95 Am. St. Rep. 845, 71 Pac. 482, holding forbidding barber to exercise his trade on Sunday a proper exercise of police power; Tacoma v. Krech, 15 Wash. 298, 34 L. R. A. 69, 46 Pac. 255, holding ordinance prohibiting barbers from pursuing their calling for compensation on Sunday unconstitutional as class legislation.

Cited in footnotes to People v. Havnor, 31 L. R. A. 689, which sustains act prohibiting barber from carrying on business on Sunday; *Ex parte* Jentzsch, 32 L. R. A. 664, which holds statute prohibiting barbers carrying on business after 12 o'clock on Sunday, void; State v. Powell, 41 L. R. A. 854, which sustains statute making baseball playing on Sunday an offense; State v. Hogriever, 45 L. R. A. 504, which sustains statute prohibiting baseball playing on Sunday; State *ex rel.* Holman v. Justus, 64 L. R. A. 510, which sustains statute prohibiting keeping butcher shops open on Sunday, though authorizing sale of confectionery and tobacco.

Distinguished in Breyer v. State, 102 Tenn. 106, 50 S. W. 769, sustaining act imposing heavier penalty than on similar violations of Sunday law for offense of exercising trade of barber.

Disapproved in State v. Nichols, 28 Wash. 637, 69 Pac. 372, sustaining act prohibiting keeping open places for sale of goods on Sunday, excepting hotels, drug stores, liveries, and undertakers; *Ex parte* Northrup, 41 Or. 495, 69 Pac. 445, sustaining act prohibiting business of barber on Sunday, as not class legislation, though there is no general Sunday law.

Constitutional law.

Approved in Bailey v. People, 190 Ill. 36, 54 L. R. A. 841, footnote p. 839, 83 Am. St. Rep. 116, 60 N. E. 98, holding void, restriction on number which lodging-house keepers may permit to occupy one room.

Cited in Chicago v. Netcher, 183 Ill. 111, 48 L. R. A. 264, 75 Am. St. Rep. 93, 55 N. E. 707, holding void, ordinance prohibiting sellers of dry goods, etc., from selling foods; Ruhstrat v. People, 185 Ill. 142, 49 L. R. A. 184, 76 Am. St. Rep. 30, 57 N. E. 41, holding unconstitutional, statute prohibiting use of flag for advertising, as depriving of a "privilege;" Lippman v. People, 175 Ill. 109, 51 N. E. 872, holding unconstitutional, statute granting special protection to manufacturers and

dealers in receptacles for beverages, as giving exclusive privileges; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 505, 98 Am. St. Rep. 254, 68 N. E. 938, holding act forbidding sale or use of receptacle stamped with trade-mark, without written consent of owner, unconstitutional as class legislation; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 164, 41 L. ed. 671, 17 Sup. Ct. Rep. 255, holding void, as denying equal protection of laws, act imposing on railroad corporations penalty for failure to settle claims within certain time of presentation; Pierce v. Dillingham, 203 Ill. 165, 62 L. R. A. 894, 67 N. E. 846, holding rule of live-stock commissioners requiring tuberculin test of cattle imported for dairy or breeding purposes only, illegal discrimination; Republic Iron & Steel Co. v. State, 160 Ind. 386, 62 L. R. A. 142, 66 N. E. 1005, holding that statute requiring weekly payment of wages interferes with liberty of contract and deprives citizens of liberty and property without due process of law; Marshall & B. Co. v. Nashville, 109 Tenn. 510, 71 S. W. 815, holding ordinance requiring city printing to bear union label unconstitutional as class legislation.

— Police power.

Cited in Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 505, 98 Am. St. Rep. 254, 68 N. E. 938, holding statute forbidding sale or use of receptacle stamped with trade-mark, without written consent of owner, not sustainable under police power.

Cited in footnotes to Bessette v. People, 56 L. R. A. 558, which holds void, requirement that horseshoers practise business for four years, submit to examination, and pay license fee; State v. Ray, 60 L. R. A. 634, which holds unauthorized, ordinance for closing stores at 7:30 P. M., except Saturdays.

32 L. R. A. 664, *Ex parte* Jentzsch, 112 Cal. 468, 44 Pac. 803.

Constitutional law; Sunday or holiday laws.

Cited in Denver v. Bach, 26 Colo. 532, 46 L. R. A. 850, footnote p. 848, 58 Pac. 1089, holding void, ordinance prohibiting sale of clothing on Sunday without applying to all kinds of merchants; State v. Sopher, 25 Utah, 324, 60 L. R. A. 470, footnote p. 468, 95 Am. St. Rep. 845, 71 Pac. 482, sustaining act forbidding barber to exercise his trade on Sunday.

Cited in footnotes to Eden v. People, 32 L. R. A. 659, which holds statute prohibiting barbers alone from carrying on business on Sunday void; Tacoma v. Krech, 34 L. R. A. 68, which holds invalid, ordinance against barbers pursuing calling on Sunday; State v. Powell, 41 L. R. A. 854, which sustains statute making baseball playing on Sunday an offense; State v. Hogriever, 45 L. R. A. 504, which sustains statute prohibiting baseball playing on Sunday; State *ex rel.* Hoffman v. Justus, 64 L. R. A. 510, which sustains statute prohibiting keeping butcher shops open on Sunday, though authorizing sale of confectionery and tobacco; Watson v. Thomson, 59 L. R. A. 602, which denies city's power to prevent carrying on of lawful avocation on Christmas day.

— Discrimination.

Approved in Johnson v. Goodyear Min. Co. 127 Cal. 16, 47 L. R. A. 343, 78 Am. St. Rep. 17, 59 Pac. 304, holding unconstitutional, act establishing liens in favor of employees on property of corporations doing business in state; State v. Garbroski, 111 Iowa, 499, 56 L. R. A. 572, 82 Am. St. Rep. 524, 82 N. W. 959, holding unconstitutional, act exempting veterans from requirement as to peddlers' license; Gibbs v. Tally, 133 Cal. 377, 60 L. R. A. 817, 65 Pac. 970, holding unconstitutional, act requiring building contract to be secured by bond.

Cited in State *ex rel.* Lewis v. Smith, 158 Ind. 571, 63 L. R. A. 129, 63 N. E. 214 (dissenting opinion), majority sustaining act deducting from assessed value of land, for taxation, mortgage debt not exceeding $700.

Distinguished in Henley v. State, 98 Tenn. 698, 39 L. R. A. 136, 41 S. W. 352, sustaining act providing for costs in certain criminal actions and denying them in others, as not unreasonable classifications; Morris v. Stout, 110 Iowa, 662, 50 L. R. A. 99, 78 N. W. 843, sustaining act for punishment of man deserting, without cause, woman whom he married to escape prosecution.

32 L. R. A. 667, WIGGINS v. MUSCUPIABE LAND & WATER CO. 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160.

Riparian rights.

Followed in Smith v. Corbit, 116 Cal. 592, 48 Pac. 725, holding court may, when parties' interests conserved, apportion flow of water by periods of time.

Cited in Jones v. Conn, 39 Or. 38, 54 L. R. A. 633, 634, footnote p. 630, 87 Am. St. Rep. 634, 64 Pac. 855, sustaining riparian right to use water for irrigating nonriparian land; Craig v. Crafton Water Co. 141 Cal. 182, 74 Pac. 762, holding that upper proprietor entitled to use water for domestic purposes and for watering stock should have his share apportioned by periods of time rather than by division of its quantity; Katz v. Walkinshaw, 141 Cal. 124, 64 L. R. A. 249, 99 Am. St. Rep. 35, 74 Pac. 766, holding common-law rule not applicable when, owing to different physical features and climatic conditions, it would tend to cause injustice and wrong.

Cited in footnote to Warren v. Westbrook Mfg. Co. 35 L. R. A. 388, which authorizes division in equity of use of water power to adjust rights of all parties.

Cited in note (46 L. R. A. 176) on periodical appropriation of water.

32 L. R. A. 671, KROMER v. FRIDAY, 10 Wash. 621, 39 Pac. 229.

Community rights in land.

Approved in Ahern v. Ahern, 31 Wash. 336, 96 Am. St. Rep. 912, 71 Pac. 1023, holding lands acquired under homestead laws, but of which husband did not receive patent until after death of his wife, is community property.

Cited in McCune v. Essig, 122 Fed. 592, holding patent issued to wife after death of husband conveys full legal title to her.

Distinguished in Forker v. Henry, 21 Wash. 237, 57 Pac. 811, holding homestead settled and improved by woman before marriage, her separate property, though final proof made and patent issued after.

Rights of infant.

Cited in footnotes to Warren v. Union Bank, 43 L. R. A. 256, which holds void, mortgage of infant's property under order of court for sole purpose of paying unauthorized debt incurred by guardian; Beliveau v. Amoskeag Co. 44 L. R. A. 167, which holds binding, settlement of suit by infant plaintiff's attorney of record after his discharge.

Distinguished in Morrison v. Morrison, 25 Wash. 473, 65 Pac. 779, holding child not bound by error of trial court in admitting proof in action on father's will, showing intention to omit mention of child, and may vacate judgment at majority.

32 L. R. A. 694, PEOPLE v. SILBERWOOD, 110 Mich. 103, 67 N. W. 1087.

Rights of riparian owner.

Followed in Sherwood v. State Land Office, 113 Mich. 228, 71 N. W. 532, holding island in Great Lake belongs to state, and not riparian owner.

Approved in State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 590, 87 N. W. 117, holding land connected with island in Great Lake, part generally a little above and part slightly below level, but sometimes covered, swamp land belonging to state.

Cited in People v. Warner, 116 Mich. 232, 74 N. W. 705, holding marshy island appearing in Great Lake since act of Congress granting swamp land to state belongs to state; Brown v. Parker, 127 Mich. 391, 86 N. W. 989, holding marsh land on edge of Great Lake, surveyed by Federal government, conveyed by it to state and by state to private purchaser, subject to absolute ownership of purchaser.

Cited in footnotes to Hall v. Alford, 38 L. R. A. 205, which denies right, without owner's consent, to hunt wild fowl in boats on marsh surrounding island which is sometimes dry, though sometimes water is a foot deep; New England Trout & Salmon Club v. Mather, 33 L. R. A. 569, which denies right of action for mere crossing of uncultivated land to reach public waters for purpose of fishing.

32 L. R. A. 697, STATE *ex rel.* MILSTED v. BUTTE CITY WATER CO. 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966.

Denial.

Followed in Rossiter v. Loeber, 18 Mont. 385, 45 Pac. 560, holding bad, denial stating defendant without knowledge or information sufficient to form belief, and therefore denies, etc.

Water and gas companies.

Cited in Crumley v. Watauga Water Co. 99 Tenn. 426, 41 S. W. 1058, holding water company cannot refuse to supply water to citizen until he pays previous indebtedness for which company had taken his due bill; Watauga Water Co. v. Wolfe, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060, holding company may refuse to supply one failing to comply with reasonable rule requiring closing of hydrants when not in use; State *ex rel.* Wood v. Consumers Gas Trust Co. 157 Ind. 352, 55 L. R. A. 248, 61 N. E. 674, holding gas company having power of eminent domain may be compelled to permit participation in supply of gas furnished by it.

Cited in footnote to Indiana Natural & Illuminating Gas Co. v. State, 57 L. R. A. 761, which denies right of natural gas company to discriminate against single consumer by enforcing meter rate, instead of flat rate, against him.

Cited in note (61 L. R. A. 106) on rights and duties of water company.

Distinguished in Kelsey v. Fire & Water Comrs. 113 Mich. 222, 37 L. R. A. 679, 71 N. W. 589, holding owner of office building cannot compel water commissioners to deal separately with individual tenants.

Statutory construction.

Followed in Largey v. Chapman, 18 Mont. 567, 46 Pac. 808, and Stadler v. First Nat. Bank, 22 Mont. 203, 74 Am. St. Rep. 582, 56 Pac. 111, holding legis-

lature in adopting statute of another state adopts construction given it in that state.

Cited in Oleson v. Wilson, 20 Mont. 552, 63 Am. St. Rep. 639, 52 Pac. 372 (dissenting opinion), majority holding courts not bound by construction of statute, adopted from another state, of courts of that state, when opposed to spirit of decisions of adopting state.

32 L. R. A. 700, SUBURBAN ELECTRIC CO. v. NUGENT, 58 N. J. L. 658, 34 Atl. 1069.

Presumption as to negligence.

Approved in Paynter v. Bridgeton & M. Traction Co. 67 N. J. L. 625, 52 Atl. 367, holding a fall while alighting from street car not such fact, standing alone, as raises presumption of negligence of company.

Cited in footnotes to Parish v. Western & A. R. Co. 40 L. R. A. 364, which holds presumption of negligence from killing person on track overcome by showing that person was sitting or lying on track at night; McLane v. Perkins, 43 L. R. A. 487, which denies presumption of freedom from contributory negligence of employee drowned while using leaky punt.

Highways.

Approved in Mahnken v. Monmouth, 62 N. J. L. 408, 41 Atl. 921, holding traveler has right to assume bridge free from unguarded obstructions and dangers.

— Electric wires.

Approved in New York & N. J. Teleph. Co. v. Bennett, 62 N. J. L. 743, 42 Atl. 759, holding owners of franchise to maintain wires in highway bound to use reasonable care not to injure others.

Cited in Gannon v. Laclede Gaslight Co. 145 Mo. 538, 43 L. R. A. 516, 47 S. W. 907 (dissenting opinion), majority holding that after plaintiff makes prima facie case showing damage caused by defendant's wire being down in alley, burden is on defendant to show no fault of servants.

Cited in footnotes to Boyd v. Portland General Electric Co. 52 L. R. A. 509, which holds want of sufficient assistance to promptly replace wires broken by severe storm not excuse, as matter of law, for delay; Boyd v. Portland General Electric Co. 57 L. R. A. 619, which holds electric light company liable for injury by wire broken during storm; Thomas's Administrator v. Maysville Gas Co. 53 L. R. A. 147, which requires corporation sending electricity into street railway company's wires to see to their insulation; Hebert v. Lake Charles Ice, Light, & Waterworks Co. 64 L. R. A. 101, which holds absolute duty imposed on electric light company to keep its wires insulated so as to prevent injurious contact with them.

32 L. R. A. 701, FULPER v. FULPER, 54 N. J. Eq. 431, 55 Am. St. Rep. 590, 34 Atl. 1063.

Tenancy by entirety.

Cited in footnote to Johnston v. Johnston, 61 L. R. A. 166, which holds estate by entirety not created by giving note secured by deed of trust to husband and wife for loan, part of which advanced by each.

32 L. R. A. 703, PICKSLAY v. STARR, 149 N. Y. 432, 52 Am. St. Rep. 740, 44 N. E. 163.

Checks.

Cited in People v. Sheppard, 37 App. Div. 123, 55 N. Y. Supp. 1130, holding obligors on bond of depositary of county funds liable for amount of check given by outgoing to ingoing treasurer, and deposited as if currency; Pawson v. Miller, 66 App. Div. 13, 72 N. Y. Supp. 1011, holding destruction by drawer of check in hands of constable, to whom it was given in satisfaction of judgment, conversion.

Delay in disaffirmance of contract.

Cited in Hallahan v. Webber, 7 App. Div. 123, 40 N. Y. Supp. 103, and Kaufmann v. McLaughlin, 24 Misc. 605, 54 N. Y. Supp. 160, holding delay fatal to action to rescind contract on ground of misrepresentations.

32 L. R. A. 706, HUTCHINS v. DURHAM, 118 N. C. 457, 24 S. E. 723.

Power of suspension.

Cited in State *ex rel.* Caldwell v. Wilson, 121 N. C. 469, 28 S. E. 554, holding railroad commissioner may be suspended from office by governor.

Revocation of license.

Approved in Wallace v. Reno, 27 Nev. 86, 63 L. R. A. 343, 73 Pac. 528, upholding right of city council to revoke business license without notice to licensee.

32 L. R. A. 708, RIDLEY v. SEABOARD & R. R. CO. 118 N. C. 996, 24 S. E. 730.

Damage by public-service corporations.

Cited in note (39 L. R. A. 610) on municipal control over public nuisances on public streets and highways, created by street railroads and other electrical companies.

Waters — Right of action for diversion.

Cited in Mullen v. Lake Drummond Canal & Water Co. 130 N. C. 502, 61 L. R. A. 842, 41 S. E. 1027, holding canal company liable for permitting water to soak through embankments and injure adjoining owners.

— Limitations in actions for diversion.

Followed in Hocutt v. Wilmington & W. R. Co. 124 N. C. 219, 32 S. E. 681, holding statute does not bar action for damages shortly before suit, from flooding caused by embankment built twenty years before; Parker v. Norfolk & C. R. Co. 119 N. C. 685, 687, 25 S. E. 722, sustaining right of action for damage accruing within three years, from negligent ditching on railroad right of way, where cause of action accrued more than three, but less than twenty, years preceding; Powers v. St. Louis, I. M. & S. R. Co. 158 Mo. 102, 57 S. W. 1090, Affirming 71 Mo. App. 544, holding action barred by prescription, complaint stating permanent injury to land from improper construction of railroad embankment more than ten years before action.

Cited in Beach v. Wilmington & W. R. Co. 120 N. C. 502, 26 S. E. 703, holding action for permanent damage to land from filling up of drains, due to negligent construction of railroad built before plaintiff bought, not barred by presumption of permanent damage before purchase.

Cited in note (59 L. R. A. 890) on limitation of liability for damming back water of stream.

Limitations in other actions for continuing injury.

Cited in footnotes to Doran v. Seattle, 54 L. R. A. 532, which authorizes recovery for damages from continuing nuisance accruing within statutory period, regardless of time nuisance has existed; Church of Holy Communion v. Paterson Extension R. Co. 55 L. R. A. 81, which holds limitation begins to run for injuries to church wall from insufficiency of retaining wall built in constructing track, from time injury occurs.

Damages in actions for continuing nuisance.

Followed in 124 N. C. 36, 32 S. E. 325, on later appeal, holding that in action for damages from flooding by railroad embankment, plaintiff may recover past damage to crops, accruing within three years, and defendant is entitled to submission of issue as to permanent damage, though not demanded in complaint. Approved in Phillips v. Postal Teleg. Cable Co. 130 N. C. 527, 89 Am. St. Rep. 868, 41 S. E. 1022, holding permanent damages may be awarded against telegraph company for injury to land from poles set on it; Chaffin v. Fries Mfg. & Power Co. 135 N. C. 98, 47 S. E. 226, holding one whose lands are flooded because of obstruction of stream by dam may recover damages arising both from its construction and its maintenance; Lassiter v. Norfolk & C. R. Co. 126 N. C. 513, 36 S. E. 48, upholding, in action against railroad company for flooding lands, recovery of both permanent damages and damages for destruction of crops; Candler v. Asheville Electric Co. 135 N. C. 17, 47 S. E. 114, holding judgment awarding damages for flooding of land up to specified time does not preclude subsequent recovery of permanent damages; Hollenbeck v. Marion, 116 Iowa, 79, 89 N. W. 210, holding, in action to recover damages for polluting stream, defendant cannot complain that plaintiff seeks recovery for temporary, instead of permanent, nuisance.

Distinguished in Hartman v. Pittsburg Incline Plane Co. 11 Pa. Super. Ct. 445, Affirming 32 Pittsb. L. J. N. S. 336, and holding fact that defendant is corporation with right of eminent domain does not prevent plaintiff, who has before recovered damages from construction, from recovering for continuation of nuisance; Jones v. Kramer, 133 N. C. 448, 45 S. E. 827, holding measure of damages for obstruction of canal, preventing proper drainage of lands, is lessened production or value of crops lost.

32 L. R. A. 712, COMMERCIAL NAT. BANK v. FIRST NAT. BANK, 118 N. C. 783, 54 Am. St. Rep. 753, 24 S. E. 524.

Liability of bank to payee of check.

Approved in Perry v. Bank of Smithfield, 131 N. C. 118, 42 S. E. 551, holding action not maintainable by payee of check against bank which has not accepted or agreed to pay check.

32 L. R. A. 715, SAYLES v. COX, 95 Tenn. 579, 49 Am. St. Rep. 940, 32 S. W. 626.

Trusts.

Cited in Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 230, 36 L. R. A. 288, 60 Am. St. Rep. 854, 39 S. W. 3, holding no trust in money or goods in possession

of assignee for creditors, unless kept separate and capable of identification; McClung v. Colwell, 107 Tenn. 601, 89 Am. St. Rep. 961, 64 S. W. 890, holding trust results in favor of person advancing purchase price of stock issued to another.

— In funds in insolvent bank.

Followed in Bruner v. First Nat. Bank, 97 Tenn. 543, 34 L. R. A. 534, 37 S. W. 286, holding, when cash fraudulently received by officers of bank knowing its insolvency, no preference if it went into funds of bank before receiver took charge and cannot be identified; Friberg v. Cox, 97 Tenn. 553, 37 S. W. 283, holding check, received by bank whose officials know it is insolvent and sent for collection to another bank which credited first bank, cannot be followed and reclaimed.

Cited in Klepper v. Cox, 97 Tenn. 537, 34 L. R. A. 537, 56 Am. St. Rep. 823, 37 S. W. 284, holding fraud of bank officials, knowing insolvency and receiving deposit of cash and check, does not effect preference, if cash mingled with funds and credit received for check before actual failure; Williams v. Cox, 97 Tenn. 559, 37 S. W. 282, holding when check deposited and credited, and depositor drew at once for part and was paid, no preference when bank becomes insolvent.

Cited in footnotes to Standard Oil Co. v. Hawkins, 33 L. R. A. 739, which holds proving claim as general creditor against bank receiver not conclusive election against following fund fraudulently obtained; State v. Edwards, 52 L. R. A. 858, which holds money collected by bank on notes and drafts, held in trust for owner.

Cited in note (34 L. R. A. 537) on trust in deposit in insolvent bank.

Distinguished in Showalter v. Cox, 97 Tenn. 549, 37 S. W. 286, holding title to check, delivered to bank officials knowing insolvency, without special agreement and without being credited, does not pass.

Banking.

Cited in footnote to American Exchange Nat. Bank v. Theummler, 58 L. R. A. 51, which sustains right of bank to apply to overdraft, draft received for collection from other bank without notice of such fact.

32 L. R. A. 723, STATE *ex rel.* LITTLE v. LANGLIE, 5 N. D. 594, 67 N. W. 958.

Collateral attack upon findings of commissioners.

Followed in State *ex rel.* Laird v. Gang, 10 N. D. 337, 87 N. W. 5, holding question of sufficiency of petition for organization of town having been determined by county commissioners is not reviewable in collateral proceeding.

Elections —Omission of notice.

Approved in Norman v. Thompson, 30 Tex. Civ. App. 543, 72 S. W. 64, holding election not invalidated by failure to give statutory notice of it, if result was not affected thereby.

— Requirement of certain proportion of votes.

Cited in Davis v. Brown, 46 W. Va. 720, 34 S. E. 839, holding requirement of three fifths of votes cast for relocation of county seat necessitates only three fifths of votes on that question; State *ex rel.* McClurg v. Powell, 77 Miss. 583, 48 L. R. A. 660, footnote p. 652, 27 So. 927, requiring majority of all electors voting at election for any purpose, for adoption of constitutional amendment; *Re* Denny, 156 Ind. 122, 51 L. R. A. 729, footnote p. 722, 59 N. E. 359, requiring majority of all votes cast at election for any purpose, for adoption of constitutional amendment.

Cited in footnotes to Bryan v. Stephenson, 35 L. R. A. 752, which requires majority of all votes cast at election to authorize issue of bonds; Citizens & Taxpayers of De Soto Parish v. Williams, 37 L. R. A. 761, which holds only majority of taxpayers actually voting at election necessary to authorize increase of taxes; Montgomery County Fiscal Court v. Trimble, 42 L. R. A. 738, which holds two thirds of those voting on question of creating county indebtedness sufficient.

32 L. R. A. 730, CHRISTENSEN v. FARMERS' WAREHOUSE ASSO. 5 N. D. 438, 67 N. W. 300.

Trials de novo in supreme court.

Approved in Edmonson v. White, 8 N. D. 73, 76 N. W. 986, holding supreme court cannot hear new evidence in trying case anew on appeal under statute; Kipp v. Angell, 10 N. D. 201, 86 N. W. 706, holding, when trial *de novo* demanded, and documents offered in lower court not made part of record, judgment affirmed.

Bona fide indorsee.

Followed in First Nat. Bank v. Flath, 10 N. D. 285, 86 N. W. 867, holding that mere suspicion will not, and nothing but clear evidence of knowledge of fraud will, defeat recovery on note by indorsee for full value before maturity.

32 L. R. A. 734, HERRMANN v. STATE, 54 Ohio St. 506, 43 N. E. 990.

Sewer assessments.

Approved in Hill v. St. Louis, 159 Mo. 173, 60 S. W. 116, holding proper, ordinance refusing permit to tap sewer until special tax bills due contractors are paid; Neill v. Trans-Atlantic Mortg. Trust Co. 89 Mo. App. 648, holding taxpayer using sewer does not make valid a tax bill against him legally declared void.

Cited in note (58 L. R. A. 381) on who is liable for expense of drainage.

32 L. R. A. 735, MORTON v. WESTERN U. TELEG. CO. 53 Ohio St. 431, 53 Am. St. Rep. 648, 41 N. E. 689.

Damages; mental suffering in telegraph cases.

Cited in Western U. Teleg. Co. v. Ferguson, 157 Ind. 75, 76, 54 L. R. A. 850, footnote p. 846, 60 N. E. 674, Reversing 26 Ind. App. 219, 59 N. E. 416, holding action not supported by mental anguish from failure to deliver telegram promptly; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 283, 126 Fed. 297, holding no recovery can be had at common law for mental suffering not due to physical injury.

Cited in footnotes to Peay v. Western U. Teleg. Co. 39 L. R. A. 463, which denies right to damages for mental anguish without physical injury, for delay in delivering telegram; Simmons v. Western U. Teleg. Co. 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for delay in delivering messages; Western U. Teleg. Co. v. Crocker, 59 L. R. A. 398, which sustains recovery for mental anguish for failure to promptly deliver telegram announcing serious illness of grandchild; Cowan v. Western U. Teleg. Co. 64 L. R. A. 546, which holds that mental anguish will sustain action for breach of contract to promptly transmit telegram.

32 L. R. A. 736, DEFIANCE WATER CO. v. OLINGER, 54 Ohio St. 532, 44 N. E. 238.

Liability for injuries from dangerous things kept on premises.

Cited in Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. 60 Ohio St. 567,

45 L. R. A. 659, 71 Am. St. Rep. 740, 54 N. E. 528, Affirming 14 Ohio C. C. 526, holding one storing nitroglycerin liable without negligence to owners of property injured, even if not adjacent.

Cited in footnotes to Esberg-Gunst Cigar Co. v. Portland, 43 L. R. A. 435, which holds city liable for negligent construction or operation of water works built under legislative authority and supervision; Vieth v. Hope Salt & Coal Co. 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on one's own premises with care and skill; Davis v. Niagara Falls Tower Co. 57 L. R. A. 545, which sustains right to injunction against maintaining tower so that ice forming on it falls upon adjoining property.

Cited in note (34 L. R. A. 616) on liability of landlord for injuries to tenant's guests and servants from defects in premises.

Distinguished in Cleveland Terminal & Valley R. Co. v. Marsh, 63 Ohio St. 249, 52 L. R. A. 147, 58 N. E. 821, holding boy employed by servant of railway to do his duty cannot recover for injuries from signal torpedo picked up by him from track and exploded; Langabaugh v. Anderson, 68 Ohio St. 143, 62 L. R. A. 952, 67 N. E. 286, holding, in action to recover for burning of plaintiff's building due to oil escaping from adjoining premises, defendant's negligence as put in issue by pleadings is question for jury.

32 L. R. A. 738, MON LUCK v. SEARS, 29 Or. 421, 54 Am. St. Rep. 804, 44 Pac. 693.

Prohibition of possession of goods.

Approved in *Ex parte* McClain, 134 Cal. 113, 54 L. R. A. 780, footnote p. 779, 86 Am. St. Rep. 243, 66 Pac. 69, sustaining city's right to make mere possession of lottery ticket a misdemeanor.

Cited in footnotes to Haggerty v. St. Louis Ice Mfg. & Storage Co. 40 L. R. A. 151, which holds void, contract for cold storage of game during close season; Ford v. State, 41 L. R. A. 551, which sustains statute making possession of record of lottery drawing or ticket an offense.

Sentence with minimum and maximum terms.

Cited in footnote to People v. Adams, 63 L. R. A. 406, which sustains statute permitting imposition of sentence of imprisonment with minimum and maximum terms.

32 L. R. A. 740, BRISTOL v. BRISTOL & W. WATERWORKS, 19 R. I. 413, 34 Atl. 359.

Cited in 23 R. I. 275, 49 Atl. 974, for previous history of case.

Specific performance.

Approved in Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. R. Co. 199 Ill. 463, 65 N. E. 424, holding one who has conveyed land after agreement to convey to another not proper defendant in action for specific performance of agreement; Cherryvale Water Co. v. Cherryvale, 65 Kan. 231, 69 Pac. 176, holding contract by city to purchase water works at appraised valuation of disinterested persons may be specifically enforced.

Municipal water works.

Cited in Kennebec Water District v. Waterville, 97 Me. 205, 60 L. R. A. 863, 54 Atl. 6, holding value of plant and franchises of water company affected by char-

acter and duration of franchises; Kennebec Water District v. Waterville, 97 Me. 216, 60 L. R. A. 868, 54 Atl. 6, holding, in estimating value of water company's plant, allowance should be made for fact that it is going concern with profitable business and good will.

Cited in footnote to North Springs Water Co. v. Tacoma, 47 L. R. A. 214, which sustains city's right to build own water works after granting franchise to water company.

Cited in note (61 L. R. A. 46, 47) on contract to purchase water works.

32 L. R. A. 744, DEFREESE v. LAKE, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505.

Life tenancy.

Followed in Bowen v. Brogan, 119 Mich. 220, 75 Am. St. Rep. 387, 77 N. W. 942, holding life tenant neglecting to pay mortgage interest cannot cut off remaindermen by buying on foreclosure.

Approved in Booth v. Booth, 114 Iowa, 79, 86 N. W. 51, holding tenant in common in remainder who pays taxes during life tenancy not entitled, without proof that he did it to protect himself, to credit therefor on partition.

Cited in Damm v. Damm, 109 Mich. 622, 63 Am. St. Rep. 601, 67 N. W. 984, holding where there are two life tenancies, and tenant in possession, also owning fee, buys mortgage on second tenancy and fee, second life tenant must contribute share of interest on mortgage on basis of relative value of life estates.

Cited in footnotes to Ruggles v. Tyson, 48 L. R. A. 809, which denies right to authorize use of trust property during life tenancy for infant remaindermen whose estate contingent on life tenant exercising power of appointment among survivors; Tabb v. Com. 51 L. R. A. 283, which holds tax assessment on land, made pending life estate, not lien on fee; Hanna v. Palmer, 56 L. R. A. 93, which denies power of life tenant to acquire absolute title to property by allowing it to be sold for taxes.

Cited in notes (32 L. R. A. 805) on effect of tax sale on land held by life tenant; (33 L. R. A. 688) on effect on estates in reversion or remainder of tax sale during existence of life estate.

Distinguished in Downing v. Birney, 112 Mich. 480, 70 N. W. 1006, holding deed not limiting estate, but in habendum to grantee, to her heirs begotten by husband, to her heirs, executors, and assigns of herself and husband, gave her life estate, second life estate to her heirs by husband, and fee in expectancy to her or heirs, or assigns of herself and husband.

Tenancy in common.

Cited in Sleight v. Roe, 125 Mich. 589, 85 N. W. 10, holding when tenant in common buys land on sale for taxes assessed during tenancy in common, he is trustee for share of cotenant.

Distinguished in *Re* Graff, 123 Mich. 460, 82 N. W. 248, holding widow, delaying performance of duties as administrator, and occupying property by consent of children, is tenant in common and cannot charge estate with taxes, etc.

Tax sale.

Approved in Boardman v. Boozewinkel, 121 Mich. 323, 80 N. W. 37, holding purchase at tax sale by attorney of mortgagee in foreclosure amounts to redemption from sale; Simons v. Rood, 129 Mich. 349, 88 N. W. 879, holding purchaser of land under contract cannot assert title thereto under tax deed.

Cited in Shrigley v. Black, 66 Kan. 224, 71 Pac. 301 (dissenting opinion) majority holding neither mortgagor nor his grantee can defeat mortgage by tax title.

Quitclaim deed.

Cited in footnote to Johnson v. Johnson, 59 L. R. A. 748, which holds grantee in quitclaim deed vested with title acquired by warrantor to grantor after warranty deed delivered.

32 L. R. A. 756, ST. PAUL TRUST CO. v. MINTZER, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657.

Life tenancy.

Approved in Booth v. Booth, 114 Iowa, 79, 86 N. W. 51, holding tenant in common in remainder, paying taxes during life tenancy, not entitled, without proof that it was done to protect his interests, to credit for amount on partition; Abernethy v. Orton, 42 Or. 444, 95 Am. St. Rep. 774, 71 Pac. 327, holding refusal of life tenant to pay taxes constitutes waste conferring jurisdiction on equity to appoint receiver.

Cited in Shrigley v. Black, 66 Kan. 225, 71 Pac. 301 (dissenting opinion by Doster, J.), who holds it is duty of life tenant to pay taxes assessed.

Cited in footnote to Ruggles v. Tyson, 48 L. R. A. 809, which denies right to authorize use of trust property during life tenancy for infant remaindermen whose estate contingent on life tenant exercising power of appointment among survivors.

Cited in notes (33 L. R. A. 688) on effect on estates in reversion or remainder of tax sale during existence of life estate; (32 L. R. A. 805) on effect of tax sale on land held by life tenant.

32 L. R. A. 761, DEMPSEY v. DOBSON, 174 Pa. 122, 52 Am. St. Rep. 816, 34 Atl. 459.

Right to trade secrets.

Followed in Dempsey v. Dobson, 184 Pa. 592, 40 L. R. A. 551, footnote p. 550, 63 Am. St. Rep. 809, 39 Atl. 493, holding unlawful, custom giving color mixer exclusive title as against employer to combinations of color devised.

Approved in Hanley v. Heidelberg Compound Oxygen Co. 24 Pa. Co. Ct. 503, holding written secret formula inclosed in envelope, subject to execution.

Cited in footnotes to O. & W. Thum Co. v. Tloczynski, 38 L. R. A. 200, which sustains right to enjoin breach of agreement by employee not to communicate trade secrets learned; Stone v. Goss, 63 L. R. A. 344, which upholds injunction against disclosure of trade secret by one under express contract, or contract implied from confidential relation.

Admissibility of letter.

Approved in Chicago v. McKechney, 205 Ill. 470, 68 N. E. 954, holding letter written by party to suit inadmissible in his own behalf, except as notice or demand.

32 L. R. A. 764, GEORGE v. AMERICAN GINNING CO. 46 S. C. 1, 57 Am. St. Rep. 671, 24 S. E. 41.

Service of process.

Distinguished in Thomson v. Pfeiffer, 60 Kan. 419, 56 Pac. 763, holding in ac-

tion against bank instigated by father of president, who selected counsel, both aiding prosecution, service on president and judgment by default valid; United States Blowpipe Co. v. Spencer, 46 W. Va. 595, 33 S. E. 342, holding service on attorney of plaintiff, as officer of defendant corporation, not void but voidable.

32 L. R. A. 766, *Re* WAGONER, 174 Pa. 558, 52 Am. St. Rep. 828, 34 Atl. 114.

Sufficiency of execution of gifts and trusts.

Followed in Dougherty v. Shillingsburg, 175 Pa. 59, 34 Atl. 349, holding execution on death bed of bill of sale of property, with instructions to vendee to divide consideration into parts for certain purposes, valid parol trust; Kulp v. March, 181 Pa. 633, 59 Am. St. Rep. 687, 37 Atl. 913, holding question of gift for jury where deceased in lifetime made, under seal, regular assignment of insurance to wife, which he left in safe, making similar statments on death bed; Funston v. Twining, 202 Pa. 93, 51 Atl. 736, holding valid gift made by delivery of note and mortgage with words declaring gift on condition of payment of interest by donee to donor during latter's life; Conway's Estate, 18 Lanc. L. Rev. 136, holding delivery to donee of order on bank for bonds, in vault with time lock, so that they could not be gotten until after donor's death, valid gift.

Approved in Eshbach's Estate, 17 Lanc. L. Rev. 330, holding signed paper not under seal, stating writer holds money of daughter, who shall have interest for life, and her children the principal, valid declaration of trust, but not gift; Conlan v. Conlan, 20 Pa. Super. Ct. 50, holding delivery of will and bond by cashier after death of testator and in accordance with the terms on which they were intrusted to him perfects delivery, which relates back to date of delivery in escrow.

32 L. R. A. 769, GRAY v. MERRIAM, 148 Ill. 179, 39 Am. St. Rep. 172, 35 N. E. 810.

Liability of bailee.

Approved in First Nat. Bank v. First Nat. Bank of Newport, 116 Ala. 532, 22 So. 976, holding bank receiving land certificates as security liable to pledgeor for loss of them from lack of ordinary care, and referring particularly to annotation in 32 L. R. A. 769; Watson v. Fagner, 208 Ill. 144, 70 N. E. 23, holding gratuitous bailee liable for negligence in making loan or in failing to collect it, which would amount to want of ordinary care and diligence.

Cited in Cussen v. Southern California Sav. Bank, 133 Cal. 537, 85 Am. St. Rep. 221, 65 Pac. 1099, holding savings bank renting vault responsible for lack of ordinary care in preservation of property.

Cited in note (29 L. R. A. 95) on liability of bailee for wrongful appropriation by his servant of thing bailed.

— Trustees.

Cited in footnote to Woodhouse v. Crandall, 58 L. R. A. 385, which requires entire balance in insolvent bank to be turned over to beneficiary of trust fund exceeding such balance.

Harmless error.

Cited in Taylor v. Pegram, 151 Ill. 119, 37 N. E. 837; Ennis v. Pullman Palace Car Co. 165 Ill. 180, 46 N. E. 439; Smith v. Smith, 168 Ill. 501, 48 N. E. 96; Highley v. Metzger, 187 Ill. 241, 58 N. E. 407,—to proposition that erroneous charge not reversible when appellant not injured.

32 L. R. A. 775, MERCHANT'S NAT. BANK v. CARHART, 95 Ga. 394, 51 Am. St. Rep. 95, 22 S. E. 628.

32 L. R. A. 778, CHISM v. FIRST NAT. BANK, 96 Tenn. 641, 54 Am. St. Rep. 863, 36 S. W. 387.

Liability of bank for check with forged indorsement.

Followed in Farmer v. People's Bank, 100 Tenn. 190, 47 S. W. 234, holding bank collecting check with forged indorsement of payee's name liable to latter for proceeds, though without suspicion of forgery.

Cited in footnote to Shepard & M. Lumber Co. v. Eldridge, 41 L. R. A. 617, which holds payee of indorsed check not deprived of remedy against drawer by intrusting it to dishonest clerk who forged indorsement of same.

Check issued or indorsed to impostor.

Cited in note (50 L. R. A. 83) as to who must bear loss where check or bill issued or indorsed to impostor.

32 L. R. A. 782, SCHMALZRIED v. WHITE, 97 Tenn. 36, 36 S. W. 393.

Landlord and tenant.

Cited in note (34 L. R. A. 829) on liability of landlord for injury to tenant from defect in premises.

Distinguished in Willcox v. Hines, 100 Tenn. 540, 41 L. R. A. 279, 66 Am. St. Rep. 770, 46 S. W. 297, holding landlord liable to tenant for defects existing when lease made, which he ought to have known and which tenant could not know.

Fire escapes.

Cited in Weeks v. McNulty, 101 Tenn. 502, 43 L. R. A. 188, footnote p. 185, 70 Am. St. Rep. 693, 48 S. W. 809, denying liability of keeper of hotel without fire escapes, for death of guest, unless death caused thereby.

Cited in footnotes to Arms v. Ayer, 58 L. R. A. 277, which sustains statute requiring fire escapes on certain kinds of buildings, giving factory inspector discretion as to their number, location, etc.; Huda v. American Glucose Co. 40 L. R. A. 411, which holds screwing down of windows leading to fire escapes not violation of statute; Carrigan v. Stillwell, 61 L. R. A. 163, which holds owner of rented building liable for injury from lack of fire escapes.

32 L. R. A. 785, CHASE v. YORK COUNTY SAV. BANK, 89 Tex. 316, 59 Am. St. Rep. 48, 36 S. W. 406.

Title of trustee as against execution sale.

Cited in Thaxton v. Smith, 90 Tex. 595, 40 S. W. 14, holding that one buying on execution sale in action begun after defendant had executed assignment for creditors takes no title as against trustee.

32 L. R. A. 788, FORSYTH v. MANN BROS. 68 Vt. 116, 34 Atl. 481.

Damages for breach of contract.

Approved in Gallagher v. Baird, 54 App. Div. 404, 66 N. Y. Supp. 759, holding measure of damages in action for breach in abandoning contract to supply granite is expense incurred in obtaining same kind and color of granite outside of market.

32 L. R. A. 792, BALL v. CHESAPEAKE & O. R. CO. 93 Va. 44, 57 Am. St. Rep. 786, 24 S. E. 467.

Liability of carrier to passenger.

Followed in Fowlkes v. Southern R. Co. 96 Va. 747, 32 S. E. 464, holding railroad company not liable for unforeseen results of false statement of agent as to connections.

Approved in Pullman Palace-Car Co. v. Hatch, 30 Tex. Civ. App. 304, 70 S. W. 771, holding sleeping car company not liable to passenger for loss or theft of property, unless it fails to exercise reasonable care; Thweatt v. Houston, E. & W. T. R. Co. 31 Tex. Civ. App. 228, 71 S. W. 976, holding carrier not responsible to passenger assaulted by another passenger or an intruder, if violence could not have been reasonably anticipated.

Cited in footnotes to Pullman's Palace-Car Co. v. Hall, 44 L. R. A. 790, which denies liability for theft of passenger's valise from sleeping car through window; Pullman's Palace Car Co. v. Adams, 45 L. R. A. 767, which holds sleeping car company liable for theft of passenger's property where porter went to sleep while on watch; Cooney v. Pullman Palace-Car Co. 53 L. R. A. 690, which holds sleeping car company liable for loss of passenger's valise intrusted employees of company.

Distinguished in Tall v. Baltimore Steam Packet Co. 90 Md. 254, 47 L. R. A. 122, 44 Atl. 1007, holding steamboat company not liable to passenger shot in quarrel between others, evidence not showing captain could have prevented shooting.

Negligence.

Approved in Willis v. Providence Telegram Pub. Co. 20 R. I. 287, 38 Atl. 947, holding no contributory negligence in trying to prevent one's horse from running away when frightened by collision, though plaintiff not in carriage; Herring v. Chesapeake & W. R. Co. 101 Va. 785, 45 S. E. 322, holding carrier delaying transportation of stock not liable for injury due to unprecedented cold and snow storm.

32 L. R. A. 796, SWASH v. SHARPSTEIN, 14 Wash. 426, 44 Pac. 862.

Statute of frauds.

Cited in footnotes to Svanburg v. Fosseen, 43 L. R. A. 427, which holds oral agreement to leave entire property at death, to members of promisor's family, rendered valid by their rendering of services and selling land at sacrifice for promisor's benefit; Bryson v. McShane, 49 L. R. A. 527, which holds specifically enforceable, executed oral contract to give entire property for support during life and burial after death; Clancy v. Flusky, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left before death.

32 L. R. A. 800, MAPEL v. JOHN, 42 W. Va. 30, 57 Am. St. Rep. 839, 24 S. E. 608.

Demurrer to evidence.

Followed in Talbott v. West Virginia, C. & P. R. Co. 42 W. Va. 565, 26 S. E. 311, holding that where jury finds verdict in alternative, subject to opinion of court on demurrer to evidence, it is duty of court to determine whether plain-

tiff made out his case; Teel v. Ohio River R. Co. 49 W. Va. 86, 38 S. E. 518, holding conflicting evidence of demurring defendant regarded as overcome, unless such conflicting evidence so plainly preponderates in his favor that court would set aside verdict for plaintiff.

Approved in Hysell v. Sterling Coal & Mfg. Co. 46 W. Va. 160, 33 S. E. 95, holding judgment on demurrer to evidence in favor of opposing party not reversed unless plainly contrary to preponderance of evidence; Meeks v. Ohio R. Co. 52 W. Va. 105, 43 S. E. 118, and Vance v. Ravenswood, S. & G. R. Co. 53 W. Va. 348, 44 S. E. 461, holding that by demurring to evidence, demurrant admits all inferences of fact fairly deducible from the evidence.

Cited in Young v. West Virginia, C. & P. R. Co. 42 W. Va. 121, 24 S. E. 615, holding defendant, by introducing evidence after demurring, waived demurrer; Chapman v. Charter, 46 W. Va. 780, 34 S. E. 768, holding no error in compelling plaintiffs to join in demurrer to evidence by defendants; Bowman v. Dewing, 50 W. Va. 447, 40 S. E. 576, holding court should consider evidence on both sides as if demurrer were a motion to set aside verdict of jury in favor of party opposing demurrer.

Questioned in Gunn v. Ohio River R. Co. 42 W. Va. 690, 36 L. R. A. 582, 26 S. E. 546, and Shaver v. Edgell, 48 W. Va. 511, 37 S. E. 664, holding upon demurrer by defendant inferences and conclusions most favorable to plaintiff will be adopted.

Preponderance of evidence.

Followed in Weaver v. Akin, 48 W. Va. 460, 37 S. E. 600, holding finding of fact by circuit court not disturbed unless contrary to plain preponderance of evidence.

32 L. R. A. 805, ESTABROOK v. ROYON, 52 Ohio St. 318, 39 N. E. 808.

Tax laws.

Cited in footnote to Tabb v. Com. 51 L. R. A. 283, which holds tax assessment on land, made pending life estate, not lien on fee.

Cited in note (33 L. R. A. 688) on effect on estates in reversion or remainder of tax sale during existence of life estate.

— Forfeitures.

Followed in Eichenlaub v. Neil, 10 Ohio C. C. 440, granting relief in equity against forfeiture of lease for nonpayment of taxes when demand not made by lessor.

Cited in Mathers v. Bull, 6 Ohio N. P. 46, holding laws imposing forfeiture for nonpayment of taxes are penal and must be strictly construed.

32 L. R. A. 811, RIDDLE v. DOW, 98 Iowa, 7, 66 N. W. 1066.

Title to crops.

Cited in footnote to Sievers v. Brown, 45 L. R. A. 642, which holds vendor entitled to crops planted by one in possession after refusal to comply with contract of purchase.

32 L. R. A. 818, GAY v. WARD, 67 Conn. 147, 34 Atl. 1025.

Termination of guaranty.

Approved in Fewlass v. Keeshan, 32 C. C. A. 9, 60 U. S. App. 133, 88 Fed. 574,

holding death of obligor in cost bond does not release his estate from costs accruing after; Valentine v. Donohoe-Kelly Bkg. Co. 133 Cal. 196, 65 Pac. 381, holding continuing guaranty of bank account ends with notice of guarantor's death.

Cited in footnote to Blyth v. Pinkerton, 57 L. R. A. 468, which holds guaranty of detective's salary and expenses in working up murder case ceases on conviction of suspect and settlement of bill.

Distinguished in Home Sav. Bank v. Hosie, 119 Mich. 127, 77 N. W. 625, holding death of one of obligors on bond to secure borrowed money, required by the business of their bank for one year, does not release his estate.

32 L. R. A. 822, SARGENT v. TUTTLE, 67 Conn. 162, 34 Atl. 1028.

Interest on taxes.

Approved in Mall v. Portland, 35 Or. 93, 56 Pac. 654, holding assessment for local improvement does not bear interest unless by special provision of statute; Vicksburg, S. & P. R. Co. v. Traylor, 104 La. 293, 29 So. 141, holding 2 per cent interest per month, imposed by law on unpaid taxes, not imposed on local tax in aid of railroad, but only legal interest.

Distinguished in Hartford v. Hills, 72 Conn. 599, 45 Atl. 433, holding interest on tax chargeable during pendency of appeal by taxpayer.

32 L. R. A. 825, MISSOURI, K. & T. R. CO. v. EDWARDS, 90 Tex. 65, 36 S. W. 430.

Duty of occupant of land to children.

Followed in San Antonio & A. P. R. Co. v. Morgan, 92 Tex. 103, 46 S. W. 28, holding railroad company not liable for injury to child on turntable without implied invitation; Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 62, 38 L. R. A. 575, 66 Am. St. Rep. 856, 41 S. W. 62, holding railroad company not liable for death of child falling in ditch by road, although near plank crossing intended for those having business there.

Approved in Ritz v. Wheeling, 45 W. Va. 268, 43 L. R. A. 152, 31 S. E. 993, holding owner of pond under no more duty to child than to adult to keep it safe; Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, holding owner of land with excavation with water in it not bound to guard it against trespassing children.

Cited in Kramer v. Southern R. Co. 127 N. C. 330, 52 L. R. A. 360, footnote p. 359, 37 S. E. 468, denying railroad company's liability for death of child by fall of pile of cross-ties in unused portion of street.

Cited in footnotes to Siddall v. Jansen, 39 L. R. A. 112, which holds owner liable to child injured by unguarded door to elevator, in store used by employees; O'Leary v. Brooks Elevator Co. 41 L. R. A. 677, which denies owner's liability for injury to trespassing child by wire projecting from shaft of machinery; Biggs v. Consolidated Barb-Wire Co. 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children; Kopplekom v. Colorado Cement Pipe Co. 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; Ryan v. Towar, 55 L. R. A. 310, which denies landowner's duty to make premises safe for attempting to rescue trespassing child caught in water wheel in unused

building; Uttermohlen v. Bogg's Run Min. & Mfg. Co. 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars; Brinkley Car Works Mfg. Co. v. Cooper, 57 L. R. A. 724, which denies liability for injury to six-year-old boy from carelessly walking into pool of hot water; Paolino v. McKendall, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish to guard young children, accustomed to play there, from fire.

Distinguished in Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 294, 42 S. W. 959, denying liability where child in mill, against warning of defendant, jumped over machinery.

Implied invitation.

Cited in Simonton v. Citizens' Electric Light & Power Co. 28 Tex. Civ. App. 378, 67 S. W. 530, holding footrests in electric light pole do not constitute an implied invitation to children to climb it.

Cited in footnote to Holbrook v. Aldrich, 36 L. R. A. 493, which holds shopkeeper not liable for injury to child putting hand up spout of coffee grinder.

32 L. R. A. 828, KRANTZ v. RIO GRANDE W. R. CO. 13 Utah, 1, 43 Pac. 623.

Conclusiveness of prior decisions in same case.

Followed in Brimm v. Jones, 13 Utah, 443, 45 Pac. 46; First Nat. Bank v. Lewis, 13 Utah, 509, 45 Pac. 890; People's Bldg. L. & Sav. Asso. v. Fowble, 18 Utah, 210, 55 Pac. 57,—holding no appeal considered on question involving same point settled in former appeal.

Cited in Silva v. Pickard, 14 Utah, 252, 47 Pac. 144, holding decision of territorial supreme court, followed on second trial of case, binding, and not reviewable in state supreme court, though appealable to United States Supreme Court; Potter v. Ajax Min. Co. 22 Utah, 283, 61 Pac. 999, holding rule that previous ruling by appellate court is final on questions on same state of facts does not apply to *obiter dicta* of decision.

Cited in note (34 L. R. A. 330) on conclusiveness of prior decisions on subsequent appeals.

32 L. R. A. 829, COWAN v. FAIRBROTHER, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212.

Contracts in restraint of trade.

Followed in Kramer v. Old, 119 N. C. 7, 34 L. R. A. 390, 56 Am. St. Rep. 650, 25 S. E. 813, sustaining contract not to engage in business in town, as valid during life of parties.

Cited in Hauser v. Harding, 126 N. C. 299, 35 S. E. 586, holding sale of physician's practice, good will, and location not in restraint of trade, and enforceable by injunction; Swigert v. Tilden, 121 Iowa, 658, 63 L. R. A. 612, footnote p. 608, 100 Am. St. Rep. 374, 97 N. W. 82, upholding contract by seller of good will of business not to be connected with competing business for ten years; Disosway v. Edwards, 134 N. C. 257, 46 S. E. 501, upholding contract not to engage in sale of spirituous liquors within twenty years in specified city; Teague v. Schaub, 133 N. C. 467, 45 S. E. 762 (dissenting opinion), majority holding contract not to practise medicine in certain town after specified time, unless field is then larger, too indefinite to be enforced.

Cited in footnotes to Trenton Potteries Co. v. Oliphant, 46 L. R. A. 255, which sustains vendor's agreement not to engage in competitive business for fifty years within United States, except in specified states and territories; Tuscaloosa Ice Mfg. Co. v. Williams, 50 L. R. A. 175, which holds void, contract by owner of ice machine to abandon manufacture of ice in certain town for five years, giving other party monopoly of business; Steichen v. Fehleisen, 51 L. R. A. 412, which holds individual partners not bound by firm agreement not to reengage in certain business for specified period; Clark v. Needham, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; Pohlman v. Dawson, 54 L. R. A. 913, which holds agreement on sale of business not to engage in barber business in any manner, violated by working as employee in other shop; Bancroft v. Union Embossing Co. 64 L. R. A. 298, which sustains contract by one selling right to manufacture and sell machine invented by him not to make, or transfer to others right to make, such machines.

Distinguished in Lanzit v. J. W. Sefton Mfg. Co. 184 Ill. 330, 75 Am. St. Rep. 171, 56 N. E. 393, Reversing 83 Ill. App. 176, holding void as unreasonable, contract not to engage in two states in business in which covenantor useful, and compelling removal from state.

Newspapers.

Cited in Whitehead v. Hale, 118 N. C. 603, 24 S. E. 360, refusing to appoint receiver of newspaper in foreclosure action, when to do so would destroy its value.

— Constitutional freedom.

Cited in footnotes to State v. McKee, 49 L. R. A. 542, which sustains statute against papers, etc., being devoted to publication of story of crimes; People v. Most, 58 L. R. A. 509, which denies protection to publication of article advocating murder of rulers and destruction of organized society; *Ex parte* Foster, 60 L. R. A. 631, which denies court's power to adjudge, on own motion, publisher in contempt for disobeying oral order not to publish testimony in pending case.

32 L. R. A. 837, DAUGHERTY v. HERZOG, 145 Ind. 255, 57 Am. St. Rep. 204, 44 N. E. 457.

Liability for negligence.

Followed in Brooks v. Pittsburgh, C. C. & St. L. R. Co. 158 Ind. 68, 62 N. E. 694, holding railroad company not liable for death of trespasser killed by train run without sounding whistle or bell, and at speed in violation of ordinance.

— To persons other than those contracting with defendant.

Approved in Dawson v. St. Louis Expanded Metal Fireproofing Co. 94 Tex. 427, 61 S. W. 118, holding independent contractor putting floors in building not liable to servant of principal contractor for injuries from falling through cement floor, only lacking time to harden.

Distinguished in Huset v. J. I. Case Threshing Mach. Co. 61 L. R. A. 303, 57 C. C. A. 240, 120 Fed. 868, holding one selling article known by him to be dangerous, without notice of danger, liable for injury reasonably contemplated as likely to result to any person not himself at fault; Glenn v. Winters, 17 Misc. 600, 40 N. Y. Supp. 659, holding liveryman renting unsafe coach to club liable to guest of club who is injured.

32 L. R. A. 838, SMITH v. PEDIGO, 145 Ind. 392, 44 N. E. 363.

Church government.

Cited in footnote to Franke v. Mann, 48 L. R. A. 856, which denies right of majority of church members to employ pastor whose teachings inconsistent with those of sect to which local church belongs.

32 L. R. A. 848, HENNEGER v. LOMAS, 145 Ind. 287, 44 N. E. 462.

Seduction.

Cited in Gunder v. Tibbits, 153 Ind. 600, 55 N. E. 762, holding complaint against one for seduction, and against same defendant and a doctor for abortion, states one cause of action against both jointly.

Cited in footnotes to Morris v. Stout, 50 L. R. A. 97, which sustains criminal statute against abandoning, without just cause, woman married to avoid prosecution for her seduction; *Re* Lewis, 63 L. R. A. 282, which holds subsequent marriage of defendant to injured female not bar to prosecution for obtaining illicit connection under promise of marriage.

Obligations between husband and wife.

Approved in Gosnell v. Jones, 152 Ind. 639, 53 N. E. 381, holding husband cannot recover against wife's estate for debt existing before marriage; Schilling v. Darmody, 102 Tenn. 446, 73 Am. St. Rep. 892, 52 S. W. 291, holding debt of woman to man discharged by marriage.

Cited in Dailey v. Dailey, 26 Ind. App. 18, 58 N. E. 1065, sustaining verbal contract by which, in consideration of wife joining in deed, husband promised to pay fixed sum.

32 L. R. A. 853, PEOPLE v. SMITH, 108 Mich. 527, 62 Am. St. Rep. 715, 66 N. W. 382.

Police power.

Approved in State v. Main, 69 Conn. 138, 36 L. R. A. 628, 61 Am. St. Rep. 30, 37 Atl. 80, holding act providing for destruction of peach trees attacked by "yellows" within police power; State v. Schlenker, 112 Iowa, 650, 51 L. R. A. 351, 84 Am. St. Rep. 360, 84 N. W. 698, sustaining act imposing fine for sale of adulterated milk; Lore v. American Mfg. Co. 160 Mo. 622, 61 S. W. 678, sustaining, as constitutional, act requiring guards for gearing of spinning machines in factories.

Cited in People v. Worden Grocer Co. 118 Mich. 610, 77 N. W. 315, holding within police power, statute prohibiting sale of vinegar not of prescribed standard; Schaezlein v. Cabaniss, 135 Cal. 468, 56 L. R. A. 734, footnote p. 733, 87 Am. St. Rep. 122, 67 Pac. 755, denying discretionary right to commissioner of labor statistics to determine possibility of preventing liability to inhalation of dangerous substances in particular factories.

Cited in footnote to *Re* Morgan, 47 L. R. A. 52, which holds void, eight-hour law applying to smelters.

Employer's liability.

Cited in footnote to Indianapolis Union R. Co. v. Houlihan, 54 L. R. A. 787, which sustains statute making railroad company liable to employees for injuries by negligence of specified servants.

32 L. R. A. 857, THOMAS v. HUNT, 134 Mo. 392, 35 S. W. 581.

Ejectment from highways.

Approved in Northern P. R. Co. v. Lake, 10 N. D. 546, 88 N. W. 461, holding ejectment lies by owner of fee of street for possession, subject to public easement, against one building on street.

Cited in footnotes to Postal Teleg. Cable Co. v. Eaton, 39 L. R. A. 722, which sustains right to ejectment for removal of telegraph poles placed in highway without compensation to owner; San Francisco v. Grote, 41 L. R. A. 335, which sustains city's right of ejectment for land dedicated for street; French v. Robb, 57 L. R. A. 956, which sustains right of owner of soil in street to maintain ejectment against person wrongfully claiming exclusive possession; Cahill v. Cahill, 60 L. R. A. 706, which holds possessory rights only will not sustain ejectment without showing legal title; Bork v. United New Jersey R. & Canal Co. 64 L. R. A. 836, which sustains right of owner to maintain ejectment against steam railroad constructed in street without legislative authority.

Boundaries.

Cited in Overland Mach. Co. v. Alpenfels, 30 Colo. 172, 69 Pac. 574, holding conveyance of lot which borders on highway carries title to center if grantor is owner of fee.

Cited in footnote to Crocker v. Cotting, 33 L. R. A. 245, which holds no part of passageway included in grant of land "bounded by" such passageway.

32 L. R. A. 861, GAVETT v. JACKSON, 109 Mich. 408, 67 N. W. 517.

Negligence as to highways.

Followed in Wesley v. Detroit, 117 Mich. 659, 76 N. W. 104, holding city not liable for accidents caused by natural accumulations of ice and snow.

Cited in Howey v. Fisher, 111 Mich. 425, 69 N. W. 471 (dissenting opinion), majority holding, in action for injuries from icy sidewalk, question of negligence of defendant in not keeping eaves trough in repair, for jury.

Cited in footnote to Reedy v. St. Louis Brewing Asso. 53 L. R. A. 805, which holds city and abutter jointly liable for ice on sidewalk remaining for unnecessary period.

Cited in note (58 L. R. A. 324) on liability for permitting water to accumulate and freeze on sidewalk to injury of travelers.

Distinguished in Navarre v. Benton Harbor, 126 Mich. 619, 86 N. W. 138, holding question of city's notice of defect in sidewalk, causing accumulation of ice, for jury.

— Sewers.

Distinguished in Monje v. Grand Rapids, 122 Mich. 649, 81 N. W. 574, holding city liable for injuries from falling into uncovered sewer trench dug by licensed plumber who alone had knowledge of it.